

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONOURABLE
HERMAN J. WILTON-SIEGEL
held via Arbitration Place Virtual
on Thursday, October 6, 2022 at 9:30 a.m.

VOLUME 64

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1 Arbitration Place Virtual
2 --- Upon resuming on Thursday, October 6, 2022 at
3 9:30 a.m.

4 MS. LAWRENCE: Good morning,
5 Commissioner. Our witness today is John McLennan,
6 and he has not yet been sworn.

7 AFFIRMED: JOHN MCLENNAN

8 EXAMINATION BY MS. LAWRENCE:

9 Q. Good morning. I'm going
10 to start with some questions about your
11 professional background and your employment
12 history.

13 I understand you are no longer
14 an employee with the City of Hamilton; is that
15 correct?

16 A. That is correct.

17 Q. Prior to leaving the City
18 of Hamilton you were the manager of risk
19 management services?

20 A. Correct.

21 Q. When did you start in
22 that role?

23 A. Exact dates aren't my
24 strong suit, but I believe I started in that role
25 around 2012 or '13. My previous boss had retired

1 I think in 2011, and I was acting for some time
2 and then eventually appointed as the manager of
3 risk management.

4 Q. Thank you. And in that
5 role of manager of risk management who did you
6 report to?

7 A. When I first took over
8 the role I reported to financial services. I
9 believe the title was -- his name was Rick Mayo
10 (ph) and he was I think director of financial
11 services. And then there was a bit of a
12 reorganize I would estimate around 2017 or 2018
13 wherein I began -- risk management began reporting
14 to legal services.

15 Q. Thank you.

16 A. Or through legal services
17 I should say.

18 Q. Thank you. You affirmed
19 an affidavit as part of the inquiry process that
20 sets out some of your former roles at the City and
21 I would like to take you through that so you don't
22 have to assess the dates from memory.

23 Registrar, can you bring up
24 RHVP 1017, please. Could you call out
25 paragraph 2.

1 So in your affidavit, which
2 we'll come back to, you've set out various roles.
3 And just looking at that, are those roles accurate
4 starting from January of 1998? I see you nodding.
5 For the court reporter --

6 A. Again not my strong suit,
7 but I would say they are certainly in the
8 ballpark.

9 Q. Thank you.

10 (Speaker overlap)

11 Q. Fair enough. Can you
12 close out the callout, please, Registrar.

13 So we'll come back to this
14 document, but you'll see at the top it is an
15 affidavit in your name affirmed on August 22,
16 2022.

17 And, Registrar, can you go to
18 the last -- the fifth page of this document
19 please.

20 A. Emily, sorry, can I
21 interrupt?

22 Q. Yes.

23 A. If you go back, sorry. I
24 just noticed this.

25 Q. Sure. Can you go back to

1 the first paragraph.

2 A. 2(d), manager in the
3 legal and risk management service from
4 approximately June 4, 2012 to November of 2021 it
5 should read.

6 Q. Thank you. Did you have
7 any employment with the City of Hamilton between
8 November 2021 and February of 2022?

9 A. I did not.

10 Q. So that's just a
11 typographical error?

12 A. I would assume so, yes.

13 Q. Thank you. Registrar,
14 can you go down to image -- if you could bring up
15 image 3 and image 4, please.

16 We'll go through this later in
17 your evidence today, but just so that we can make
18 it an exhibit, you'll see that you signed it
19 electronically on the 22nd day of August. Do you
20 see that?

21 A. I do.

22 Q. And you recall executing
23 this affidavit?

24 A. Oh, yes.

25 Q. Thank you. And you

1 reviewed it carefully before you did that?

2 A. Correct.

3 MS. LAWRENCE: Carefully
4 enough. Maybe some typographical errors. Thank
5 you.

6 I would like to make this the
7 next exhibit, please. I believe we're on
8 Exhibit 165.

9 THE REGISTRAR: Thank you,
10 Counsel. Noted.

11 EXHIBIT NO. 165: Affidavit of
12 John McLennan; RHV1017

13 BY MS. LAWRENCE:

14 Q. Thank you. You can close
15 this document.

16 Before you started at the City
17 in 1998 where did you work?

18 A. I worked for State Farm
19 Insurance.

20 Q. In a similar role to the
21 claims representative role that you took on at
22 Hamilton?

23 A. Yes.

24 Q. What is your educational
25 background?

1 A. I went to -- well, I
2 graduated high school and then went to University
3 of Western Ontario where I majored in political
4 science.

5 Q. Did you move directly
6 from school to State Farm?

7 A. No, I think there was a
8 period of, geez, probably I think it was about
9 five years I waited at the Keg for a long time.
10 That's what a political science degree gets you.

11 Q. Fair enough. Maybe I'll
12 put my question differently. Did you learn the
13 claims management practices on the job at State
14 Farm?

15 A. Handling of claims, yes.

16 Q. Thank you. Turning to
17 your role as manager of risk management services,
18 starting really just with a little more
19 information about that department, what is the
20 primary function of the City's risk management
21 services department?

22 A. The primary function,
23 first and foremost function is the handling of
24 claims. City on average receives -- well, handles
25 on average I would say between 2,000 and 2,500

1 claims a year, which is a pretty heavy workload.
2 So the majority of our time is spent
3 administrating and handling claims.

4 We also have -- the other two
5 silos or roles would be the procurement of the
6 annual insurance coverages and contract review,
7 what we call compliance issues. When we -- in a
8 perfect world we would get into enterprise risk
9 management when we could, but we really weren't
10 staffed or financed to flesh out that role to any
11 great degree.

12 Q. Okay. What does
13 enterprise risk management mean?

14 A. It's sort of a concept
15 that developed I would say at the year 2000, maybe
16 a bit before. It is -- I would compare it to
17 the -- you're trying to establish risk management
18 and accident avoidance the same way occupational
19 health and safety has done at organizations,
20 everyone thinking about accident avoidance and
21 trying to spot potential liability situations
22 where they turn into actual liability situations.

23 So it's really making everyone
24 risk aware company-wide as opposed to maybe
25 your -- maybe just your risk management department

1 and maybe legal services giving the odd lecture or
2 seminar once a year sort of thing.

3 Q. Thank you. Flowing from
4 that answer, did risk management have an advisory
5 function within other departments in the City
6 around risk or risk management?

7 A. Yeah, I mean we were a
8 service division. That being said, it was
9 generally -- it was generally not proactive.
10 People -- departments would come to us and say,
11 you know, we've got a situation here, we would be
12 interested to hear what risk management has to
13 say. We occasionally might spot claims trends.
14 More often than not it was -- it was trip and fall
15 situations, be it on crosswalks or sidewalks or
16 roadways, and proactively reach out to a
17 department. But generally departments came to us
18 to ask for advice.

19 Q. And where you brought a
20 claim trends to a department or a department
21 reached out to you, what was your role in
22 resolving the risk that you identified as compared
23 to the other department?

24 A. Compared to the
25 department that we were working with on a

1 particular issue?

2 Q. Exactly.

3 A. Well, more often than
4 not -- well, I should say more often than not. At
5 first, because risk management kind of has their
6 finger in a lot of pies around the City, so I
7 think the first order of business for us would be
8 to actually learn what -- and I'll use trip and
9 falls as an example on sidewalks -- to learn what
10 goes into the creation of a sidewalk, what goes
11 into the life -- you know, what is the lifespan,
12 what goes into the inspection and maintenance.

13 And we would receive all that
14 information, and then through our risk management
15 lens and sometimes with the assistance of legal
16 services we would -- and with knowledge of
17 developing case law or case law that has already
18 happened, suggest that they may need to make
19 certain enhancements about inspection periods or
20 maintenance responses to customer or citizen
21 complaints, that sort of thing.

22 It was almost -- I would
23 always term it as sort of a -- and this sounds a
24 bit, I don't know, maybe a bit hawky (ph), but
25 applying a common sense lens to a lot of things

1 that the City did. The services the City offered
2 I should say.

3 Q. Okay. So where there --
4 it was a suggestion to make certain enhancements
5 or maintenance responses, once that decision was
6 put or that suggestion was put on the table, what
7 role did risk have in seeing that suggestion
8 through to implementation?

9 A. Well, we were advisory
10 so, you know, what I would usually say sort of
11 off-the-cuff is, you know, I reserve the right to
12 say I told you so if you don't act on my
13 suggestions. You know, a lot of times our
14 suggestions really weren't consistent with the
15 budget realities of a given department, which was
16 completely beyond -- completely beyond my
17 understanding I guess. We would say here's what
18 you might do in a perfect world.

19 Q. Okay. So am I taking
20 from your answer that apart from providing the
21 suggestion or at least giving a heads up about an
22 issue or claims trend, that risk really didn't
23 have any role in costing or finding funds or
24 actually implementing --

25 A. I would agree with that.

1 Q. So I think you've said
2 that the City or your department handled 2,000 to
3 2500 claims a year roughly?

4 A. On average, yeah. It
5 usually seemed to be somewhere between 1,800 or
6 24, 2500.

7 Q. Okay. When you say
8 handled that, the total number of claims that are
9 on your -- that are in your department --

10 A. System.

11 Q. -- system?

12 A. And I should probably
13 clarify that a claim is -- you know, it is someone
14 putting in writing, submitting to the City I have
15 a problem with the City, my sewer backed up or I
16 hit a pothole, I've incurred damages and I want
17 compensation from the City. That's how they would
18 come from citizens, and of course we would get
19 claims from law firms too.

20 Q. When you say someone
21 putting in writing that they have a problem, do
22 you mean the commencement of a legal claim or do
23 you mean putting the City on notice?

24 A. Just -- by legal claim do
25 you mean statement of claim?

1 Q. I do.

2 A. No, no. That's a
3 claim -- we probably should have never called them
4 claims because we considered a claim someone
5 writing a letter to the City, not through small
6 claims or anything like that.

7 Q. I see. So anything from
8 writing a letter to the City to actually
9 commencing litigation against the City?

10 A. Right. And, you know,
11 eventually -- when I first started in the 90s we
12 used to insist on the letter being written being
13 put in writing, but as things developed we
14 would -- we would then accept an e-mail.
15 Occasionally if it was an elderly person or
16 someone who really wanted to complain we would
17 just accept the information over the phone and
18 start the claim that way.

19 Q. So when you say there's
20 1,800 to 2,500 I think was your -- 2,400 was your
21 range --

22 A. Yeah.

23 Q. -- that would include
24 claims, or pardon me, notices that came into the
25 City and never went anywhere; is that right?

1 A. Never went -- never went
2 anywhere in the form of they didn't develop into
3 statements of claim or litigation. More often
4 than not they didn't. They were either denied
5 with an explanation, you know, we're not paying
6 your pothole claim because the road was inspected,
7 you know, with all due diligence we've inspected
8 our roads and maintain them, that sort of answer;
9 or we would pay the claim if our investigation
10 found that the City was negligent somehow.

11 Q. And it was also included
12 claims, as you say, coming through law firms so
13 where there is actually a statement of claim
14 issued?

15 A. Absolutely.

16 Q. And for the -- that first
17 category we were just talking about where the City
18 would receive a notice and assess it and either
19 deny it or pay it, did all of that stay within the
20 legal risk department as compared to internal or
21 external legal counsel?

22 A. For the most part yes.
23 The only time outside -- well, you know, I
24 shouldn't say that because we did have outside
25 adjustors who assisted us with our investigations.

1 We only had four claim reps in our staff of 10 who
2 actively handled claims on a day-to-day basis. So
3 we had a roster of I think three adjusting firms
4 who would do investigations for us.

5 If you're talking about
6 outside legal, there were two reasons why outside
7 counsel would be used, and that would be if
8 particular expertise was required outside of the
9 abilities of legal services at the City or if the
10 insurer preferred to assign outside counsel. So
11 if we reported a claim to an insurer, and we would
12 do that when potential damages would exceed our
13 deductible, which has been as high as a million
14 dollars at times, they would more often than not
15 say okay, this is going to go to, you know, it was
16 usually one of five firms that were on their
17 roster.

18 Q. Thank you. That's
19 helpful. So you talked a little bit about outside
20 counsel. My question was actually focused more on
21 your team in risk versus any lawyer including
22 internal City lawyers. So maybe I'll ask my
23 question a little differently.

24 Did the claims team within
25 risk handle the assessment of claims more often

1 than not not involving internal legal counsel?

2 A. Yes, that's correct.

3 Q. So of the large volume of
4 claims that the City was handling at any given
5 time, can you provide some categories of the types
6 of claims that the City would attract?

7 A. Sure. The most -- I can
8 sort of give you a top 10 list probably, the
9 biggest being potholes. They were the constant
10 thorn in our side. Sewer backups, trip and falls
11 on the sidewalk, slip and falls on the sidewalk,
12 the City of Hamilton was a -- I forget the
13 terminology, but well, I guess one tier so we
14 handled all municipality services. So we would
15 get a fair amount of internal claims. They would
16 come through our office when we had damages to a
17 city property, you know, flooding or vehicle
18 damages. Certainly motor vehicle accidents where
19 people would allege that it could be potholes, it
20 could be alleging something wrong with the traffic
21 signals or road signs or condition of the roadway.
22 We had a certain amount of police claims for
23 wrongful arrest, excessive force, police pursuits.
24 Those would be the -- those
25 would be the main categories. I don't think I'm

1 leaving anything out. Water main breaks, when
2 they would happen would generally cause flooding
3 in a neighbourhood. That sort of thing.

4 Q. You said that risk
5 handled all municipality services so you would get
6 internal claims. And just to unpack that a little
7 just so that I'm clear, that's where the City
8 wants to make a claim against the insurer for some
9 property damage incurred by the City?

10 A. Well, the way I've
11 explained it before is you could look at us
12 basically as the mini-insurance company for the
13 City. We carried extremely high deductibles. The
14 lowest deductible we've ever had is \$250,000. So
15 even when we had internal damage like say a fire
16 at a building or flood at a building, generally we
17 handled it in-house underneath our deductible.
18 Very rarely would a property claim go to the
19 insurer.

20 So they funneled through --
21 even though the department may be the primary
22 department for facilitating the repairs, it
23 funneled through risk management for tracking
24 purposes.

25 Q. Thank you. That's

1 helpful. You also said -- you referenced the
2 number of categories and you had potholes and then
3 you had motor vehicle accidents which might
4 include potholes. For the first category what do
5 you mean about claims involving potholes?

6 A. So we would -- you know,
7 every year it would be pothole season. It was
8 usually spring or occasionally when the weather
9 started getting cold in the late fall. But
10 someone would be driving along the roadway, and
11 you know what a pothole is, I think, and they
12 would bottom out in the pothole and that generally
13 would be a flat tire or a bent rim and they would
14 make a claim against the City for the repair
15 expenses that they incurred.

16 And it was really -- you know,
17 you had no way of knowing what kind of pothole
18 season you're going to have and it really was
19 completely dependent on the freeze/thaw cycle of
20 the weather. In some years we would get 5, 600
21 pothole claims; some years we would get under a
22 hundred. We always received -- generally I would
23 say potholes were always in the top three of
24 categories of most common claims.

25 Q. Okay. And what about

1 motor vehicle accidents, any kind, involving
2 potholes or otherwise? What was the percentage of
3 the total claims that were related to motor
4 vehicle accidents?

5 A. Well, it would certainly
6 be -- and I'm going sort of from memory. I don't
7 have hard statistics in front of me. I would say
8 motor vehicle accidents would be in the top 15
9 probably of most common claims, and again very
10 weather dependent because most of them were
11 related to winter maintenance.

12 Q. When you say --

13 A. We sort of joke I was a
14 good risk manager in the years where there was
15 easy winters. So saw (ph) from the back and say
16 we didn't have a lot of motor vehicle accidents
17 this year. But certainly -- and we wouldn't just
18 code them as motor vehicle accidents. There were
19 codes for ice and snow on the road, traffic
20 signal, road design, that sort of thing. Whatever
21 main thrust of the notice of claim was, that's how
22 we would code them.

23 Q. Right. We will come to
24 some coding in a moment. You said the top 15 most
25 common claims. My question had been as a

1 percentage proportion of all claims, can you give
2 us some range of how many -- what the percentage
3 of total claims related to motor vehicle
4 accidents?

5 A. You know, I would --
6 well, if we use a figure of let's say 2,000
7 claims, I would say -- this is not an exact
8 science by any means and those numbers certainly
9 could be produced -- but, you know, out of 2,000
10 claims I would say claims of negligence against
11 the City related to motor vehicle accidents
12 excluding potholes would maybe be 50 on average.

13 Q. Okay.

14 A. 50 -- I'm not good with
15 math. So whatever the percentage -- whatever it
16 boils down to out of that.

17 Q. Thank you.

18 A. And that's by no means an
19 exact science, Emily.

20 Q. Fair enough. So not a
21 large proportion of the types of claims, is that
22 fair to say?

23 A. I would agree with that,
24 yeah.

25 Q. Okay. Not being good at

1 math myself. 50 out of 2,000. In terms of the
2 types of damages that would arise from motor
3 vehicle accidents, were they more significant than
4 the number of claims proportionately?

5 A. Well, you know, when you
6 weed out potholes, which very rarely involved
7 injury, motor vehicle accidents would be a concern
8 because generally no one would think to bring in
9 the municipality because they are covered by
10 insurance. They also have the ability to sue the
11 at fault party. When the municipality was brought
12 in it was generally because damages were more
13 significant.

14 Q. Right.

15 A. They were what we called
16 low frequency but high impact in terms of (skipped
17 audio) damages.

18 Q. Thank you. So let's talk
19 a little in more detail about the structure of the
20 department. So who reported to you within risk
21 management?

22 A. Okay. Well, as manager
23 everyone reported up to me eventually, but I
24 had -- I shouldn't say I -- we had claims
25 supervisor Diana Swaby. Our senior team was

1 myself, Diana as claims supervisor, and for the
2 most part of my tenure a senior risk and
3 compliance officer by the name of Jody Arnault who
4 really had no involvement with claims.

5 Underneath her she had --
6 underneath Jody there was a -- her title was
7 claims representative but she was really an
8 assistant to Jody, helping her with compliance
9 issues and contract review.

10 For our concerns, Diana was
11 the claims supervisor. She had four claims
12 representatives and two risk analysts underneath
13 her.

14 Q. Okay. So --

15 A. There was a risk
16 assistant as well.

17 Q. So those -- the claims
18 representatives and the risk analysts, that's six
19 altogether, all reported to Ms. Swaby and then she
20 reported to you?

21 A. Yes. Now -- and I -- I
22 can't say that exactly. One of the risk analysts
23 may have been considered under the silo of the
24 compliance officer but, you know, it wasn't etched
25 in stone. It was -- the analysts sort of provided

1 support on an as-needed basis. If I recall the
2 performance appraisals, Jody did do the
3 performance approval for one of the analysts and
4 Diana did the performance for the other analyst.
5 So I think you could safely say Diana had one risk
6 analyst underneath her and four claims
7 representatives.

8 Q. Okay. And each claims
9 representative, did they have their own caseload
10 of claims?

11 A. Correct.

12 Q. And did Diana also,
13 Ms. Swaby, also have her own caseload of claims
14 she personally managed?

15 A. Correct, as did I.

16 Q. Okay. That was going to
17 be my next question. Just for a matter of
18 clarity, I think it might come up, Ms. Swaby, I
19 understand she went by a different surname earlier
20 in your tenure as manager?

21 A. She moved from Sabados
22 (ph) to Swaby at one point.

23 Q. So actively were you
24 involved in managing claims?

25 A. Well, in terms of -- I

1 had a case load of probably about 300 claims so I
2 was obviously active in the handling of them, but
3 for the most part I was content to leave the
4 primary oversight of claims handling to Ms. Swaby.

5 Q. Okay. And when you say
6 the oversight of claims handling, so she had her
7 own files, then those underneath her had files,
8 and she provided oversight to the claims
9 supervisors?

10 A. Correct. Claims
11 representatives. And that being said, certainly
12 her office was right beside mine, she would --
13 back before the pandemic we would probably have
14 daily conversations about claims, about the
15 performance of the claims representatives,
16 particular claims that were representing a higher
17 exposure. So I would say I had a pretty good
18 handle on the general flow and status of claims
19 and certainly I needed to have that in terms of
20 reporting up to either through financial services
21 or legal, but Diana, nuts and bolts, that was her
22 purveyance.

23 Q. Was she entirely
24 responsible for the assignment of particular
25 claims to particular staff members?

1 A. Primarily, yes.

2 Q. So did all claims that
3 came into the City flow past your desk at one
4 point or another?

5 A. Well, they would come
6 into -- more often than not they would come into
7 the clerks, and clerks would stamp them and they
8 would write "J. McLennan Risk." And they would
9 come over to risk management through interoffice
10 mail, but the risk assistant who handled the mail
11 would look at them and say that's a new claim, I'm
12 flopping it down on Diana's desk for assignment
13 out to the claims reps.

14 You know, if something --
15 maybe if something unusual caught the risk
16 assistant's eyes she might point my attention to
17 it, but through Diana's tenure as claims
18 supervisor 98 percent of the time she would be
19 assigning the claim. She may come to me on
20 occasion and say I think we should farm this out
21 to Sedgwick, who used to be Cunningham-Lindsey, or
22 couple of the other claims services that -- claims
23 adjusting services that we used.

24 Q. Did you find -- would you
25 say you had a good working knowledge of all of the

1 claims that were being handled by your department?

2 A. I think so.

3 Q. How did you develop that
4 working knowledge of all of the claims?

5 A. Well --

6 (Speaker overlap)

7 Q. -- with that?

8 A. Coming up through the
9 system as starting at the bottom as a claim rep
10 and coming up through the system. But as I said,
11 Diana's office was right beside mine. I would
12 fairly often look at claims reports from one of
13 the analysts about where we were at in a given
14 year in terms of our claims expense. Say after
15 second quarter I would like to look and see that
16 we were coming in at a projected claims expense
17 number that was at least consistent with past
18 years and there were going to be no surprises at
19 the end of the year where the claims expense was
20 much higher than it was projected to be.

21 Q. Okay. But it's not that
22 you actually had sort of working knowledge of the
23 details of all 2,000 claims that the City was
24 handling --

25 A. No, only in the sense

1 that you work at a place long enough you know
2 that, okay, there's a -- going to be -- the top
3 five don't change every -- or the top 10 don't
4 change every year, so it's a matter of how they
5 fluctuated in terms of weather or in terms of
6 certain happenings at the City.

7 Q. How did risk management
8 keep track of claims?

9 A. We had the claims
10 software system which -- entitled Riskmaster which
11 I think we got into that -- we purchased that in
12 2000 or 2001. Previous to that it was a fairly
13 antiquated data program. Really we used sort of
14 spreadsheets before then. And Riskmaster was a
15 fairly common software program used by
16 municipalities.

17 Q. What type of claims
18 information is stored in Riskmaster?

19 A. So when a claim would
20 come in, when we were finally allowed to hire a
21 risk assistant her primary role was the data entry
22 of claims. Previous to that the claims reps
23 themselves would do it. But you would read the
24 notice of claim and there were several hard-coded
25 fields in Riskmaster that you couldn't save the

1 claim until you had input the data into these
2 hard-coded fields. Obviously date of loss, all
3 contact information for the claimant, they were
4 all hard coded, as were -- you had to post a
5 reserve and you had to post -- you had to enter in
6 the department, the most appropriate department,
7 and the cause code, which would -- I think we had
8 a list of I would guess about 60 cause codes that
9 could be chosen. Probably 20 of them were the
10 main cause codes that were used.

11 Q. You said earlier that you
12 would code in -- for motor vehicle accidents, for
13 example, you would code in motor vehicle accident
14 and then some descriptor like pothole or --

15 A. No, we wouldn't -- you
16 wouldn't code in motor vehicle accident. You
17 would simply -- you would code in pothole.

18 Q. Okay.

19 A. And the hard code would
20 just be that it's a liability claim against the
21 City; the cause code being pothole, ice and snow
22 on the road. There would be an area for
23 commentary or description too, and it was usually
24 one or two sentences and you would say claimant
25 alleges tire damage due to pothole on Wentworth

1 Street North.

2 Q. In terms of that very
3 last bit, the reference to the location, was that
4 a requirement, to put in a location of the loss?

5 A. I think so. It always
6 was input if it -- you know, you would never find
7 a claim where location wasn't inputted. I don't
8 think, Emily, that it was hard coded though.

9 Q. Was Riskmaster also a
10 location where materials that came in over time
11 for a claim were stored?

12 A. Yes.

13 Q. It had like a filing --

14 A. Yes.

15 Q. -- ability. You could
16 see the statements of claim or the letter of
17 notice, anything like that?

18 A. Yes. At first when we
19 first adopted it it really was just data
20 management, but as time moved on we were making a
21 concerted effort to go electronic, so to speak.

22 Q. And was your expectation
23 that materials on a file would all be saved within
24 Riskmaster?

25 A. I wouldn't say we were

1 there yet. If I really wanted to -- if I wanted
2 to really be sure that I was looking at all
3 materials related to a file I would look at
4 Riskmaster and the file portion of roadside safety
5 assessment. I would also want to have the hard
6 paper file in front of me. I was as guilty as
7 anyone of not completely committing to going
8 electronic.

9 Q. Is there a section in
10 Riskmaster that will show the status of a piece of
11 litigation, like for example pleadings closed or
12 discoveries or anything like that?

13 A. No. You may find that in
14 the claim, the file handler's notes -- but again
15 if I really wanted to see where a file litigation
16 was at I would look at the paper file or pick up
17 the phone and speak to the lawyer.

18 Q. Okay.

19 A. I mean, technically, yes,
20 the claim rep should have been updating as the
21 file unfolded but, in fairness to the claims reps
22 and the file handlers, there simply wasn't enough
23 time to be as thorough as possible.

24 Q. Did Riskmaster have a --
25 the ability to generate reports based on various

1 fields that had been coded?

2 A. Yes. Riskmaster had I
3 guess you would call it a partner component called
4 I think business intelligence, and it certainly
5 wasn't very user friendly, but one of our analysts
6 was fairly conversant with it and could run
7 reports basically however I asked them for.

8 Q. Is that Mr. Chamberlain?

9 A. Gavin Chamberlain, yes.
10 He was a risk analyst.

11 Q. Who had access to
12 Riskmaster within the City?

13 A. Everyone in risk
14 management, and I think that was a staff of 10.
15 And the only other might be the HSR. That is
16 Hamilton Street Railway Transit Authority in
17 Hamilton. They may have had the ability to enter
18 bus accidents as events, not as claims.

19 So I think that our claim reps
20 could actually go into the system and find
21 information on a transit incident related to
22 someone phoning in and saying that they wanted to
23 make a claim for an injury that occurred on one of
24 our buses. But certainly in terms of claim entry
25 it was limited to risk management services and

1 risk management services only.

2 Q. You said earlier that
3 most claims came through the clerk's office. Did
4 you also receive information from members of the
5 public through other means, phone calls, e-mails,
6 that sort of thing?

7 A. Yes. Consistently people
8 would phone the City wanting information about how
9 to make a claim, and the customer service
10 representatives would dispatch them to risk
11 management services and our risk assistant or
12 whoever picked up the phone would explain the
13 claims process to whoever was calling. We
14 would -- get as society became more electronic
15 that would take the form of e-mails too.

16 Q. In terms of dealing with
17 the Red Hill and the LINC, did you work with other
18 departments within the City in terms of responding
19 to contact from members of the public short of
20 people actually wanting to make a claim, but
21 rather, people wanting to make a complaint?

22 A. I don't -- my
23 recollection of people phoning in to risk
24 management services is a general recollection of
25 people making complaints about any service that

1 the City offered. So in answer to that question I
2 would say depending on the nature of the phone
3 call, we might possibly reach out to the -- we
4 called them the user departments, and ask for
5 information related to someone who called in, but
6 for the most part we wouldn't act on a situation
7 until an actual claim came in. I don't know if
8 that answers your question.

9 Q. It does, thank you. So
10 one last set of questions about general practices.

11 When a claim came in and it
12 needed to be assessed, who was responsible for
13 collection of documents or materials that would be
14 relevant to a claim?

15 A. The file handler. The
16 reason I don't say claims representative is
17 because Diana and myself handled files too. So it
18 would be -- there would be -- hard coded in
19 Riskmaster would be I think it said claims
20 representative, so that could be Diana, myself or
21 one of the four claims reps. And one of the
22 analysts too; Domenic would handle files as well.

23 Q. So who -- how did you go
24 about collecting documents that might be relevant
25 to a claim from within the City?

1 A. You would -- almost your
2 first order of business would be to either get on
3 the phone or get on your e-mail and communicate
4 with -- you get to know the City quite well over a
5 period of time, and you develop contacts within
6 departments and you knew who handled certain -- if
7 it was a pothole you would reach out to the
8 district investigator of a certain roads district.
9 If it had something to do with traffic lights you
10 would reach out to the section of the traffic
11 department who handled traffic signals.

12 So generally you would send it
13 by e-mail so that you had a paper trail, so to
14 speak, and ask for any information related to the
15 details of this claim. Quite often you might even
16 send a copy of the claim along.

17 Q. And then it would be up
18 to that contact in the user department to compile
19 documents that would be relevant?

20 A. Correct. And you would
21 normally set a diary date for two weeks hence,
22 three weeks hence, depending, if you hadn't
23 received anything back, which wasn't uncommon,
24 because assisting risk management really wasn't
25 front boiler for -- front burner for any of the

1 departments, but generally they were pretty good
2 about responding back with the information. And
3 you would review that and if you found you needed
4 more information you would go back to them and try
5 to flush it out.

6 Q. Where a claim ended in
7 litigation there would be lawyer assigned to
8 represent the City?

9 A. Correct.

10 Q. Either an internal
11 employee lawyer or an external counsel; is that
12 right?

13 A. More often than not it
14 was internal. Usually we would have a claim on
15 file, either a lawyer has simply just written us a
16 letter without a statement of claim or a citizen
17 has written us a letter. And then eventually if
18 they didn't like our analysis of liability you
19 would get a statement of claim in.

20 And the fact that we got a
21 statement of claim would not automatically mean it
22 was transferred to legal because quite often we
23 would simply reach out to the plaintiff lawyer and
24 ask for a waiver. It would not go to legal
25 generally until defence was requested.

1 Q. Okay.

2 A. If it was a claim where
3 you knew that there was no point in trying to
4 negotiate a settlement with a lawyer or needing to
5 get further -- if you knew that this is a denial
6 and this is one we're going to stand on, you would
7 funnel it right over to legal and say might as
8 well get a (skipped audio), this is not one where
9 a settlement is recommended.

10 Q. So where a defence
11 counsel was appointed to represent the City, what
12 role did the claims handler have in the litigation
13 process?

14 A. After that point it
15 depended on the lawyer. Some lawyers would almost
16 take over the file in whole and you might not even
17 hear from them again. Some lawyers would review
18 the file that we sent over and say I need more of
19 this or I need whatever it might be, weather
20 history or a road inspection history, and they
21 would ask the claims representative or the file
22 handler to get that for them.

23 But it was really a mixed bag
24 of depending on how the actual lawyer preferred to
25 stock their files, if I could use that term.

1 Quite often they would use their clerks or their
2 assistants. There was no hard and fast policy for
3 the relationship.

4 Q. In dealing with motor
5 vehicle claims did risk management provide
6 information about the claims it had received to
7 other City departments for the preparation of
8 reports like the traffic safety status reports or
9 annual collision reports or network screening
10 charts?

11 A. No. I mean, our
12 information -- I shouldn't say that. Our
13 information, you have to remember, was claims
14 related, so we only -- any reports that we could
15 provide would only have information relevant to
16 someone having submitted a claim. So I guess
17 certain departments would want to know what their
18 claims experience was, so in that respect, yes, we
19 would provide that information.

20 When I think of traffic's
21 annual -- it may have been every other year -- I
22 call it the collision report, they wouldn't seek
23 that kind of input from us.

24 Q. Was the converse true?
25 Did you use those reports to educate yourself

1 about the collision circumstances in the city that
2 might be useful to your claims?

3 A. Absolutely. I found the
4 collision report to be quite useful. It tended to
5 give you a very -- simple is the wrong word, but
6 it tended to give you sort of basic information
7 that would -- that might assist in your analysis
8 of a file in the way that they would rank sections
9 of roadway or they would rank intersections as
10 being the top 25, these are -- this is not how
11 they would phrase it, but these are the worst
12 intersections in the City of Hamilton.

13 And ideally you would have
14 your claim and you would go to the collision
15 report and you would say well, you know, this
16 isn't an intersection that has -- that's in the
17 top 25 or the top 50 of accident history
18 incidents, so you would tend to think that this is
19 probably a claim that we will be able to
20 successfully defend.

21 To the contrary, you may find
22 oh, this is in the top five so accident history is
23 not going to be on our side in terms of defending
24 a claim. Obviously there's a lot more it to than
25 just simple statistics, but that would sort of

1 guide you.

2 Q. Thank you. Recognizing
3 it's hard to ballpark, how many claims did the
4 City receive related to the Red Hill or the LINC
5 each year?

6 A. Very few. I would say
7 maybe one or two.

8 Q. In your affidavit that
9 you affirmed as part of the inquiry process you do
10 list Red Hill based claims and LINC based claims
11 that included both circumstances where an action
12 was commenced and circumstances where there was
13 not. And when you say there was one or two a
14 year, that list in your affidavit, is that a
15 comprehensive list of all of the claims that you
16 found related to LINC and Red Hill?

17 A. That should be a
18 comprehensive list, yes. Emily, can I interrupt?
19 I need to plug in my computer. I thought it was
20 plugged in but I just want to go to a different
21 outlet.

22 Q. We don't want to lose
23 you.

24 A. Excuse me. Sorry.
25 That's better. I'm electronically connected now.

1 Q. Let's get into the Red
2 Hill. Turning to some more specific questions,
3 we're going to come to some e-mails that you were
4 copied on after some rainstorms in September 2013.

5 Before we go there, the
6 inquiry has received documents that suggest within
7 the first year of the Red Hill opening members of
8 council and public works staff started to receive
9 anecdotal complaints about the Red Hill being
10 slippery. Did those sorts of anecdotal complaints
11 make their way to you at some point after -- into
12 2008 or at some point after that?

13 A. I don't think I could
14 categorize it by when. I don't think it would
15 surprise anyone to say that there wasn't -- there
16 wasn't a line of anecdotal commentary about the
17 Red Hill Valley Parkway being slippery, you know,
18 for lack of a better term. I couldn't tell you
19 when I started to become aware of that line of
20 commentary. I suppose it could have been shortly
21 after it opened.

22 Q. I think I might have
23 misheard you. I think you said I don't think it
24 would surprise anyone that there wasn't a line of
25 anecdotal commentary --

1 A. No, that there was.

2 Q. There was. Okay.

3 A. I don't think it would
4 surprise -- yeah, that there was. I mean, it
5 was -- it was something, you know, water cooler
6 talk or -- anecdotal commentary that the Red Hill
7 was slippery.

8 Q. Prior to 2013 did anyone
9 from public works ask risk management to be
10 involved in anything programatic (ph) or anything
11 sort of high level as a proactive response to the
12 anecdotal information that the parkway was
13 slippery?

14 A. Not that I recall.

15 Q. Do you recall any
16 anecdotal complaints about a lack of lighting on
17 the Red Hill making their way to you in the first
18 few years of the Red Hill's opening?

19 A. No, I don't.

20 Q. In 2013 public works
21 staff started to conduct safety reviews and
22 assessments on the Red Hill. The Tradewind report
23 is one piece of work that came out of some of that
24 process. In the fall of 2013 were you aware that
25 Golder Associates had been retained to review

1 aspects of the pavement surface of the Red Hill?

2 A. I was not.

3 Q. Were you aware in the
4 fall of 2013 that traffic engineering and
5 operations had retained CIMA to conduct a safety
6 review on a portion of the Red Hill?

7 A. I was not.

8 Q. There was also subsequent
9 studies conducted by CIMA in 2015, 2017 and 2018.
10 Were you aware that those studies, when they were
11 in progress?

12 A. No, I was not aware.

13 Q. Before late 2018 did you
14 review any staff reports that related to safety
15 countermeasures or anything on the Red Hill?

16 A. Not that I recall, no.

17 Q. Was it your practice to
18 read staff reports at a public works committee?

19 A. No. Only if they had
20 asked for my assistance in putting them together
21 or perhaps reviewing something within a report
22 that they felt risk management might be able to
23 add something meaningful.

24 Q. In September 2013 there
25 was a heavy rainfall incident on the Red Hill and

1 a number of accidents were reported in the media.
2 Following this incident there were a number
3 e-mails exchanged between City staff about
4 accidents and complaints coming out of that heavy
5 rainfall. Do you generally have a recollection of
6 being involved in some of those e-mail
7 discussions?

8 A. Yes.

9 Q. I'm going to take you
10 back into the overview documents.

11 Registrar, could you bring up
12 OD 6 page 52 and 53, please. Thank you.

13 Just before we turn to this,
14 can you see both of this pages that the Registrar
15 has put up for us?

16 A. Yes, very clearly.

17 Q. Registrar, could you call
18 out the top of page 53, please.

19 This is an e-mail as between
20 operations staff that there was some issues on the
21 Red Hill due to heavy rain. The police call us
22 saying the ramps on the road are very slippery.
23 There are quite a few accidents. And then the
24 author, who was a district supervisor in roads,
25 says "I feel it's a pavement problem and speed

1 problem." And at he end he says:

2 "There is nothing I can
3 do to prevent these road
4 conditions. There was no
5 flooding it was just the
6 condition of the road."

7 Registrar, can you close that
8 down and call out the next two paragraphs, 132 and
9 133. Mr. McLennan, I'm just going to take you
10 through some documents before I ask you some
11 questions.

12 A. That's fine.

13 Q. Ms. Blackburn, who is
14 another person in roads, adds to the e-mail. She
15 says in 132, and notes:

16 "Due to the Superpave
17 product they used
18 allowing the asphalt to
19 last 20, 30 years, with
20 this mixture it contains
21 more liquid asphalt and
22 small glass shards with
23 for observe reasons makes
24 it slippery when wet."

25 She recommends slippery when

1 wet signs be placed throughout the Red Hill,
2 especially on the ramps.

3 And then she says to maybe
4 help alleviate the City from some potential claims
5 and accidents. So engaging in a bit of risk
6 management herself, would you agree?

7 A. Yes, seems to be.

8 Q. And then at 133, again
9 this is still within roads but it's being
10 escalated now. "Roads has a big issue whenever it
11 rains." And then the next paragraph is:

12 "Can we please take the
13 risk out of this by
14 getting traffic to add
15 slippery when wet signs
16 to every ramp along the
17 route."

18 And it says:

19 "We are getting several
20 collisions every time it
21 rains and police are
22 asking us to do something
23 like add sand."

24 Registrar, can you close that
25 down. If you can go to the next two pages,

1 please.

2 It gets -- the individuals on
3 these e-mails expand from roads operations into
4 traffic engineering, and in particular Mr. White.

5 You'll see that at the top of
6 page 1 -- pardon me, page 54 paragraph 134. And
7 Mr. Moore also gets copied in and in 136 he says
8 I'm not sure where this information on Superpave
9 is coming from but it's totally incorrect, and
10 then goes on to talk about micro -- hydroplaning
11 and suggesting that using sand is not appropriate.

12 Registrar, could you go to the
13 next two pages, please.

14 These are various threads of
15 the same e-mail discussion but they do branch off
16 a little. So you'll see -- apologies, Registrar,
17 if you can go to the next two pages, 58 and 59.

18 After a few days on
19 September 25 Mr. White responds now to Mr. Shynal.
20 And you know Mr. Shynal; is that right?

21 A. Yes.

22 Q. He's the head of roads at
23 the time?

24 A. Probably. I don't recall
25 his title, I know he was sort of a senior staffer

1 in roads -- public works/roads, yeah.

2 Q. I already mentioned
3 Mr. Moore. Did you know Mr. Moore as the director
4 of engineering?

5 A. I did.

6 Q. And Mr. White and
7 Mr. Mater are both in public works in the (skipped
8 audio) engineering side?

9 A. Correct.

10 Q. This is the e-mail at 147
11 that you get copied into.

12 Registrar, can you call out
13 the e-mail at the bottom of page 58, please.

14 About eight lines down
15 Mr. White says we will also confer with risk
16 management regarding the matter, and this is after
17 he suggests doing a collision history of the
18 entire LINC/Red Hill. And then at the bottom of
19 this he says:

20 "Roads staff have
21 commented that erecting
22 the signs reduce our
23 liability. I am not
24 certain that is actually
25 true and wonder if we

1 actually have any claims
2 relevant to the road
3 conditions and will pass
4 this information along to
5 John" -- to you for
6 comment.

7 Do you remember receiving this
8 e-mail from Mr. White?

9 A. I remember the e-mail
10 chain, yes.

11 Q. Registrar, could you
12 close this down.

13 Is this the kind of
14 circumstance where user departments might come to
15 you for your information and expertise about the
16 claims history on, in this case, the Red Hill?

17 A. Yes, it is.

18 Q. So not unusual that a
19 user department might reach out to you for this
20 information?

21 A. No, not unusual. Not all
22 that common but not unusual.

23 Q. Registrar, can you call
24 out paragraph 149, please.

25 So you respond:

1 "Off the top of my head I
2 would say there's not a
3 significant claims
4 history for slippery
5 conditions on the Red
6 Hill certainly no more
7 than any mountain cut if
8 I can call it that."

9 You go on, and we'll go
10 through this e-mail in a moment. But just
11 stopping there, did you consult with anyone prior
12 to providing this response?

13 A. No.

14 Q. Had you previously dealt
15 with any claims for slippery conditions on the Red
16 Hill?

17 A. I couldn't say now. I
18 don't believe so.

19 Q. Okay. You mention a
20 mountain cut. Do you mean the grade roads that
21 traverse the mountain in Hamilton?

22 A. I do.

23 Q. Did you have some
24 understanding or impression that mountain cuts
25 might be different from a claims perspective or an

1 accident perspective than flat roads?

2 A. Yeah, I think that comes
3 down to the common sense lens that we tend to look
4 at things through in risk management, you know,
5 any graded road or roadway that is on a grade is
6 certainly more susceptible I think to being
7 slippery. Again, I don't like the use that term,
8 but being slippery where it's wet.

9 Q. You wrote that you copied
10 Gavin Chamberlain to run a location-based report
11 in Riskmaster?

12 A. Right.

13 Q. So a fair bit about
14 Riskmaster. Can you explain here what information
15 a location-based report would provide to be
16 responsive to Mr. White?

17 A. Sure. I would either
18 have spoken to Gavin or sent an e-mail which would
19 have said -- I probably would have laid out the
20 basics of there's some concern about the condition
21 of the Red Hill, can you run me a claims report
22 for vehicle accidents on the Red Hill using these
23 cause codes.

24 Q. Did you have confidence
25 that coding in Riskmaster that would -- did you

1 have confidence in Riskmaster that that would --
2 that location-based report would capture all of
3 the claims on the -- that occurred on the Red
4 Hill?

5 A. I did. He would have --
6 again, I'm not the best at explaining this type of
7 computer technology, but he would have run the
8 report through filters of cause code and through
9 filters of location so it would have captured any
10 claims in our system that happened on the Red
11 Hill.

12 Q. Not just those that
13 suggested slippery when wet conditions?

14 A. Correct.

15 Q. In the next paragraph you
16 write:

17 "What we do have is a
18 situation of which we,
19 the City, are aware and
20 also the general public.
21 In the event of a serious
22 accident in the future
23 this experience will be
24 cited and the allegation
25 will be 'we knew of the

1 A. You mean technically in
2 terms of the manual of traffic operations?

3 Q. Yes, that is what I mean.

4 A. No, certainly not. And I
5 would -- my expectation would be that the people
6 in public works would have that knowledge.

7 Q. So you were making a
8 risk-based recommendation or suggestion and then
9 you would leave it to public works to determine
10 whether it was feasible to implement or
11 appropriate to implement; is that right?

12 A. Correct. And had they
13 said they wanted to put one up every 10 feet I
14 wouldn't object to it, but my recommendation is --
15 was what it was. I certainly had no technical
16 knowledge of what was required.

17 Q. And that's common with
18 your user departments. You make a recommendation
19 and then they have to assess the feasibility and
20 technical aspects of that; is that right?

21 A. That's correct.

22 Q. At the bottom of this
23 e-mail you say:

24 "If the Superpave product
25 really does produce a

1 slicker surface when wet
2 I would be curious to see
3 what other municipalities
4 are doing about it."

5 At this time did you have any
6 knowledge of the pavement, which was SMA, that had
7 been used on the Red Hill?

8 A. No, no knowledge at all.

9 Q. Did you have any
10 knowledge of other Superpave pavements?

11 A. No.

12 Q. Did you have any
13 knowledge or impression that Superpave pavements
14 were slipperier when wet than other pavements
15 apart from reading through this e-mail chain?

16 A. Apart from reading
17 through this, no, not at all.

18 Q. Did you contact any other
19 municipalities to ask what they were doing about
20 the use of Superpave?

21 A. I did not.

22 Q. In writing that statement
23 were you suggesting that public works should do
24 that or were you taking that on as a task?

25 A. Well, you know, it is a

1 vague sentence. I wouldn't have thought to have
2 taken on the task. That would be I guess a
3 roundabout way of me saying it might be wise to
4 see what other municipalities are doing. That
5 being said, there are not a lot of situations in
6 any municipalities where there is a roadway
7 similar to the Red Hill Valley Parkway.

8 Q. Registrar, could you
9 close the callout and go to page 60, please. If
10 you could call out paragraph 151.

11 So Mr. Moore replied to you
12 and others from your -- the e-mail we were just
13 looking at, and he indicated that:

14 "As part of the ongoing
15 pavement monitoring for
16 asset management purposes
17 we have skid resistance
18 test -- we will have skid
19 resistance testing
20 completed on both the
21 LINC and the Red Hill."

22 Stopping there before we go to
23 the rest of his e-mail. At the time did you have
24 any experience with friction testing or friction
25 results?

1 A. No, none at all.

2 Q. Were you aware if any
3 friction testing had already been done on the Red
4 Hill?

5 A. I was not aware.

6 Q. Mr. Moore goes on to say:
7 "There is a standard by
8 which we can report on
9 the relative level of
10 resistance and by which
11 we can gauge the
12 performance of each mix
13 and road surface."

14 Stopping there. Did you
15 understand that friction testing would -- pardon
16 me -- let me try that again.

17 What did you understand that
18 friction testing would demonstrate as it related
19 to wet weather slipperiness?

20 A. Well, I would have -- at
21 the time I would have read this and thought well,
22 good, they are going to do some sort of testing
23 which might give them some idea of the veracity or
24 the validity of the slippery commentary.

25 Q. Beyond that impression

1 did you have any understanding about what a
2 friction test might show as it related to --

3 A. I had no idea how they
4 would go about doing it. I presume -- I had read
5 enough engineering reports in my career to know
6 that at some point they possibly could be boiled
7 down to layman's understandings, which is usually
8 what the conclusion or summary portion of a report
9 would suggest. So in terms of hard statistics or
10 technical language, I would be non-conversant.

11 Q. Okay. Mr. Moore goes on
12 to say:

13 "This should be
14 sufficient for any due
15 diligence required,
16 eliminating the 'ought to
17 have knows' as well as
18 dealing with the 'we
19 think it is slippery'
20 issues."

21 Did that provide you with some
22 assurances or at least understanding that the City
23 was going to obtain some sort of report that might
24 be useful if there ever was a claim on the Red
25 Hill?

1 A. Yes. Yes. It would
2 have. I would have been relatively pleased to
3 read that.

4 Q. Mr. Moore says "I'll let
5 you know when we get this." Did you expect that
6 Mr. Moore would keep you apprised of the -- or at
7 least advise you of the results of the testing?

8 A. Reading that I would have
9 thought so, yes. But, you know, it's not unusual
10 to have people say they will follow up and it
11 doesn't happen. But reading that I would have
12 thought okay, good, that will be interesting to
13 read once it comes in.

14 Q. Did he let you know when
15 he got friction testing completed?

16 A. No.

17 Q. Did he provide you with a
18 copy of the results?

19 A. No.

20 Q. Did you follow up with
21 him at any point?

22 A. I did not.

23 Q. Did you discuss friction
24 testing on the Red Hill or the LINC at any time
25 with anyone at the City after this e-mail exchange

1 and before late 2018?

2 A. I don't believe so, no.

3 Q. Registrar, you can close
4 the callout.

5 You may recall I referenced in
6 Mr. White's initial e-mail where he included you
7 getting a claim history review completed. Do you
8 recall having any discussions with anyone in
9 traffic engineering and operations about a
10 collision review that Mr. White said they would
11 complete?

12 A. Not -- no, not
13 specifically, no.

14 Q. You say not specifically.
15 Do you have some general recollection?

16 A. Well, I'm looking at what
17 Martin -- that is what Mr. White -- has written
18 here so certainly there must have been at least an
19 ask for claims history relative to some report
20 that they were planning and I presume we would
21 have provided it.

22 I do not recall any further
23 involvement or discussion about a report, and I
24 don't recall a specific report going to council or
25 coming to my office or through circulation or for

1 commentary other than the annual or semi or
2 biannual reports that traffic put out.

3 Q. Would you know what a
4 collision review would look like, like what that
5 could include? Is that a phrase that is known to
6 you?

7 A. Only in the -- you know,
8 obviously it's going to be some sort of analysis
9 of a collision history at a specific location. I
10 don't know if that's a technical term where the
11 parameters are consistent or if it's something
12 that would be created within traffic of their own
13 design.

14 Q. Did you have some
15 familiarity in reviewing collision reviews, that
16 is the analysis of a collision history at a
17 specific location?

18 A. Only through the review
19 of the collision reports that traffic routinely
20 produced. My expectation would have been that had
21 they branched out to something specific to a
22 specific segment of roadway, it would probably
23 look somewhat like their annual report.

24 Q. Fair enough. I
25 understand that presumption. Did you have any

1 experience in traffic engineering and operation
2 creating a tailored collision review for a
3 specific location? Had that been the --

4 A. No, no experience other
5 than, you know, other than providing the claims
6 history. And those reports, they were created
7 between Gavin Chamberlain and myself.

8 Q. But no experience
9 receiving from traffic operations a collision
10 history?

11 A. No.

12 Q. And you don't recall any
13 discussions with anyone in traffic operations
14 about the particular collision review that
15 Mr. White mentions in his earlier e-mail?

16 A. I don't.

17 Q. Registrar, could we go to
18 page 83, please. Could you bring up page 82 and
19 83. Could you call out the bottom -- actually I
20 think it's fine. I think we can read it at 214.

21 In December of 2013 Colleen
22 Crawford, a law clerk at Shillingtons, e-mailed
23 Gary Kirchknopf, who was in traffic, and Ms. Swaby
24 and Mr. Shillington, and she said -- she provided
25 some details of three collisions in 2011 and 2012

1 and wanted to inquire about who should be produced
2 on behalf of the City in these three actions.

3 So just stopping there. Was
4 Shillingtons one of the law firms on the roster of
5 additional counsel? You said there was a handful
6 earlier.

7 A. Yeah, they would have
8 been a firm approved I guess, if you will, by the
9 insurer to handle litigation on behalf of the
10 City.

11 Q. You're not copied on this
12 e-mail. Did Ms. Swaby advise you at the time that
13 Shillingtons was looking for an appropriate
14 deponent?

15 A. I don't recall her doing
16 so, and that wouldn't be unusual. I certainly had
17 every confidence in her ability to handle anything
18 that came up on a given file.

19 Q. You say that wouldn't be
20 unusual. In the usual course she would not raise
21 with you issues of requesting deponents in
22 proceedings?

23 A. No, she would -- you
24 know, as being more hands on with claims she would
25 have a better understanding of who would be an

1 appropriate deponent. Doesn't mean we wouldn't
2 talk about it, however, it certainly would not be
3 unusual for her to not consult me.

4 Q. Registrar, can you go to
5 page 85, please. If you could pull out 223,
6 please. Mr. Kirchknopf writes back to
7 Ms. Crawford:

8 "My director advised me
9 today that due to the
10 complex nature of these
11 claims, which cross three
12 different divisions....
13 he would like you to set
14 up a meeting."

15 And Mr. Kirchknopf references
16 Mr. Moore, Mr. Mater and Mr. Shynal, so three
17 different departments within public works, and
18 then a point person would be determined.

19 Registrar, could you close
20 that down and could you pull up page 86, please.
21 Could you turn now, Registrar, to page 98, please.
22 If you could call out 256.

23 Ms. Swaby follows up with some
24 people in construction about contract documents
25 that defence counsel raised. Is this the kind of

1 task that Ms. Swaby would have raised with you
2 either before or after completing it?

3 A. No, not necessarily, no.

4 MS. LAWRENCE: Registrar, you
5 can close this down.

6 I'm noting the time. I'm
7 about to move on to another topic. Commissioner,
8 would this be an appropriate time for us to take
9 our morning break?

10 JUSTICE WILTON-SIEGEL: It
11 would be. We're just about -- let's take
12 15 minutes. We will come back at 20 past 11.
13 Stand adjourned until that time.

14 --- Recess taken at 11:03 a.m.

15 --- Upon resuming at 11:20 a.m.

16 MS. LAWRENCE: Commissioner,
17 may I proceed?

18 JUSTICE WILTON-SIEGEL: Yes,
19 please proceed.

20 BY MS. LAWRENCE:

21 Q. Thank you. We are going
22 to turn now to 2017, so we're going to jump
23 forward a fair bit in time.

24 Registrar, could you call out
25 HAM26216, please. Just for ease of viewing can

1 you call out the content of -- thank you.

2 So we're in 2017 and this is
3 from Monday, July 17, 2017. And you in a subject
4 line RHVP article e-mail Ms. Swaby "not all bad"
5 and then a link to a Hamiltonnews.com website,
6 which I believe is the Hamilton Spectator,
7 "Highway traffic tragedies. Why are there so many
8 crashes on the Red Hill?"

9 How did this article come to
10 your attention?

11 A. I don't know
12 specifically. Can you hear me all right?

13 Q. Yes.

14 A. Good. There was a
15 service within the City that I think from the City
16 manager's office that would circulate media
17 articles concerning the City to probably managers
18 and up. That's probably how I received it.

19 Q. Were you a regular reader
20 of the Hamilton Spectator?

21 A. I was not a subscriber,
22 but certainly in the form of that service, yes,
23 anything related to the City I would generally
24 read with interest, even if it necessarily didn't
25 have to do with claims.

1 Q. Did you ever use website
2 alerts like Google Alerts to have topics brought
3 to your attention?

4 A. No.

5 MS. LAWRENCE: Can you close
6 this down and can you -- actually before we leave
7 this document, I don't believe that this is in the
8 OD nor yet an exhibit, so I would like to make
9 this the next exhibit which I believe is 166.

10 THE REGISTRAR: Noted,
11 counsel. Thank you.

12 EXHIBIT NO. 166: One-page
13 e-mail dated 7/172017;
14 HAM26216

15 BY MS. LAWRENCE:

16 Q. You can close this down,
17 Registrar, and if you can bring up HAM52704,
18 please.

19 This is an article that has
20 the same title as the link that you sent to
21 Ms. Swaby.

22 Registrar, can you bring up
23 the next page as well.

24 It may look different in terms
25 of form. Did you review this article in order to

1 say "not all bad"?

2 A. Yes, I did.

3 Q. Registrar, could you call

4 out the first paragraph of the second page.

5 Exactly. Thank you.

6 The first line of the article

7 says the Red Hill had more than twice as many

8 crashes than the connecting LINC over the last

9 five years despite lower traffic volumes. Was

10 that news to you?

11 A. Yes, I would say that

12 would be news to me.

13 Q. Was it surprising, that

14 statistic?

15 A. You know, I think I would

16 probably look at that in a little different manner

17 than a lot of people would. With knowledge of the

18 LINC and the Red Hill, the LINC being flat and

19 straight and the Red Hill being on a fairly

20 significant grade and with curves, and despite

21 having lower traffic volumes than the LINC,

22 certainly high traffic volumes relatively

23 speaking, you know, twice as many would catch my

24 attention but it wouldn't cause me to go holy cow.

25 Q. By 2017, at least in

1 terms of the date of loss it looks like there are
2 13 claims that by 2019 you've identified and are
3 contained in your affidavit for the Red Hill and
4 there are three on the LINC. Is that -- so by
5 2017 did you have a sense that there were not only
6 more collisions on the Red Hill as referenced
7 here, but also more claims?

8 A. It stands to reason that
9 I would have had that understanding.

10 Q. Did you personally have
11 carriage over any of the claims related to the Red
12 Hill or the LINC?

13 A. No.

14 Q. Do you recall, did
15 Ms. Swaby have carriage -- from the claims
16 perspective, have carriage over all of the Red
17 Hill and LINC matters?

18 A. Best of my recollection
19 she would have had carriage of all of them.

20 Q. Was that by coincidence
21 or by design?

22 A. By design.

23 Q. Registrar, could you
24 close the callout. If you could call out the
25 fifth paragraph down, please. Actually,

1 Registrar, could you close that callout and call
2 out the fourth and fifth paragraph together.

3 So there is rumour and
4 speculation about Red Hill being slippery which
5 the author says has plagued the parkway since it
6 opened in 2007, and now the City is planning to
7 repave the road surface starting next year. Do
8 you recall otherwise being aware of the City's
9 plans to repave the road surface in July of 2017?

10 A. I don't recall, no. This
11 would have been my first knowledge of it.

12 Q. Do you, sitting here
13 today, have a recollection that reading this
14 article was the first time that you learned that?

15 A. That would be my best
16 guess.

17 Q. Fair enough. The article
18 goes on to say the City has done limited friction
19 testing on the road but refuses to make the
20 results public, saying only that they were
21 ultimately inconclusive. By mid-July 2017 were
22 you aware that the City had otherwise -- not from
23 this article -- were you aware that the City had
24 done limited friction testing on the Red Hill?

25 A. I would say no.

1 Obviously back in '13, at that time I would have
2 had some knowledge of the consideration of
3 friction testing, but I doubt very much that I
4 would have related back to 2013 when I read this
5 article.

6 Q. Prior to your -- prior to
7 the inquiry being called -- I'll put it this way.
8 Prior to late 2018 did you understand that skid
9 resistance testing was the same thing as friction
10 testing?

11 A. No.

12 Q. Registrar, you can close
13 this down. If you can call out the last four
14 paragraphs at the bottom of this page. The
15 article continues. We've jumped over some, but it
16 continues that:

17 "A 2015 engineering
18 report found crashes when
19 the road is wet where it
20 inexplicably going up,
21 not down, and recommended
22 that the City study
23 friction."

24 Did reading the reference to
25 the 2015 engineering report prompt you to contact

1 anyone to obtain a copy of that report?

2 A. No.

3 Q. By sending it to

4 Ms. Swaby did you anticipate that she would go
5 through and assess whether there was anything
6 contained in the report that might be useful on
7 the litigation matters she was handling?

8 A. By forwarding it to her I
9 would have expected that she would read the
10 article and apply anything within the article that
11 she may not have been aware of to her file
12 handling.

13 Q. "The article again?
14 references testing
15 friction, it says later
16 that year, but the
17 results were never made
18 public. There is no
19 official report, Moore
20 said, only an informal
21 chart sent in an e-mail
22 in December 2015. The
23 friction testing was not
24 fulsome and the results
25 were quote/unquote

1 inconclusive, he said.
2 But instead of doing
3 further testing as
4 recommended the City
5 decided to repave."

6 Did you have any concerns from
7 a risk perspective about this chronology of
8 events, friction testing, that results were
9 inconclusive and a decision to repave?

10 A. Well, I think I would
11 have found those last two paragraphs to be
12 somewhat comforting to risk concerns that I might
13 have had. You know, first of all, I certainly had
14 a lot of confidence in Mr. Moore and his staff. I
15 am not scientifically or mathematically gifted so
16 I'm not -- the discussion of friction testing
17 would be a very vague concept to me.

18 So knowing Gary's reputation
19 as very talented engineer and as someone who had
20 the confidence of people that I respected very
21 much, that being Gary Davis and Chris Murray, my
22 expectation was that whatever he was doing to
23 analyze friction or grip or a slip factor on the
24 Red Hill Valley Parkway was sufficient, and, you
25 know, if they are going to go ahead and repave

1 that seemed to render the argument concluded. I
2 think that's what I would have thought reading
3 those last two paragraphs.

4 Again, Diana being the file
5 handler of the Red Hill files, you know, I would,
6 A, obviously this article would be of interest to
7 her, and B, my thinking is that she at least would
8 have a file handler's/layman's knowledge of the
9 reports that are referred to within.

10 Q. Thank you. Registrar,
11 you can close this callout and if you can go to
12 the next page. If you can call out the first four
13 paragraphs, please.

14 So this is further quotes from
15 Mr. Moore following from what we were just looking
16 at, and he says:

17 "All we got was an
18 indication we should do
19 further work. It was
20 moot when we decided to
21 go ahead with repaving."

22 And so is that part of the
23 comfort of the risk concerns you would have
24 otherwise had?

25 A. Yes.

1 Q. The article goes on to
2 say that the City refused to share that chart with
3 the Spectator and Mr. Moore was quoted as saying
4 no one ever releases that type of information
5 because it's the first thing anybody would use in
6 a lawsuit.

7 On that quote did you turn
8 your mind to the fact that friction testing
9 results might be producible in litigation?

10 A. No. That wouldn't have
11 occurred to me at the time.

12 Q. Reading this did you
13 agree with Mr. Moore that no one -- with his
14 strategy not to give information to the Spectator
15 because it's the first thing anyone would use in a
16 lawsuit?

17 A. Well, I wouldn't
18 necessarily agree with his phrasing. I do
19 understand what he was trying to say. In my --
20 it's very hard to say what I was thinking reading
21 this at the time. I probably had a bit of a
22 chuckle at first over the statement. But, you
23 know, what Gary is saying is that only engineers
24 are really capable of reading and analyzing this
25 type of thing and it certainly could be construed

1 however the reader wanted to construe him given
2 his earlier comments that the findings were
3 inconclusive.

4 I don't think at the time it
5 would have occurred to me to consider privilege as
6 it relates to the claims that we already had. You
7 know, even in forwarding that to Diana, I don't
8 know if in my mind I was thinking well, Diana will
9 be able to comment on privilege. It was forwarded
10 to Diana, as she has considerably more knowledge
11 about the claims than I do, so I will leave it to
12 her to deal with any areas of concern in this
13 article.

14 Q. From a risk management
15 perspective did you see the difference in having a
16 publicly available document given to the media
17 versus a document that the City might have to
18 produce in litigation?

19 A. I understand the
20 difference, yes. And I would imagine, you know,
21 if -- let's just say the Spectator kept pressing
22 Gary, I would imagine that that would then be
23 bounced over to legal to consider the response,
24 not risk management.

25 Q. Thank you. You can close

1 this, Registrar.

2 This is quite a lengthy
3 article. It references the deaths of two young
4 women in 2015 and median barriers, a number of
5 aspects. I won't make you sit here and read
6 through the whole thing to answer this question,
7 but of course if you need to you can. My question
8 is this: You said to Ms. Swaby "not all bad."
9 What did you mean "not all bad"?

10 A. Well, my general
11 perception of the Spectator in any article about
12 City performance, City services, happenings at the
13 City, is that they tend to have a decidedly
14 negative narrative to them about the performance
15 of the City and how the City was possibly or
16 underservicing its citizens.

17 It seems like -- and I don't
18 know if that's a product of media in general --
19 people may tend to prefer to read negative stories
20 about their local government as opposed to many,
21 many good stories that could be told about local
22 government. So that sets the scene I think for my
23 overall opinion of how the Spectator reported on
24 city business.

25 However, reading this, I

1 didn't find it to be as unbalanced as I would have
2 expected. It references inconclusive findings and
3 it references -- it quotes Councillor Merulla. I
4 think at some point it references the fact that
5 the use or the traffic flow is much higher than
6 anticipated when originally designed. It
7 references driver behaviour and it references the
8 fact that there -- there are no absolute answers
9 here. You know, that was -- I took that to be not
10 bad.

11 Q. Thank you. Registrar,
12 you can close this document.

13 Following from that e-mail
14 that you flipped to Ms. Swaby, do you recall any
15 discussions with her about friction testing
16 results being relevant to her Red Hill claims?

17 A. I do not.

18 Q. Did she tell you -- and
19 we're in July 2017 so let's say for 2017 -- did
20 she tell you that defence counsel at Shillingtons
21 in some other Red Hill cases wanted to obtain
22 friction test results?

23 A. I don't recall her doing
24 so, no.

25 Q. It appears that

1 Shillingtons was prompted by this article to ask
2 about friction test results. Does that assist
3 with refreshing your memory if Ms. Swaby advised
4 you about that?

5 A. It doesn't refresh my
6 memory, no. And I'm not saying she didn't. I'm
7 saying I don't recall.

8 Q. Okay. Did she advise you
9 in 2017 that Mr. Moore had sent a copy of the
10 Tradewind report, which you'll later review, to
11 Shillington in August of 2017?

12 A. I would give the same
13 answer, that if she did I don't recall it. It's
14 quite possible that she did.

15 Q. Okay. We're going to
16 come back to that as we move through the
17 narrative. So I take it that those answers about
18 not recalling if she advised you about this, those
19 are all for the period of time in 2017; is that
20 right?

21 A. Correct.

22 Q. Registrar, could you call
23 out HAM64357, please.

24 We will get into the content
25 of this, but this first page you will see this is

1 a letter from Shillingtons. It's dated
2 January 31, 2018, and it's addressed to Ms. Swaby,
3 and it is re three pieces of litigation, Melo, Lee
4 and Barlow. Were you generally familiar with
5 these three pieces of litigation in January
6 of 2018?

7 A. Certainly Melo, yes; the
8 other two not as much. I would know them by name
9 and I would know they were related to either the
10 LINC or the Red Hill.

11 Q. Would you know -- do you
12 have enough of a working knowledge of the details
13 of these claims to know which parkway they were
14 related to, the Red Hill or the LINC?

15 A. Probably at the time. I
16 wouldn't say that I do now.

17 Q. Fair enough. Registrar,
18 could you bring up image 2 and 3, please.
19 Actually just image 2, please. Have you had an
20 opportunity in preparation for today to review
21 this document?

22 A. Yes, I have.

23 Q. Then I won't take you
24 through all of it. It's fairly lengthy. It
25 starts off at the top City of Hamilton records.

1 Registrar, could you call out the first three
2 paragraphs under solicitor-client privilege.
3 Sorry, all of them from City of Hamilton records
4 on. That's perfect. Thank you.

5 At this -- under this heading
6 "City of Hamilton Records," Shillingtons, and it's
7 Mr. Thompson at Shillingtons, says that he had
8 received voluminous productions from the City in
9 response to requests for relevant documentation,
10 and then it says:

11 "It's difficult to
12 separate the pre-accident
13 and post-accident
14 complaints and traffic
15 tasks pertaining to the
16 LINC, as many of the
17 studies were over a
18 lengthy period of time."

19 And then it says:

20 "To further complicate
21 matters, certain
22 engineering studies
23 commissioned prior to the
24 accident were never
25 submitted to council due

1 to the deficiencies of
2 calculations. Overall,
3 the results of the
4 post-accident traffic
5 engineering reports did
6 not raise concerns
7 regarding the design and
8 operation of the LINC.
9 Inter-office e-mails and
10 buried reports, however,
11 do raise issues that will
12 have to be addressed in
13 order to be -- in order
14 to successfully defend
15 these actions."

16 I'm going to close the
17 callout, please. I wanted to provide you with
18 that context just so that you can see that there's
19 reference to the LINC and at this point not to
20 the Red Hill, and that there's reference to an
21 overall comment from Shillingtons about issues
22 that will have to be addressed in order to
23 successfully defend these actions. With those two
24 points in mind, did you review this letter when
25 Ms. Swaby received it?

1 A. I don't recall doing so,
2 no.

3 Q. More generally, when
4 would Ms. Swaby escalate a reporting letter from
5 defence counsel to you, in what circumstances?

6 A. Well, that would be a
7 very general statement for me to make. Certainly
8 no hard and fast rule. You know, I would say when
9 she wanted advice or direction, which wasn't very
10 often. You know, she certainly -- not just in
11 matters of the Red Hill, you know, I had every
12 confidence in her ability to file -- to handle any
13 type of file, and she is a former law clerk as
14 well and was very highly regarded at legal
15 services.

16 So, you know, I certainly
17 would never question her ability to handle things
18 appropriately or by best practice, and she had a
19 very long leash when it came to handling files
20 without running stuff by me, and it's an approach
21 that worked very well. I think overall we did a
22 very good job handling files.

23 That being said, you know, she
24 may come into my office and talk about a file on a
25 slow day. There was just no hard and fast rule

1 about what we might discuss on any particular
2 file.

3 Q. Where there was defence
4 counsel assigned, as here with Shillingtons, did
5 you expect that defence counsel and Ms. Swaby
6 together would assess whether there might be a
7 significant issue that should be escalated to you?

8 A. Oh, absolutely. Like I
9 said, I don't recall reading this, but reading it
10 at this point in time, thinking back to how it
11 would have been handled, you know, I can certainly
12 see Diana addressing it as it should have been
13 addressed and not necessarily thinking she needed
14 to discuss it with me.

15 Q. Registrar, could you go
16 to image 5. At the top of this page there is
17 reference to friction testing survey summary
18 report, and it references the Tradewind report and
19 that Mr. Moore advised that the City commission
20 the report as it was considering repaving options,
21 and that testing confirmed that the friction
22 values on the LINC were superior to the Red Hill.

23 It goes on to reference a bit
24 about the measurements, and really with a focus on
25 the LINC being comparable or above the relevant UK

1 investigatory level 2, and then there's a notation
2 that the friction report did not go to counsel,
3 spelled as legal counsel in that case.

4 So, Registrar, can you go back
5 to image 2 now. I think that provides a bit of
6 context for that callout we were looking at
7 before:

8 "Overall, the results of
9 the post-accident traffic
10 engineering reports do
11 not raise concerns
12 regarding the design and
13 operation of the LINC.
14 Inter-office e-mails and
15 buried reports, however,
16 do."

17 So the -- at least as I think
18 you can read image 2 and 5 together, Shillingtons
19 is not raising a concern about the Tradewind
20 report as it relates to the friction values on the
21 LINC but this evidentiary issue.

22 Recognizing it's hard to say
23 in hindsight, is that the kind of evidentiary
24 issue that you would expect Ms. Swaby to raise
25 with you?

1 A. No, not necessarily.
2 We've had many discussions over the years, not
3 just between Diana and myself but with anyone
4 representing the City, that the biggest challenge
5 that municipalities face, given the volume of work
6 that they do and given the amount of documentation
7 and given the amount of hands that touch
8 everything, the biggest problem faced by
9 municipalities in defence is one of evidence.

10 So I wouldn't -- this wouldn't
11 represent anything particularly unusual, I
12 wouldn't think, in the analysis of a particular
13 claim. I would question the use of "buried." I
14 think that's probably a misnomer, but obviously I
15 didn't write the report and I'm only seeing it
16 this many years later. But buried reports could
17 mean reports forgotten about as opposed to
18 purposely buried.

19 Q. Thank you.

20 A. You would have to ask
21 Mr. Thompson exactly what he meant and if he could
22 recall correctly what he meant by buried. It's a
23 strange word to use.

24 Q. It is a particular word
25 to use, yes. Moving on, Registrar, you can close

1 this and you can go to OD 9A, page 13, please. If
2 you could call out paragraphs 18 and 19 together,
3 please.

4 We've moved forward in time
5 again, but we're still on the same topic of the
6 Shillingtons retainer. In May of 2018, Ms.
7 Crawford forwarded an e-mail that she received
8 from Mr. Moore in August of 2017 to Mr. Moore
9 (sic) and copied in Ms. Swaby, and part of that
10 e-mail was an attachment, being the Tradewind
11 report.

12 Ms. Crawford was directing her
13 e-mail to Mr. Moore, and she said:

14 "We are in the process of
15 preparing the City's
16 affidavit of documents
17 with respect to
18 litigation matter
19 involving a media
20 crossover on the LINC.
21 Plaintiff's counsel has
22 specifically asked us
23 about friction testing.
24 We would likely need to
25 produce a copy of this

1 report in the City's
2 affidavit of documents."

3 And she's asking to confirm if
4 the report has been presented to council, and if
5 so, to provide materials.

6 Mr. Moore replies, "No, this
7 report was never reported to council."

8 Registrar, you can close that
9 down. Recognizing you were not copied on this
10 e-mail exchange, did Ms. Swaby raise the -- this
11 e-mail exchange with you in May of 2018?

12 A. Not that I recall, no.

13 Q. Is this the kind of
14 information that there would be a report that
15 would be provided, an affidavit of documents that
16 had not been provided or presented to counsel? Is
17 that the kind of information that you would expect
18 Ms. Swaby to escalate to you?

19 A. No. I mean, it's very --
20 to imagine that everything that the City produces
21 in any affidavit of documents being reviewed by
22 counsel is pretty far-fetched.

23 Q. Fair enough. There's
24 that reference to plaintiff's counsel specifically
25 asking us about friction tests. By May of 2018,

1 were you aware of any other files on which
2 plaintiff counsel had raised questions of friction
3 test results?

4 A. No, I was not.

5 Q. Registrar, can you go to
6 page 118 of this document, please. Can you call
7 out 295 and 296, please.

8 So we've moved forward again
9 in time to October of 2018, and Mr. Sabo e-mailed
10 Ms. Edwards and you under the subject line
11 "pavement." At this point, by October of 2018,
12 you report to Mr. Sabo; is that right?

13 A. Correct.

14 Q. Were you familiar with
15 Ms. Edwards?

16 A. Oh, yes.

17 Q. So Mr. Sabo says:
18 "FYI and in relation to a
19 recent discussion Debbie
20 and I had over consultant
21 or draft of reports
22 studying the surface of
23 the red hill expressway."

24 Just stopping there. Did that
25 prompt you to recall either the article that we

1 looked at or the discussions with Mr. Moore in
2 2013 about studying the surface of the Red Hill
3 Expressway.

4 A. I don't believe it did,
5 no. I couldn't say, but I don't believe that it
6 did.

7 Q. Mr. Sabo says:
8 "I wonder where the
9 numbers for the Red Hill
10 would put it in
11 comparison to
12 international standards
13 in the link below."

14 And then he directs a question
15 to you:

16 "Is it your recollection
17 -- is your recollection
18 the same as mine, that
19 plaintiffs counsel in
20 recent years had been
21 aware of or requesting
22 information on the RHE
23 studies as a result of
24 some discussions at City
25 Committees or in the

1 press."

2 So at that time was that your
3 recollection, that plaintiff's counsel had been
4 aware of or requesting information about the Red
5 Hill, or about studies on the Red Hill?

6 A. Well, I don't believe I
7 responded to Ron's question, which probably means
8 that I didn't recollect. I really can't say for
9 sure. What I will say is having read these
10 documents, I was happy to see that the Tradewind
11 report was produced.

12 Q. You mean later in time?

13 A. I mean to Shillingtons.

14 Q. Oh, I see. Okay. Thank
15 you. That's your hindsight?

16 A. I don't remember this
17 particular e-mail, and, you know, it wasn't
18 uncommon for Mr. Sabo to write this type of e-mail
19 that sort of -- you know, it sort of lent itself
20 to answering or not answering. If I didn't
21 answer, I would say that, you know, it didn't twig
22 anything for me.

23 Q. Do you recall having
24 discussions following from this e-mail exchange
25 with Ms. Edwards or Mr. Sabo about consultants or

1 drafts of reports studying the surface of the Red
2 Hill?

3 A. No, I don't.

4 Q. Registrar, can you go to
5 page 147 of this document, please. If you can
6 call out 344 and 345. We've jumped forward again
7 in time. We're now in November of 2018, and
8 Ms. Edwards made some handwritten notes which are
9 transcribed here, and then the following year she
10 summarized the handwritten notes into a paragraph.

11 So there's two different
12 versions of basically the same information. So
13 you'll see that Ms. Edwards in 344, it says "11,
14 12, 18, TC Gord McGuire." Were you familiar with
15 Mr. McGuire?

16 A. Yes. What does "TC"
17 mean? That was plaguing me last night.

18 Q. Telephone call.

19 A. Ah, okay. Thank you.
20 Yes, I'm familiar with Mr. McGuire.

21 Q. Thank you. Her notes
22 say:

23 "Gary said sent info over
24 to Diana about two years
25 ago. Report looked at UK

1 standard. There is no
2 standard in Ontario.
3 Report is a bit
4 misleading since not
5 binding. Gary doesn't
6 recall receiving any
7 response. John McLennan
8 is aware."

9 Do you have any information
10 about -- or did you have any information or
11 awareness before November 12, 2018 about any of
12 the information that is contained in this note?

13 A. I don't think so. I sort
14 have been puzzled as to what Debbie meant by "John
15 McLennan is aware." And I don't know what
16 information she has provided on that, but my
17 analysis or my interpretation would be Debbie
18 must've informed me of what she has explained in
19 this -- the information that is in this
20 transcription, if you will.

21 Q. Do you have a
22 recollection of Ms. Edwards informing you of this
23 on November 12, 2018?

24 A. No, but I mean it
25 wouldn't be unusual to have had a discussion with

1 her about it. I do not have a specific
2 recollection.

3 Q. You don't have a
4 recollection of what details, if any, she provided
5 to you?

6 A. No.

7 Q. Registrar, you can close
8 this down. If you can go to page 151, please.
9 Thank you. If you can call out 357, please.

10 This is the next day, the day
11 after those notes that Ms. Edwards made.
12 Actually, sorry, stopping -- just before we get
13 into this, Registrar, you can close the callout
14 for a moment.

15 Where is it that you were
16 aware -- is it possible that those notes reflect
17 Mr. McGuire telling Ms. Edwards that he had made
18 you aware? Maybe I'll do my question differently.

19 Did you have a discussion with
20 Mr. McGuire in November of 2018 about any of this
21 information that Ms. Edwards puts in her note?

22 A. Not that I recall, no.

23 Q. Thank you. Registrar,
24 you can open that callout for 357, please.

25 On November 13th, Ms. MacNeil,

1 Byrdena MacNeil, e-mailed you attaching a copy of
2 the Tradewind report and she says:

3 "I dropped by your office
4 this morning to speak to
5 you about the attached
6 report. There is
7 currently an FOI request
8 that the City is having
9 to respond to, and this
10 looks to be a responsive
11 document. Can we chat?"

12 (As read)

13 Do you recall chatting with
14 Ms. MacNeil on November 30th (sic)?

15 A. November 30th or 13th?

16 Q. Pardon me, 13th.

17 A. Yeah, obviously I don't
18 remember the date. I remember at some point
19 around this time having a face-to-face
20 conversation with Ms. MacNeil?

21 Q. Okay. Looking at the
22 e-mail, she attaches a copy of the Tradewind
23 report. Did you review the report when you
24 received this e-mail?

25 A. Oh, I definitely would

1 have.

2 Q. Did you review it before
3 you met and spoke to Ms. MacNeil face-to-face?

4 A. No.

5 Q. So the first discussion
6 with Ms. MacNeil you were -- you didn't have the
7 opportunity to have digested the information in
8 the Tradewind report?

9 A. The first copy I received
10 of the Tradewind report would have been from
11 Ms. MacNeil.

12 Q. Okay. My question is
13 when you then -- you recall speaking to
14 Ms. MacNeil, but you spoke to Ms. MacNeil before
15 you had the opportunity to read the report?

16 A. I would expect so, yes.

17 Q. Had you had any
18 discussions with Ms. Edwards, Mr. Sabo, Mr.
19 McGuire or Ms. Swaby about the Tradewind report,
20 even if you hadn't received a copy of it yet
21 before this time?

22 A. Certainly not with Mr.
23 McGuire. It is quite possible that I had
24 discussions with Debbie, Ron or Diana about the
25 Tradewind report now that it sort of was a hot

1 topic, if you will.

2 Q. But you don't have a
3 particular recollection of doing that before
4 receiving a copy of it?

5 A. No, I don't.

6 Q. Ms. MacNeil references an
7 FOI request. Were you aware before receiving this
8 e-mail that there was an FOI request that legal
9 was dealing with?

10 A. I don't think so. Not to
11 my recollection.

12 Q. Does risk generally have
13 a role in FOI requests?

14 A. Not very often.
15 Occasionally we would get requests for our file
16 contents on a particular file, and it was always
17 sort of confounding to me having to produce the
18 records and -- you know, my view is always that it
19 was information prepared in anticipation of
20 litigation. I always thought it was something
21 that I shouldn't have to forward to FOI, but
22 basically you always copied your file and sent it
23 over, and I was never quite sure as to what became
24 of the contents after I sent it. I was never sure
25 what went out and what didn't go out. So it was

1 always a bit of a mystery to me. But the only
2 time I would get involved would be a request for
3 what is in our files, our claims files.

4 Q. When you say when that --
5 those sorts of requests came in, you say you would
6 copy the file and send it over. Do you mean you
7 would send it to the City's privacy officer for
8 review?

9 A. Oh, yeah. Correct.
10 That's correct. The FOI office, yes.

11 Q. Did risk management have
12 any role in consulting on FOI requests that didn't
13 involve the risk management's records but rather
14 some other user department's records?

15 A. Not that I recall. It
16 may have happened that we got a call from someone
17 in a department saying, I've got this FOI, I want
18 to run it by risk. But my response, and I'm sure
19 that call would have come to me, would have been,
20 you know, I'm -- you've got to provide what has
21 been asked for. If you really want to discuss FOI
22 or MFIPPA, put in a call to legal services.

23 Q. Here Ms. MacNeil from
24 legal services is saying she wanted to talk to you
25 about this. Was that unusual as it relates to FOI

1 requests?

2 A. Yeah, I would say no one
3 in legal had ever come to me before to discuss an
4 FOI request. That's a fair assessment.

5 Q. You said you recall
6 speaking to Ms. MacNeil. What was the focus of
7 that first discussion that you had with her?

8 A. I think she explained to
9 me what the request was and what the -- you know,
10 early stages at this point, I think she would have
11 explained what report or reports are likely to be
12 responsive, and I don't recall specifically but
13 I'm guessing she would have inquired as to files
14 or claims we had for the Red Hill or possibly the
15 LINC, which in my, you know, less-than-basic
16 understanding of privilege might lend itself to a
17 different analysis of what is responsive and what
18 isn't. I would have imagined that's why she was
19 coming to me to discuss, and I would have said,
20 yeah, we've got these files. I think at the time
21 it was four.

22 Q. I'm not sure I entirely
23 followed your last answer. Maybe I'll rephrase my
24 question and we can go from there.

25 Why was Ms. MacNeil raising

1 the Tradewind report with you from your
2 perspective?

3 A. From my perspective -- I
4 can't speak for her obviously. From my
5 perspective, I would say that she wanted to know
6 if there were claims related -- that might be
7 related or if this report might be related to the
8 claims that we already had.

9 Q. Was she asking you about
10 whether this report had been produced in any other
11 litigation?

12 A. I don't think she did. I
13 don't recall, but I don't think she did ask me
14 that.

15 Q. What discussions, if any,
16 did you have about the potential impact of a
17 disclosure through the FOI process on the Red Hill
18 related litigation?

19 A. During that initial
20 discussion?

21 Q. Yes.

22 A. Okay. Well, I was pretty
23 frank, in my opinion. You know, my opinion was
24 that knowing whatever -- whatever the narrative at
25 that early stage was about the Tradewind report, I

1 would have been concerned that release of this
2 report would have an adverse impact on our ability
3 to defend claims. That being said, you know, it
4 was way outside of my purview to decide what is
5 responsive and what isn't, but for the sake of
6 defending, my hope was that they weren't
7 responsive.

8 Q. Did Ms. MacNeil convey to
9 you if she had a preliminary view about whether
10 the Tradewind report was in fact responsive to the
11 FOI?

12 A. I don't -- I don't recall
13 her specifically saying one way or the other.

14 Q. This may be jumping
15 forward a bit in time, but at some point did
16 Ms. MacNeil convey to you her view about whether
17 the Tradewind report was responsive to the FOI?

18 A. Yes, I do remember, you
19 know, the narrative turning to these -- you know,
20 the Tradewind report is responsive.

21 Q. Despite your hope that it
22 was not responsive --

23 A. Can I rephrase that? It
24 wasn't -- you know, it's not that -- hope is maybe
25 the wrong word. Just in terms of ability to

1 defend, I saw this as something that would be a
2 hurdle to overcome in the defence.

3 Q. Thank you. I think I
4 understand the rationale for your rephrasing.

5 Given that view that you held
6 about the hurdle that this would create, did you
7 accept Ms. MacNeil's opinion that the Tradewind
8 report was responsive when she conveyed it to you?

9 A. Absolutely. That being
10 said, I wanted to be sure that we had done all due
11 diligence in making that decision because my
12 primary concern was putting our insurance coverage
13 in jeopardy.

14 Q. And did you and
15 Ms. MacNeil have discussions about that due
16 diligence at this first meeting on or about
17 November 13?

18 A. I can't say for sure.
19 Certainly it was discussed at some point.

20 Q. We'll come to it. What
21 about your primary concern about putting insurance
22 coverage in jeopardy? Was that discussed with
23 Ms. MacNeil at this first meeting?

24 A. Again, can't say for
25 sure. I doubt that it was. That was probably,

1 you know, roaming around in my mind, but I don't
2 know that I brought it up at that first meeting.

3 Q. Okay. Registrar, you can
4 close this down. If you can go to 156, please.
5 Can you call out 157 as well, please.

6 If you look at paragraph 375,
7 this is about a week after the discussion with
8 Ms. MacNeil. So November 20th Ms. Auty e-mailed
9 Mr. Sabo and you with the subject line "PW Red
10 Hill matter," and I'm actually going to bring up
11 the --

12 A. Paragraph 375?

13 Q. Sorry, 371.

14 A. Okay, got it.

15 Q. At the very bottom of
16 156.

17 A. Yeah, got it.

18 Q. I'm actually going to
19 bring up the underlying document just because I
20 think it's a bit easier to read, and that is
21 HAM62477. Thank you. If you could call out the
22 body of that e-mail, please. Thank you.

23 So this is from Ms. Auty. Did
24 you work regularly with Ms. Auty?

25 A. Well, I would say my

1 regular liaison, if you will, or my regular
2 communications were with Mr. Sabo, but certainly I
3 wouldn't say it was unusual for me to communicate
4 with Ms. Auty, particularly on issues of higher
5 importance.

6 Q. This e-mail says:
7 "Further to our
8 discussion last week, do
9 we have any concerns with
10 Dan McKinnon speaking to
11 Gary Moore on the issue
12 of the report regarding
13 the friction to get more
14 of his perspective and
15 determine if there are
16 any other documents we
17 need to be aware of?"

18 Just stopping there, Ms. Auty
19 starts off by saying "further to discussions last
20 week." Do you recall having discussions with
21 Ms. Auty and Mr. Sabo in the week before
22 November 20?

23 A. I do not.

24 Q. Sitting here today, is
25 that to say that you have confidence that you did

1 not have discussions, or that you just can't --

2 A. Oh, no. I'm imagining I
3 did. I'm saying I don't remember them. I don't
4 remember them as formal discussions, i.e., a
5 meeting being called and taking place.

6 Q. Okay. The next paragraph
7 says:

8 "Where are we with
9 regards to speaking to
10 David Boghosian and out"
11 I think that's supposed
12 to be "our assessment of
13 the risk/impact on
14 litigation matters and
15 the need for an interim?
16 Should we set up a
17 meeting to review with
18 Byrdena the MFIPPA
19 issue?"

20 Does that refresh your memory,
21 the many things that are referenced in those two
22 sentences, about meeting about Mr. Sabo and
23 Ms. Auty in the week before?

24 A. I do remember
25 conversations, it would have been on fourth floor

1 at 50 Main Street, where we discussed acquiring
2 some form of opinion from an expert, who turned
3 out to be Mr. Boghosian, you know, who I had no
4 objection to them retaining him. Not that I would
5 have had a whole lot of say in the matter, but I
6 certainly was well aware of David and his
7 abilities and was quite happy that they were
8 turning to him. I would have had little, if any,
9 input on the assignment to him in terms of what
10 was expected from him.

11 Q. Just stopping there. You
12 said you recall discussions about acquiring some
13 form of opinion from an expert. So "expert" can
14 mean lots of things.

15 A. Yes, sorry.

16 Q. Was it particularly from
17 a lawyer?

18 A. Yes. By that I meant,
19 you know, David's a very well-respected insurance
20 defence counsel, particularly in the area of
21 municipal defence, and probably even boiling that
22 down, further into defence of roads-related
23 claims. David certainly had represented the City
24 on some of our files, and he was -- what I liked
25 about it was that whatever opinion he provided,

1 the insurers would be comfortable with it. They
2 were well aware of David's abilities and certainly
3 would put a lot of faith into his opinion.

4 Q. You said you had no
5 objection to Ms. Auty and Mr. Sabo retaining
6 Mr. Boghosian. Were you in favour of the idea of
7 obtaining some sort of report from a lawyer with
8 expertise like Mr. Boghosian had?

9 A. Yes, definitely.

10 Q. For what purpose exactly?

11 A. Exactly for the purpose
12 of establishing with the insurer that we were
13 exercising all due diligence in handling this
14 matter. Like I said, this is -- and I think I
15 said this earlier, it's unusual in that normally
16 you report to the insurer where you have a claim.

17 In this particular instance,
18 we would eventually be reporting to the insurer of
19 a situation that may lead to claims, so I was
20 pleased that we would have a document from a
21 highly respected defence lawyer sort of
22 summarizing everything that had happened to date
23 and providing his opinion.

24 Q. What was your expectation
25 about what he would be providing in his opinion?

1 Not his conclusions, but his opinion on what
2 topic.

3 A. For my concerns, sitting
4 from the risk management -- from manager of risk
5 management, I was expecting or was looking forward
6 to or interested to see his opinion on how the
7 release of this information would impact
8 litigation that is currently in progress, possibly
9 litigation that was closed in the past or
10 litigation that was never started in the past, and
11 how it would possibly attract future litigation.

12 I also had an expectation that
13 he would comment on the responsiveness of the
14 information to the FOI request. That was an area
15 of particular concern to me as it relates to the
16 relationship with the insurer.

17 My biggest fear was that we
18 would provide the Tradewind report or other
19 reports to the FOI office, they would get
20 released, and then the insurer would have a look
21 and say, well, this is clearly not something that
22 needed to be responsive and now you've prejudiced
23 our position, our ability to defend the claim on
24 your behalf, so we'll be doing so under a
25 reservation of rights, or they will simply just

1 deny coverage. So that's a nightmare for a risk
2 managers.

3 Sorry to be so long-winded,
4 but those were my primary concerns and
5 expectations of Mr. Boghosian's opinion.

6 Q. Thank you. That was
7 quite helpful and not long-winded.

8 A. Thank you.

9 Q. On the last point, the
10 issue of coverage and the responsiveness. Can you
11 explain in somewhat more detail why you were
12 concerned that an insurer might deny coverage
13 based on an FOI and how you were hoping
14 Mr. Boghosian might navigate that issue for you?

15 A. Sure. As the insured,
16 you are expected to comport yourself in accordance
17 with the insurance contract. And, you know, it's
18 not something that I can recite to you verbatim,
19 but you obviously are expected to conduct
20 yourselves so as not to put the insurer's ability
21 to defend in jeopardy.

22 And, you know, I -- and it has
23 come up in the past -- this was another sort of
24 offshoot that I was happy that Mr. Boghosian was
25 going to be involved. It had come up in the past

1 where senior staffers or councillors in particular
2 had made public comments, you know, that were
3 adverse to the interests of the defence of the
4 City, and quite often situations like that would
5 lead to the insurer -- it had never come to a
6 situation where coverage was denied, but certainly
7 where they were unhappy with our performance.
8 They may have sent a reservation of rights letter
9 or sort of threatened the fact that you are
10 putting your coverage in jeopardy. Again, that is
11 -- that's a road that you don't want to go down as
12 the main conduit between insurer and city.

13 Q. So you were hoping that
14 Mr. Boghosian would provide a second opinion about
15 the responsiveness and that regardless of what his
16 opinion would be, you could then take that to the
17 insurer for a little built of extra weight?

18 A. They would be much more
19 comfortable -- yeah, I think they had relative
20 confidence in the ability of the City's legal
21 services, but certainly the addition of
22 Mr. Boghosian's opinion, which I think matched
23 that of Ms. MacNeil's, would sort of make our
24 decision unassailable, I think.

25 Q. Thank you. Just going

1 back to the other expectation that you had for
2 Mr. Boghosian to deal with or to opine on the
3 impact of the release of the Tradewind report on
4 litigation -- past litigation or litigation that
5 had never been started. So just those two terms.
6 Past litigation, you mean litigation had been
7 resolved?

8 A. Not necessarily resolved
9 by us. Certainly there may have been situations
10 where two vehicles may have collided on the Red
11 Hill and litigation had resulted from that in the
12 absence of including the City.

13 Now, you know, if this
14 information appears on the front page of the
15 Spectator an enterprising lawyer might say, well,
16 had I known this at the time of this litigation, I
17 would have included the municipality, which is a
18 very serious consideration in light of the
19 presence of joint and several liability.

20 Q. And for litigation that
21 had never been started, was your concern that an
22 enterprising lawyer or just a member of the public
23 would see the release of the Tradewind report and
24 discover that they in fact had a claim that they
25 had not previously thought that they had?

1 A. Correct, yeah, "discover"
2 being the key word. Claims that -- I don't think
3 I need to explain it to you, but, you know, claims
4 that otherwise would have been statute barred
5 might now be available because the limitation
6 period has been moved forward by discoverability,
7 if I can apply my layman's lawyer terms.

8 Q. Sure. Did you expect
9 Mr. Boghosian to go into the particular claims
10 that were currently before -- that were currently
11 on risk management's list of claims in particular
12 and do specific assessments about those claims?

13 A. No, I don't have that
14 expectation.

15 Q. In terms of Mr. Boghosian
16 commenting on any measures that would be
17 appropriate between November of 2018 and when the
18 repaving was going to happen on the Red Hill,
19 would that be of interest to you?

20 A. Yes. Certainly of
21 interest, yes.

22 Q. Again, that's a matter of
23 managing liability, but prospectively rather than
24 retrospectively?

25 A. Yes, yes, you could say

1 that, yes.

2 Q. Do you recall having
3 discussions with Ms. Auty or Mr. Sabo about
4 whether or not to ask Mr. Boghosian for an opinion
5 about interim measures that could be taken until
6 the repaving was done?

7 A. I don't have specific
8 recollection of that.

9 Q. Do you recall any
10 discussion with Ms. Auty and Mr. Sabo about making
11 an interim report to council?

12 A. No, I don't have
13 recollection of that, nor would I have been really
14 expecting to be consulted on something like that.

15 Q. I'm not asking about your
16 consultation; I'm just asking about your
17 involvement and your recollection.

18 A. Well, just leave it to
19 the first half of my answer then. I do not recall
20 a discussion of an interim report.

21 Q. In terms of unrelated to
22 Mr. Boghosian, particularly do you recall any
23 discussions, again in November of 2018, with
24 Ms. Auty and Mr. Sabo about getting an assessment
25 of safety measures from a non-lawyer expert, from

1 a friction expert or a safety expert?

2 A. No, I don't recall that.

3 Q. Back in 2013 when you
4 said that lawyers love the word ought to know or
5 you ought to have done something, were you
6 thinking at this time, in November 2018, about how
7 to position the City for future litigation through
8 getting experts?

9 A. Oh, I'm sure I would have
10 been thinking about it. At this point, in
11 November of 2018, you know, it was -- I was well
12 aware of the fact that I had nominal understanding
13 of all the various information that was out there.
14 So in my mind, I'm thinking, you know, first order
15 of business is to get your head around everything
16 that's out there, which, you know, I'm not so sure
17 ever happened, certainly previous to the time it
18 went in front of council.

19 Q. When you say that, you
20 don't believe that you had your head fully around
21 all these issues before February 6th, 2019?

22 A. Correct. You know, I
23 was -- I was -- I didn't know who CIMA was in
24 November of 2018. There was an awful lot of
25 information pouring in. Never mind CIMA, but CIMA

1 reports of certain dates and what information was
2 in those reports. So it was -- you know, it was a
3 whirlwind of information that you're trying to
4 process.

5 Q. Did you anticipate that
6 the City would require some expertise to better
7 understand what the conclusions in the Tradewind
8 report meant?

9 A. Sorry, could you ask that
10 again.

11 Q. Sure. Did you anticipate
12 in November 2018 that the City would require some
13 expertise to better understand what the
14 conclusions in the Tradewind report meant?

15 A. No, I don't think so. I
16 think it would have been incumbent on Mr. Moore
17 to -- or staff, or his staff, to report to council
18 at some point just what information was in the
19 Tradewind report and possibly various other
20 reports and what their interpretation of those
21 reports was and how they -- what their action
22 items were coming out of receiving those reports.
23 I didn't know that -- I didn't think at the time
24 that it would require outside expertise.

25 Q. Maybe I'll put my

1 question differently. Did you anticipate that the
2 City was going to require some expert in
3 litigation to respond to the conclusions in the
4 Tradewind report about the level of friction on
5 the Red Hill?

6 A. You're talking about
7 Mr. Boghosian?

8 Q. No, a non-lawyer expert,
9 a safety expert or a friction expert.

10 A. Non-lawyer expert. No.
11 You know, I'm going to give a very similar answer
12 I think to what I just gave. While an outside
13 expert may have been required, I would have
14 thought that step would have been taken after --
15 after a report submitted by the City's own
16 engineers.

17 Q. Do you remember through
18 November or December 2018 meeting with the City's
19 own engineers or public works traffic safety staff
20 during which you better understood the Tradewind
21 report and what its conclusions actually meant?

22 A. You know, I wouldn't say
23 at any time that I felt I had a fulsome
24 understanding of the report. I recall one meeting
25 in particular that took place at legal services

1 where I believe certainly Dan McKinnon was there,
2 and you know who -- Mr. McKinnon, GM of public
3 works. And Gord McGuire was present. Nicole Auty
4 was present. I'm not sure if Ms. Swaby was
5 present, and I'm not sure if Mr. Zegarac was
6 present. But at that meeting I got the most
7 understanding of the various information that was
8 being considered, everything from SMA to friction
9 testing to CIMA reports, when and where they
10 happened and what was contained in them.

11 Q. We'll try to nail down a
12 timeframe for that meeting as we go through.

13 A. Sure.

14 Q. When you say you got the
15 most information at that meeting, in November and
16 December I know you attended quite a few meetings,
17 did you have an impression that the public works
18 staff were taking steps to assess the safety of
19 the Red Hill during this period of time?

20 A. Oh, yes, I think so.

21 Q. In what ways were they
22 doing that?

23 A. Well, I can't say
24 specifically, but in my mind I would have imagined
25 that they were probably going through everything

1 that they had received from consultants and, you
2 know, reviewing their decisions in terms of
3 responding to the reports that they had received
4 over the course of time.

5 Q. So going back and
6 reviewing what they had received, do you recall
7 being left with the impression that public works
8 staff were taking concrete steps to test the
9 roadway, assess the roadway, anything concrete to
10 ensure that the roadway was safe?

11 A. Moving forward or looking
12 back in retrospect?

13 Q. Moving forward.

14 A. Moving forward.

15 Q. At the present, just in
16 that moment, in December of 2018.

17 A. Okay. So we're at this
18 point in time, what can we do moving forward to
19 enhance if necessary, is that what you're asking?

20 Q. No, I'm not asking about
21 enhancement. I'm asking do you -- were you left
22 with the impression in November or December
23 of 2018 that public works staff were taking steps
24 to assess the current safety of the roadway --

25 (Speaker overlap)

1 A. Oh, yes, I had that
2 impression, yes, yes.

3 Q. What concrete steps did
4 you understand that public works staff were
5 taking?

6 A. I would -- again, I think
7 it's a repeat of what I said, was they were -- and
8 again I don't know for certain, but I would have
9 thought that they would be looking at every
10 recommendation and any report that was provided to
11 them and making sure that they had acted
12 appropriately and responsibly to recommendations
13 that were made, you know, certainly in keeping
14 with budgetary constraints.

15 Q. I can see why that would
16 be your assumption.

17 A. Yes.

18 Q. Do you have a
19 recollection of being left with that impression
20 for some reason, that that's what they were doing?
21 Or were you just assuming that that's what they
22 were doing?

23 A. I would say it was an
24 assumption, but knowing -- you know, it was a very
25 well-founded assumption knowing the individuals

1 involved.

2 Q. We'll come back to
3 plodding through some of these meetings that you
4 attended to try to nail down that time, and of
5 course your impressions during that period of
6 time. I'm just going to jump back for a moment
7 into November of 2018.

8 Registrar, you can close this
9 callout and close the document.

10 A. Thanks. It's weird to
11 talk without seeing faces.

12 Q. Can you not see the
13 windows when the callout is up?

14 A. No, I move them
15 because that -- I'm just on my laptop, so it's
16 easier to view the document as a whole if the
17 faces aren't up. So the document was up for a
18 period of time there. I felt a little
19 disconnected.

20 Q. Next time you put a
21 callout up maybe we'll switch your gallery view so
22 that you can see both if your laptop is big enough
23 to do that, and I'll try to be mindful of taking
24 down callouts when they are not necessary.

25 A. Thank you.

1 Q. So can you bring up a
2 document, Registrar, 9A, page 155 to 156, please.
3 Registrar, if you could call out 370, please.

4 So you e-mail Ms. Auty and Mr.
5 Sabo under "Expressway Claims," and you say, my
6 review indicates that we have four significant
7 claims that could be theoretically impacted by the
8 FOI requests. None of them cite "friction factor"
9 as far as I can tell.

10 And then you say "this is just
11 my quick review in advance of Diana returning."

12 Do you recall if Ms. Swaby was
13 on vacation during this period of time?

14 A. I don't recall why she
15 was absent, but she obviously was absent.

16 Q. Okay. You said that you
17 had done a review that found these four
18 significant claims. What was your process for
19 that review?

20 A. Well, normally if Diana
21 had been there it would have been, you know, what
22 claims do we have for the Red Hill Valley. But in
23 this instance I would have -- I don't recall doing
24 it, but I'm certain I would have sought out
25 Mr. Chamberlain and said, run me a report of Red

1 Hill claims.

2 Q. So when we're talking
3 about claims in this -- in this e-mail, are we
4 talking about Statements of Claim, pieces of
5 litigation, as compared to what that --

6 (Speaker overlap)

7 A. Yeah. Well, as it turns
8 out, I believe all of these were in litigation,
9 but it is possible that there -- you know, had
10 someone simply submitted a claim on their own, it
11 would have showed up.

12 Q. So you weren't intending
13 to limit these to pieces of litigation?

14 A. That is correct.

15 Q. Where it says "none of
16 them specifically site a 'friction factor,'" what
17 steps did you do to provide that information to
18 Ms. Auty and Mr. Sabo?

19 A. I would have looked -- I
20 would have gone through the paper files and, you
21 know, looked at probably the statement of claim
22 and any notice of claim if one came previous to a
23 statement of claim, and looked for, you know, a
24 specific reference to lack of friction or slippery
25 condition of the roadway being the proximate cause

1 of the accident. I believe for all four of these,
2 the statement of claim would have been a very long
3 list of potential areas of negligence, you know,
4 really all relating to road design.

5 Q. Registrar, can you close
6 this callout. I'm going to call out another
7 document, but first why don't we try to sort out
8 your screen just to see if you can see.

9 If you go up to the gallery
10 view, you may be able to change the view so that
11 you can see our windows on one side and then the
12 two documents?

13 A. Would that be
14 side-by-side mode?

15 Q. I believe so, yeah.

16 A. Oh, that's better.

17 Thanks.

18 Q. Registrar, can you bring
19 up 368 and -- sorry, 368 that traverses the two
20 pages, please. I'm sorry, my instructions were
21 completely unclear. Can you go back to page 155
22 and 156 and can you call out paragraph 368, which
23 is on the bottom of 155 and to the top of 156.

24 Sorry. Thank you, Registrar.

25 So you forwarded Ms. MacNeil's

1 e-mail in which she attached the Tradewind report
2 to Ms. Swaby on November 20 and said:

3 "FYI the preliminary
4 thought is that this
5 report will have to be
6 released to the
7 requestor."

8 That preliminary thought, is
9 that from your discussion with Ms. MacNeil?

10 A. Yes.

11 Q. "Obviously not a good
12 turn of events for any of our RHVE files." And
13 then, you'll see an e-mail where I advise her the
14 four files I could find. Please provide more
15 information.

16 So why did you provide the
17 Tradewind report to Ms. Swaby on this day?

18 A. She was the file handler
19 of these four files.

20 Q. Before November 20th, had
21 you spoken to Ms. Swaby about friction testing or
22 the Tradewind report?

23 A. If she was present in the
24 office, I'm presuming that I did, but I don't have
25 a specific recollection.

1 Q. Do you remember her
2 giving you information that left you with the
3 impression that the Tradewind report was not a new
4 document to her around this time, November 20th?

5 A. Not that I specifically
6 recall, no.

7 Q. So you say, "Obviously
8 not a good turn of events for any of our RHVE
9 files." And where you say "obviously not a good
10 turn of events," do you mean, as you said before,
11 that release of this document would not be
12 favourable to a city's defence?

13 A. Yeah, you know, and I --
14 you know, I don't mean for that to sound callous
15 or uncaring. It has to do with simply a cold,
16 hard analysis of the City's ability to defend, and
17 my sort of -- in conjunction with my opinion, you
18 know, which was largely formed by what I had heard
19 about the report, that it was inconclusive and
20 sort of had been established in our minds, myself
21 and Diana's, as a bit of a red herring. But in my
22 experience, I had seen trials turn on a lot less
23 than something like the Tradewind report, so I had
24 significant concerns about the impact of the
25 Tradewind report on the analysis of liability.

1 Q. Thank you. Registrar,
2 you can close down the callouts.

3 So just on that point, so
4 we're in November, November 20 -- in fact, you can
5 call out -- you can close down the -- actually,
6 can you see me now?

7 A. Yes, I can see you.

8 Q. Great. So I won't close
9 it down. We'll come back to it.

10 So you said -- we're in
11 November 20th, and you said that your opinion had
12 been -- was made in conjunction with what had
13 largely formed in your mind about the Tradewind
14 report being inconclusive. Can you pinpoint when
15 you received information or the suggestion that
16 the Tradewind report was inconclusive?

17 A. I can't pinpoint. I do
18 know that I had had informal discussions, probably
19 on a daily basis, with -- I would say
20 predominantly with Mr. Sabo about the report and,
21 you know, what it -- what its contents were and
22 what they meant, and then you take that and you go
23 back retroactively, and I'm certain that we would
24 have had a file of media reports related to
25 accidents on the Red Hill. You know, you look

1 back and you find Gary's -- Mr. Moore's quotes
2 about -- back as far as 2017 I think that article
3 appeared that said, you know, that the findings
4 were inconclusive. So -- and having applied my
5 own laymen's lens to reading the Tradewind report,
6 you know, it wasn't something that I thought in a
7 perfect world would cause us a lot of grief
8 defending the claims. But again, as I said
9 earlier, I had seen trials or arbitrations or
10 mediations turn on things that were, you know, a
11 lot less impactful than the Tradewind report. So
12 again, I was very seriously concerned about its
13 presence.

14 Q. So I'm going to suggest
15 to you that there was a lot of discussion amongst
16 City staff in November and December of 2018 about
17 this. By November 20, you're about a week after
18 Ms. MacNeil has first provided you with a copy of
19 the Tradewind report. Do you think that within
20 that week you had already landed on the conclusion
21 that the Tradewind report was inconclusive, or was
22 that something -- and a red herring, or was that
23 something that built over and over the period of
24 November and December?

25 A. I would say whenever I

1 did my initial reading I would have not thought a
2 lot of the report as a defining document, lending
3 itself one way or the other towards liability
4 versus no liability. As discussions about the
5 report carried on, I think the general narrative
6 was that it was more red herring than anything
7 else.

8 Q. Fair enough. And I think
9 I probably said inconclusive and red herring in
10 the same -- together.

11 A. Well, I think red herring
12 is somewhere in these productions.

13 Q. It is, in fact, just a
14 few days later. I was really actually just trying
15 to focus on inconclusive. We have just a few
16 minutes before we're going to take our lunch
17 break. I'm going to try to take us through a few
18 more sets of e-mails before that.

19 Registrar, can you go to 158,
20 please. If you can call out 375.

21 So in this e-mail exchange
22 with Mr. Sabo, there's a reference to Boghosian
23 not being involved in these claims, I presume as
24 defence or -- as defence counsel. Was it -- were
25 you given the task of determining whether

1 Mr. Boghosian was involved in any of the claims?

2 A. I don't recall
3 specifically. It would have been an easy task
4 given that we had that -- given that we had four
5 and I probably was already aware that Shillingtons
6 was on at least one of them. So the paper files
7 were there, very easily attained, so I would have
8 found out that Shillingtons was on one or two and
9 in-house counsel was on the others.

10 Q. Do you recall a
11 particular rationale for preferring or being
12 pleased that Boghosian was not involved in the
13 claims?

14 A. It wouldn't have mattered
15 to me if he was. I would have been happy with
16 just about anyone that -- I shouldn't say that.
17 My preference would have been the appointment of
18 someone who I knew would be approved by our
19 insurers. So Boghosian was one of them, so I was
20 happy about that. Had he been involved in the
21 defence of the claims and declared a conflict, I
22 would have been equally as a happy with, say,
23 Learners or Thomas Gold Pettingill or -- Loopstra
24 Nixon. Any of them, I would have been, you know,
25 more than happy to know that they were being

1 consulted.

2 Q. In this same e-mail, you
3 say:

4 "I think we should let
5 the insurer chime in on
6 this too. If they
7 disagree with a City
8 decision to release the
9 report it might adversely
10 impact coverage."

11 So I think we have already
12 talked about your views on that.

13 Do you recall having a
14 discussion with Mr. Sabo, who is on this e-mail,
15 about when it would be appropriate to let the
16 insurer chime in?

17 A. Not so much as when as,
18 you know, the fact that it was going to happen.
19 What I don't like to do is put an insurer -- the
20 insurer on notice without what I feel to be
21 sufficient information, particularly given this
22 situation where we're not really talking about a
23 specific claim; we're talking about an issue. So
24 it was kind of -- I think at this point I felt we
25 had enough information to bring them in, so to

1 speak.

2 Q. So you didn't feel that
3 you needed to wait to retain Mr. Boghosian and get
4 him to do an opinion before putting the insurer on
5 notice?

6 A. No, I would have been
7 happy to let them know we were exercising due
8 diligence by involving, again, Mr. Boghosian or
9 any other of those other firms had it been them.

10 Q. Just stopping here for a
11 moment. When you say "we should let the insurer
12 chime in," the City has more than one insurer; is
13 that right?

14 A. Yes, in this particular
15 instance -- let me test my memory -- we were
16 insured with the Frank Cowan Company up until
17 2011, and then we switched to JLT in 2011. So
18 you're talking about two different managing
19 general agents, if you will, but they essentially
20 are the insurer. They act as the conduit for the
21 various subscribers, so we always refer to them as
22 the insurers. So those are two companies that
23 would have needed to be notified.

24 Q. Thank you. So you didn't
25 feel the need to wait for Mr. Boghosian's opinion

1 to contact the insurer?

2 A. No.

3 Q. And was it your
4 preference to contact the insurer or the insurers
5 before anything was released either through the
6 FOI or in some other way like through counsel?

7 A. Well --

8 Q. Were you trying to give
9 them a heads up before it was made --

10 A. Yeah, certainly my
11 preference was to not have them find out about it
12 through the media. I always want to, you know,
13 provide them with as much awareness as possible of
14 a given claim situation or, again, this unusual
15 situation where we had an issue that was going to
16 possibly lead to future claims or have an adverse
17 impact on claims already in place.

18 Q. But that's exactly what
19 happened, isn't it, that they found out through
20 the media?

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

22 Q. No? You provided them
23 with notice in advance?

24 A. I believe so, yes.

25 Q. Okay.

1 A. Are you getting to that?

2 Q. Hm-hmm. We'll get to
3 that. I see a number of back and forth with the
4 insurers in February. What do you recall about
5 when you provided notice to the insurers?

6 A. In my recollection, they
7 were put on notice either formally or informally
8 previous to us going to council.

9 MS. LAWRENCE: I see it is
10 exactly 1 o'clock, and I'm going to move on to a
11 different topic. I think this might be an
12 appropriate time for lunch.

13 JUSTICE WILTON-SIEGEL: That
14 sounds fine. Let's stand adjourned until 2:15.
15 --- Recess taken at 1:00 p.m.

16 --- Upon resuming at 2:15 p.m.

17 MS. LAWRENCE: Commissioner,
18 may I proceed?

19 JUSTICE WILTON-SIEGEL: Please
20 do.

21 BY MS. LAWRENCE:

22 Q. Thank you. Before the
23 break we were talking about interactions you had
24 with Mr. Sabo in late November. We're going to go
25 back to that time period now. Registrar, can you

1 bring up OD 9A, page 158 and 159, please. Thank
2 you.

3 So you'll see at the bottom of
4 158, paragraph 376, Ms. Swaby replied to your
5 e-mail from November 20th where you had asked her
6 to look at -- you said you had found those four
7 claims, but asked her to inquire further.

8 Registrar, can you pull out
9 the top of 159, please. She says:

10 "This report concerns the
11 Red Hill and the LINC.

12 As far as I can tell,
13 it's a red herring. Most
14 accidents happened due to
15 driver error, speed, tire
16 blowing or dangerous
17 driving. All of our
18 serious files...are for
19 the most part being
20 defended by Shillingtons,
21 save and except
22 Sherk/O'Hare --"

23 which is Dana Lezau. And
24 that's an internal city lawyer; is that right?

25 A. Yes, yes.

1 Q. "-- and one being handled
2 right now by Dan Bartley (Kanagaratnarajan)." And
3 that's also an internal lawyer?

4 A. Yes.

5 Q. Okay.

6 "Shillingtons recently
7 asked about the report,
8 citing that it will have
9 to be produced in the
10 City's affidavit of
11 documents in at least one
12 of the claims. An
13 inquiry did come from
14 Shillingtons office
15 concerning this report.
16 The inquiry was referred
17 to Gary Moore who
18 indicated the report was
19 not presented to
20 council."

21 So just stopping there. This
22 e-mail does not, in my reading, make clear that
23 Ms. Swaby has a copy of the Tradewind report. It
24 just makes reference to Shillingtons asking about
25 the report. What did you understand in

1 November -- end of November, November 23, about
2 whether Ms. Swaby had a copy of the Tradewind
3 report?

4 A. Oh, I would have -- I
5 would have been -- I would have known that she had
6 seen a copy of it. My reading of this e-mail
7 would indicate that to me.

8 Q. So that is how you would
9 read this e-mail:

10 "Shillingtons recently
11 asked about the report,
12 citing that it will have
13 to be produced."

14 You read --

15 (Speaker overlap)

16 A. I'm sorry, what's the
17 date of this, Emily?

18 Q. It is November 23.

19 A. Yeah, I can't fathom that
20 when I came into possession of the report I
21 wouldn't have immediately provided it to her.

22 Q. So you did on
23 November 20th when she was away from the office.

24 A. Okay.

25 Q. And you asked her to --

1 you said, I found these four claims but can you --
2 basically can you dig into them when you get back.
3 And her response is "this report concerns the Red
4 Hill and the LINC," and then she references
5 Shillingtons recently asking about the report,
6 citing it will have to be produced, and then she
7 says an inquiry did come from Shillingtons' office
8 concerning this report.

9 So as I read these things
10 together, she's not expressly saying to you, oh, I
11 already had a copy of this report from
12 Shillingtons.

13 A. No, she's not saying
14 that, no.

15 Q. You had discussions. So
16 I'm trying to understand -- as I read this,
17 Ms. Swaby is providing you with this information
18 in a way that is new information to you, but she's
19 not saying that she has a copy of the report. So
20 I'm trying to understand what -- if there was any
21 discussion or how you understand when Ms. Swaby
22 told you that she already had a copy?

23 A. I really couldn't say. I
24 certainly would have provided her with a report,
25 and I think we established that I did.

1 Q. Yes.

2 A. It appears to me that --
3 I mean, I think we can establish that she has read
4 the report, but you cannot tell from anything in
5 this e-mail if she had the report previous to my
6 providing the report to her. She may have known
7 about it I suppose, but don't know that she's read
8 it, no.

9 Q. So I can tell you the
10 inquiry has documents to establish that she did
11 have a copy of the report, and months later she
12 actually flips you the e-mail where she received
13 the report in May of 2018.

14 A. Okay.

15 Q. But at this period of
16 time, can you recall either way whether you were
17 aware on November 23rd that Ms. Swaby had already
18 had a copy of the report?

19 A. No.

20 Q. I will come to the moment
21 in time where she flips you the e-mail from
22 Shillingtons with a copy of the report, and maybe
23 we can come back to this issue of when you went --
24 first understood that Ms. Swaby already had a copy
25 when we get there.

1 In her last paragraph, she
2 says:

3 "If there's a specific
4 question I need to ask
5 Shillingtons, please
6 advise."

7 Was there a specific -- sorry,
8 just because we had the lunch break, just to
9 remind you, you had said in the e-mail where you
10 gave her the report, Diana, please contact Terry
11 Shillington as soon as possible. I think that's
12 part of her response, is:

13 "If there's a specific
14 question I need to ask
15 Shillingtons, please
16 advise."

17 Was there a specific question
18 that you wanted Ms. Swaby to raise with
19 Shillingtons?

20 A. I don't believe so. If
21 there's not a response to this e-mail, I would
22 suggest that I didn't give her a specific one. My
23 interest would have been for their general,
24 all-encompassing impression of how this affects
25 the litigation.

1 Q. Registrar, can you close
2 this callout and bring up 59 and 60.

3 So on that same day, you'll
4 see in paragraph 377, Ms. Swaby did e-mail
5 Mr. Shillington, marking it with high importance,
6 and says:

7 "Hi Terry. This
8 afternoon, I am meeting
9 with GM of Public Works
10 as well as the Director
11 of Legal Services and
12 John McLennan of our
13 office concerning an FOI
14 request to release this
15 report. I take it that
16 they do not want to
17 release the report. Do
18 you have a moment to
19 discuss the implications
20 of the release and how
21 the report affects the
22 litigation we have
23 ongoing?"

24 Were those two points, one,
25 discuss the implications of the release, and two,

1 how the report affects litigation, is that the
2 nature of the questions that you were hoping
3 Ms. Swaby would ask?

4 A. Certainly in a general
5 sense, yes.

6 Q. She says:
7 "I take it that you do
8 not -- that they do not
9 want to release this
10 report."

11 Had you conveyed to Ms. Swaby
12 that you or the GM of public works or the director
13 of legal services didn't want to release the
14 report?

15 A. You know -- and I think
16 I've spoken to this issue previously, so I don't
17 agree with her phraseology there. It not a matter
18 of want. It's a matter of are we sure it needs to
19 be released. Does it qualify as something that is
20 responsive. So I would think I would be looking
21 for Diana to receive an opinion from Shillingtons
22 saying, you know, if they feel qualified to reply
23 about an FOI request, what their opinion was on
24 that.

25 Q. So at this point did you

1 know that or were you hopeful that Mr. Boghosian
2 was going to address that issue but you also
3 wanted Shillingtons to address that issue?

4 A. Sure, why not?

5 Q. In terms of leaving side
6 the release under the FOI or not, were you also
7 hoping to get more insight into whether the report
8 needed to be included in their affidavit of
9 documents in this litigation?

10 A. It would have been of
11 interest to me. I mean, again, I was always
12 somewhat confounded by what constitutes privileged
13 documents and what constitutes something that
14 needs to be included in Schedule A, Schedule B.
15 You know, if Shillingtons was of the opinion that
16 it needed to be included in their affidavit of
17 documents relative to that piece of litigation,
18 then that would be good enough for me. I'm
19 certainly far from an expert on that topic.

20 Q. Is that true even if or
21 regardless of the decision made to release the
22 Tradewind report as part of the FOI? Did you view
23 those as two separate --

24 A. That would be a very
25 weird circumstance, wouldn't it? Sorry to answer

1 the question with a question, but I can't foresee
2 that happening. I don't know how to answer that.

3 Q. I think -- I will take
4 your question and try to rephrase it into a
5 question of my own.

6 Were you looking to
7 Shillingtons to advise you about whether they
8 thought the report needed to be included in the
9 City's affidavit of documents if the Tradewind
10 report was not responsive to the FOI request?

11 A. Oh, I see. Sorry. I
12 don't know that I heard that correctly. I was --
13 this is through Diana. I was interested to hear
14 Shillingtons' opinion on both aspects.

15 Q. Okay.

16 A. So if it qualified for
17 one, if it qualified for the other, if it
18 qualified for both, or neither. That's -- to my
19 mind, that's why you have lawyers and that's why
20 you consult them. So I was an open book as far as
21 the topic goes.

22 Q. So you'll see at
23 paragraph 380 on page 160 that Mr. Thompson
24 replied internally with his colleagues and said:

25 "I can't think of any

1 concern in our
2 litigation, except that
3 it is not relevant. The
4 last I heard the report
5 had never been produced
6 to Council. If they
7 decide not to provide
8 under the FOI request,
9 they should at least let
10 us know so we don't
11 include it in our
12 productions."

13 Did Ms. -- oh, and then
14 Mr. Shillington said, "Thanks. She's good with
15 our review and will let the others know."

16 Did Ms. Swaby report back to
17 you that Shillingtons believed the Tradewind
18 report to not be relevant to the litigation that
19 they were handling?

20 A. Not that I recall.

21 Q. Did she report back to
22 you that Shillingtons would be amenable to
23 removing it from their affidavit of documents, the
24 City's affidavit of documents, if instructed to do
25 so by the City?

1 A. Not that I recall.

2 Q. When you say not that you
3 recall, do you remember Ms. Swaby conveying
4 anything back to you from Shillingtons, or you
5 just can't recall either way?

6 A. I can't recall either
7 way, I'm sorry.

8 Q. That's all right. Do you
9 recall having a meeting with the GM of public
10 works, who at that point would have been Mr.
11 McKinnon, Ms. Swaby, because she says she's going
12 to attend, and then someone who is listed as the
13 director of legal services?

14 A. Yeah, that was a term
15 commonly used to designate the city solicitor.
16 People tended to understand that term better than
17 saying city solicitor because the heads of
18 departments were all directors, so it tended to
19 get referred to that way. It would have been
20 Nicole.

21 Q. Okay. So do you remember
22 having a meeting with Ms. Swaby, Mr. McKinnon, and
23 Ms. Auty?

24 A. My only recollection of a
25 formal meeting was the one I described earlier,

1 and certainly Mr. McKinnon was there and certainly
2 Ms. Auty was there. It was at legal services.
3 Diana was there. I don't recall specifically
4 Diana being there. To my recollection, Mr.
5 McGuire was there as well.

6 Q. What about Mr. Zegarac?

7 A. That's my only specific
8 recollection of a formal meeting.

9 Q. Okay. What about
10 Mr. Zegarac?

11 A. May or may not have been
12 there. I cannot say definitively.

13 Q. I think you spoke a
14 little bit about the recollection of this meeting
15 that you had, and we were going to try and
16 pinpoint the time. When you say you only have one
17 definitive meeting that you can recall, is that to
18 say that you have a specific recollection of one
19 meeting but you also attended a number other
20 meetings, they just all kind of run together?

21 A. Well, the interesting
22 thing to me is specific recall of a meeting at
23 legal services, of a formal meeting with a start
24 time and, you know, you responded that you would
25 attend. I would think -- there's another meeting

1 that's been referred to that occurred at city
2 hall, and it was relatively unusual for me to go
3 over to city hall for a meeting. I would think I
4 would remember that, and I certainly would
5 remember a meeting where the mayor was involved,
6 and I do not recall being in a meeting with the
7 mayor.

8 So this is my -- absolutely
9 did I have a number of informal conversations and
10 meetings, if you will, on the subject, but this is
11 the only formal meeting I recall.

12 Q. So when you say "formal
13 meeting," do you mean like a meeting with an
14 agenda, or do you just mean that someone sent you
15 an appointment?

16 A. I would say an
17 appointment. I don't recall an agenda, probably
18 because the agenda was one item, right, let's talk
19 about the Red Hill and the Tradewind report and
20 the FOI request.

21 Q. Why don't we go -- maybe
22 this might be the assist.

23 Can you -- Registrar, can you
24 go to page 156, please. Can you pull out 269.

25 This is an e-mail from a legal

1 assistant with a calendar invitation to Ms. Auty,
2 Mr. Sabo, you, Mr. McKinnon, and a recipient that
3 I think is booking the boardroom. City hall,
4 first floor, 171, seats 8, and it's "Next steps on
5 RHV," and it's scheduled for November 26.

6 Is that the meeting that you
7 think that you are remembering?

8 A. No. This is the one that
9 I would think that I would remember because it was
10 at city hall. So it involved walking over there
11 and finding room 171, which the numbers are crazy
12 at city hall so it was never a -- it was never a
13 sure thing. No, the meeting I specifically recall
14 happened at legal services, 50 Main Street East.

15 Q. Okay. I think that
16 covers --

17 A. I'm not saying it wasn't
18 there, Emily, but I do not have a specific
19 recollection.

20 Q. Okay. Let's close this
21 down. Registrar, can you go to page 407 and 408.
22 Can you call out 933.

23 The inquiry has received
24 evidence about these undated handwritten notes
25 authored by Mr. Sabo, and they're only partially

1 excerpted below. Mr. Sabo's handwriting is quite
2 hard to read, but we can go into the handwritten
3 notes if you like. There's a reference to you, it
4 says, "John RHP, what are we telling him
5 outside" -- I think it's operation. And then
6 there's a reference to "Risk (DS) -1 or 2. Dana
7 2. Dan 2. Dana has CIMA reports."

8 Mr. Sabo seems to have some
9 not conclusive recollection that these notes refer
10 to a meeting that happened in late November or
11 early December, and that he understood that he was
12 getting information about the number of RHV
13 litigation cases that DS, being Diana, Donna (ph)
14 and Dan had.

15 A. Makes sense.

16 Q. Does that help you with
17 whether -- with a meeting that Mr. Sabo is at
18 sometime in later November, maybe November 26?

19 A. It doesn't help. Again,
20 those are possibly -- I mean, the numbers beside
21 DS and Donna and Dan make sense, I think. You
22 know, again, my recollection of the one formal
23 meeting is one that occurred at legal services.
24 These notes could be from that. I don't know.

25 Q. I'm going to try one more

1 way to attempt to nail it down. Registrar, you
2 can close these down, and if you can go to
3 paragraph 600, page 253. And if you can call out
4 paragraph 600, please. Sorry, 600 rather than
5 601.

6 So there's a calendar
7 invitation for December 14th to Dana Lezau, Mr.
8 Bartley, you, and Ms. Auty. I may have to go --
9 and maybe Mr. Sabo. Another version indicates
10 that. We can go in and see where it was, but I
11 think this one is at legal services.

12 A. Okay.

13 Q. Does that assist you,
14 these attendees? Do you think that is the meeting
15 that you have a specific recollection about?

16 A. It doesn't jibe with my
17 memory because this looks like it would have been
18 a meeting, given the invitees, to discuss claims
19 that are already open. The memory -- the distinct
20 memory I have of a meeting definitely involved Dan
21 McKinnon, and Dan wouldn't have been involved at a
22 meeting to only discuss the claims. So it's
23 certainly possible we had a meeting to discuss the
24 current status of the Red Hill Valley claims. I
25 don't have a specific recollection of it.

1 Q. In respect of this
2 meeting on December 14th, you're quite correct, it
3 is really just you and those from legal services.
4 Do you recall whether Dana Lezau and Mr. Bartley
5 received copies of the Tradewind report before
6 this meeting or at this meeting?

7 A. I couldn't say. I really
8 couldn't say.

9 Q. We can close this down.
10 Registrar, could you go to page 160, please. If
11 you can call out 382. So this is the same day as
12 the meeting appointment that we just looked at
13 with Mr. McKinnon and others, and Ms. Swaby. This
14 may or may not help you refresh your memory, but
15 on that same day you e-mailed nwsa.ca@gmail.com,
16 who I think we will learn is Ryan Ellis from
17 National Walkway Safety Auditing; is that right?

18 A. Correct.

19 Q. Do you remember anything
20 about that meeting with Mr. McKinnon that connects
21 you in time to deciding to reach out to Mr. Ellis?

22 A. No. No. This would have
23 been something of my own doing.

24 Q. Okay. Who is Mr. Ellis?

25 A. Mr. Ellis is an

1 acquaintance who I came to know through basically
2 after-work meetings, sort of drinks after work.
3 He was acquainted with -- generally with folks in
4 facilities maintenance, and I believe he had
5 contracts with the City for floor treatments. So
6 he was -- I don't know that you would call him or
7 qualify him as an expert in terms of floor safety
8 or surface safety, but the topic was of interest
9 to me, and I had several conversations with him
10 over time about floor treatments, and he would
11 describe to me a machine that he used to measure,
12 and I always get this term wrong, co-efficiency of
13 friction I think it is. And the readouts of this
14 machine that he had would tell you I guess whether
15 the friction factor on a given surface was
16 sufficient.

17 So it was interesting to me
18 because -- primarily because we would have slips
19 and falls in our buildings, in change rooms at the
20 pools, and in lobbies, usually if there was water
21 on some of this marble surfaces, that kind of
22 thing.

23 So he came to mind as I was
24 reading and struggling with the Tradewind report,
25 you know, with a lot of the terms, and I thought,

1 A. I don't believe I did.
2 If anyone, it would have been probably Diana, but
3 I can't say for sure that I did or didn't.

4 Q. You later received
5 Mr. Ellis' written report on December 12th, and
6 we're going to go to that. First let's go to the
7 OD, page 243, please. And if you can bring up 244
8 as well.

9 We have some excerpts from the
10 report here. It's also -- it's a five-page
11 report. I'm happy to go into it if you haven't
12 reviewed it recently.

13 (Speaker overlap)

14 Q. Okay. So we have the
15 attached report has the introductory paragraphs at
16 the bottom of 243, and it says quite clearly that:

17 "NWSA does not claim to
18 have an expertise in or
19 complete friction testing
20 on roadways. We do
21 believe a third-party
22 governing standard should
23 be followed by anyone
24 completing a friction
25 testing program."

1 So they put quite a caveat on
2 what they say. And then Mr. Ellis says:

3 "After reading [the]
4 report a few questions
5 come to mind about what
6 type of friction testing
7 program this is and the
8 three components of our
9 friction testing
10 programs."

11 What organization is governed?
12 How is it certified? And what are the testing
13 methods and standards? And finally, is the
14 equipment calibrated?

15 The remaining five pages go
16 through those questions, and then conclude that
17 there really is -- the program for testing is not
18 regulated or required, and the testers are not
19 certified and that they don't have any sense of
20 the calibration. Is that generally in keeping
21 with your recollection of this report?

22 A. Yes.

23 Q. You say:

24 "Thanks Ryan, good stuff.
25 I'll make a few edits but

1 meet any of your objectives to help you be more
2 conversant or have a better sense of the
3 terminology?

4 A. No, I would say not. I
5 mean, the point of interest that I gleaned from it
6 was about the recalibration, but, you know, I
7 remember thinking at the time it would be highly
8 unlikely that an expert in the field who has been
9 subcontracted by engineering experts, that being
10 Golder, would not be using their equipment in the
11 most appropriate way possible. So I understood
12 that that -- if -- maybe it's a possibility that
13 they didn't -- their methodology wasn't perfect,
14 but I found it highly unlikely.

15 Q. I'm going to move on.
16 Registrar, can you go to page 195, please. Could
17 you pull out 443, please.

18 So this the December 4th, and
19 Ms. Auty e-mailed Mr. Zegarac and Mr. McKinnon and
20 said, I propose:

21 "We need to get everyone
22 together to discuss the
23 totality of the reports
24 and information and
25 review options. I

1 propose Thursday
2 afternoon. I would want
3 you," and there's a
4 reference to Gord, which
5 I think is Mr. McGuire,
6 "Byrdena, Ms. MacNeil,
7 and Ms. Auty, plus anyone
8 who you think should be
9 there."

10 And Mr. Zegarac says, "yes, do
11 that," and that meeting is scheduled for
12 December 6th.

13 I'm trying again in terms of
14 having a sense of your meetings, so you remember
15 one where Mr. McKinnon was there and you
16 independently attending -- recall attending a
17 meeting where Mr. Zegarac was there?

18 A. Well, I think this is the
19 one that I specifically remember attending. I
20 don't specifically remember Mr. Zegarac being
21 there, but that doesn't mean that he wasn't.

22 Q. Did you often interact or
23 have -- attend meetings where Mr. Zegarac was
24 present?

25 A. No, not very often.

1 Q. What do you recall -- I'm
2 going to close the callout. Thank you.

3 We don't have any notes of
4 that meeting to refresh your memory, so I'm just
5 going to ask you some questions. Starting with
6 what do you recall about the topics raised and
7 discussed at that meeting?

8 A. My most definitive memory
9 is a discussion about the current safety level of
10 the Red Hill Valley Parkway and the question of
11 whether it should be closed or not. I was very
12 interested to hear the thoughts of Mr. McKinnon
13 and Mr. McGuire on that subject, and I was happy
14 both from a risk management standpoint and from
15 simply just a citizen standpoint that it was --
16 they felt under no circumstances that it needed to
17 be closed. That's my most compelling memory of
18 that meeting.

19 It was the first time -- it
20 was the first time I had had the opportunity to
21 meet or speak with Mr. McGuire. I remember
22 thinking this is the first time I've heard
23 anything come out of his mouth about this
24 particular situation.

25 Q. So what do you recall was

1 the context for the thoughts for Mr. McKinnon and
2 Mr. McGuire about whether the road was safe? Was
3 that part of a broader discussion that was
4 occurring with the attendees?

5 A. Yes, it was definitely
6 part of a broader discussion. And again I
7 remember sort of being not shocked but surprised
8 that closing the roadway was even something that
9 was up for consideration. And again I was, you
10 know, imagining or knowing that they knew a lot
11 more about the situation than I did. I was sort
12 of relieved to hear that, no, geez, we don't need
13 to close the roadway.

14 And there was a broader
15 discussion of moving forward, do we need to -- is
16 there anything we need to do moving forward with
17 the roadway to make it safer, for lack of a better
18 term.

19 Q. What came out of that
20 discussion? Is there anything we need to do to
21 make the roadway safer?

22 A. Well, specifically I
23 can't recall, except that I believe it was at this
24 meeting where I discovered or where I learned,
25 sorry, that they were going to repave basically as

1 soon as possible, and that that sort of rendered,
2 you know, a number of concerns about friction
3 moot.

4 Q. Do you recall whether Mr.
5 McKinnon or Mr. McGuire explained why they thought
6 the road didn't need to be closed?

7 A. Yes. I think one primary
8 concern was the chaos that it would cause, and,
9 you know, although it would in theory keep people
10 off what -- if they did take that step, if they
11 felt it was necessary to do it, there would be
12 chaos in the neighbourhood. You might be
13 creating, I think, an unsafe situation in other
14 parts of the City. But I think the bottom line
15 was that they didn't consider it to be an unsafe
16 roadway. That was the primary reason why it did
17 not require closing.

18 Q. I understand that they
19 didn't think it needed to be close because they
20 thought it was safe. Did they explain why they
21 thought it was safe such that it didn't need to be
22 closed?

23 A. I don't remember specific
24 commentary and reasoning behind that. Certainly
25 that was an opinion of mine as well, and I don't

1 know how much I would have chimed in in that
2 regard, you know, given that I'm not an engineer
3 or a public works expert like I would consider Dan
4 and Gord to be. Certainly my impression of the
5 Red Hill, and it's unique because again I've
6 travelled it literally hundreds of times, as have
7 family, as have friends, and I know what the
8 traffic counts are, and all things considered, I
9 think it -- at the time I thought and, I still do
10 think, that it was a safe roadway.

11 Q. Thank you, Registrar.
12 Can we go to page 208, please.

13 In the bottom of the page,
14 490, Ms. Auty e-mailed you and Ms. MacNeil the day
15 after that meeting that you were scheduled to go
16 to. Registrar, can you go to the next page as
17 well. Ms. Auty wrote:

18 "I'm in the office today.
19 Let me know if you're
20 available to follow up on
21 yesterday's discussion."

22 And the meeting was arranged
23 for 9:30 the same day. Do you recall meeting with
24 Ms. MacNeil and Ms. Auty?

25 A. No.

1 Q. Do you recall at that
2 meeting on December 6th that there was any
3 discussion about the retainer of Mr. Boghosian?

4 A. Not specifically at that
5 meeting, no.

6 Q. You don't have a specific
7 memory, or no, it wasn't discussed at that
8 meeting?

9 A. I don't have a specific
10 memory.

11 Q. What about discussions
12 about contacting road or safety consultant experts
13 rather than legal experts?

14 A. I don't have a specific
15 recollection.

16 Q. Do you remember having
17 any action items for you coming out of the
18 December 6th meeting that Ms. Auty would want to
19 follow up with the next day?

20 A. No, I don't. I think
21 I -- you know, at that point I had provided what
22 they were expecting of me, and generally that
23 meant claims information.

24 Q. Okay. Were you involved
25 at all in the retainer of Mr. Boghosian?

1 A. Um...

2 (Speaker overlap)

3 A. Sorry. Like, I knew he
4 was going to be retained, and I had no objection
5 to it. My advice was not sought, shall I say. I
6 was just sort of kept in the loop.

7 Q. Registrar, can you go to
8 page 249, please. And could you call out 588.
9 Mr. Sabo and Ms. Auty are going back and forth in
10 respect of the December 13th, 2018 draft opinion
11 that Mr. Boghosian provides to them, and Mr. Sabo
12 says:

13 "I know John would like
14 David to help with the
15 approach to giving notice
16 to the City's current and
17 former insurers on this
18 one."

19 Had you requested that that be
20 part of the scope of Mr. Boghosian's opinion?

21 A. No. You know, I've seen
22 this excerpt, and I'm not quite sure what Ron --
23 what Mr. Sabo was meaning by saying that. I think
24 probably what I said was it would be helpful to
25 have David's opinion in any notice provided to the

1 insurers. I simply didn't need help in providing
2 notice to the insurers. Whatever was going to be
3 in Mr. Boghosian's report, that's what I would
4 eventually provide to the insurers.

5 Q. Were you looking for
6 advice not about whether to provide notice or not,
7 but the content of, say, how much information to
8 provide?

9 A. To provide to the
10 insurers?

11 Q. Yeah.

12 A. No. You know, I would
13 never -- you know, it's not something you would
14 look to govern or limit. It's whatever you have,
15 you know, you're going to produce for them.

16 Q. Registrar, you can close
17 this callout. And can you go to page 227,
18 paragraph 539, please. That's not super helpful
19 to call out just that. Sorry. Can you call out
20 the paragraph above as well, please. Thank you.

21 So there's some back and forth
22 including with Ms. MacNeil about gathering the
23 information for the FOI response, that it would be
24 gathered by the first week of January 2019, and
25 Ms. MacNeil forwarded that information to

1 Ms. Auty, Mr. Sabo, and to you. Do you know why
2 Ms. MacNeil was keeping you copied on FOI-related
3 e-mails?

4 A. No, I never asked her and
5 she certainly didn't explain. I think she just --
6 and again I'm speaking for her -- I think she
7 considered risk management as a -- maybe a
8 satellite participant who deserved to be kept in
9 the loop.

10 Q. But you had no to-dos, no
11 action items related to the FOI or this e-mail?

12 A. Not as far as I recall.

13 Q. Registrar, you can close
14 this down, and if you can go to page 221, please.
15 If you can call out the paragraph at 526, please.
16 I'm not calling out all of it. If you can call
17 out right to the bottom. Thank you, Registrar.

18 It goes on to the next page,
19 but I'm not going to call it out unless you would
20 like me to. Ms. MacNeil exchanged e-mails with
21 Ms. Auty, Mr. Sabo, and with you. I don't think
22 you actually chime in on this one, but there's
23 some back and forth about an audit commenced by
24 audit services, in particular Mr. Pellegrini. Did
25 you have any involvement in this audit process?

1 A. No, none at all.

2 Q. Did you have any
3 discussions with Ms. MacNeil about keeping you in
4 the loop on the audit process?

5 A. No, I did not.

6 Q. You can close this down,
7 Registrar. I think you said earlier you have no
8 recollection of attending a meeting with the mayor
9 about the Red Hill; is that right?

10 A. I don't recall it, and I
11 would think that I would.

12 Q. Registrar, can you go to
13 page 287, please, and 288, please.

14 287 at the bottom, at 668, Mr.
15 Sabo forwarded you an e-mail containing the draft
16 Boghosian opinion that's dated December 13, and he
17 does that on January 8. And all the e-mail -- the
18 subject line is just "draft opinion," and there's
19 no body of that e-mail. Do you recall speaking to
20 Mr. Sabo before he sent you this e-mail?

21 A. No, I don't.

22 Q. Is it unusual for Mr.
23 Sabo to send an e-mail that doesn't have any
24 information in it?

25 A. So it's titled what?

1 Q. We can go into it. It's
2 62042. This is the whole chain, which we're going
3 to stay on. See at the bottom it's just -- it's
4 just his signature block?

5 A. I presume there was an
6 attachment.

7 Q. Pardon me, the Boghosian
8 opinion is attached.

9 A. Okay. I don't know -- I
10 can't say -- you know, normally you would expect a
11 little bit of preamble, but it's possible he may
12 have passed me in the hallway and said, David's
13 draft report is in, I'm going to flip it to you.

14 Q. Do you remember seeing a
15 copy of Mr. Boghosian's draft opinion in December
16 but before the holidays? I can say we have no
17 electronic --

18 A. I couldn't tell you when
19 I first laid eyes on it, no.

20 Q. I can tell you we have no
21 electronic document that would suggest that.

22 A. Okay.

23 Q. Do you remember seeing a
24 printed off copy?

25 A. No, I don't.

1 Q. Is it likely that this is
2 the first time that you received the Boghosian
3 opinion, on January 8?

4 A. I would agree with that.

5 Q. You flip it to Ms. Swaby
6 just a few minutes later and say, give it a read.
7 Why did you want Ms. Swaby to read the report --
8 pardon me -- the opinion?

9 A. Oh, because again
10 greatly -- what's the word I'm looking for --
11 respected whatever opinion she would provide, and
12 she was also the person on my staff with the most
13 knowledge of the claims. So very anxious to -- or
14 very interested, I should say, to hear what she
15 might have to say about David's draft report.

16 Q. Registrar, you can close
17 this down. If we can to 288 in OD 9A, please.
18 You'll see at 670 she says, his:

19 "...opinion is consistent
20 with mine as to friction
21 testing completed, as
22 there is no industry
23 standard in Ontario,
24 there isn't much cause
25 for concern."

1 down.

2 Did the Boghosian report
3 provide you with that comfort that you were
4 looking for on the due diligence side for the FOI
5 issue, that is, that the Tradewind report was
6 responsive.

7 A. Yes, certainly it would
8 have made me feel better, yes. You know, it's not
9 that I would be doubtful in any way of Ms.
10 MacNeil's opinion, but it certainly -- I had a
11 very high regard for her abilities. Certainly the
12 insurer wouldn't know who she is. They would know
13 who Mr. Boghosian is, and I was happy to have that
14 secondary opinion.

15 Q. You'll see in the next
16 paragraph down you forward Ms. Swab's response
17 back to Mr. Sabo and said, here are Diana's
18 thoughts which are consistent with mine, and then
19 there's a redaction for privilege, and then it
20 says, "At this point I think it is incumbent on us
21 to bring in JLT." JLT is one of the City's
22 insurers; is that right?

23 A. Yeah, correct. That's
24 the managing general agent. So for simplicity
25 purposes, they are the insurers.

1 Q. Who were the people at
2 JLT that you thought -- did you have specific
3 contact people there that you knew to raise this
4 with?

5 A. Yes. Providing notice of
6 a claim, you would provide notice -- you would
7 generally in writing provide notice to at that
8 time a person by the name of Dino Zenarosa, and
9 you would probably cc Megan Callahan. I don't
10 know what her title was at the time, but I would
11 view her as someone who oversaw a portion JLT's
12 business, of which the City of Hamilton was a
13 part. So she would be interested to get notice of
14 the claim. And it was also general protocol to
15 include the broker, which was a local -- which was
16 a local broker. Then I think it was -- they were
17 under the title of Pearson Dunn. They have since
18 changed to Gallagher. They are Gallagher
19 Brokerage now. The same personnel have been the
20 City's brokers for 20, 25 years.

21 Q. Registrar, can we go to
22 page 406, please. The inquiry has come into
23 possession of a number of documents prepared in
24 preparation for both a council meeting on
25 January 23rd, 2019, which was closed session, and

1 a GIC meeting on February 6, 2019, which included
2 in-camera sessions. What was your role in
3 preparing for either of those meetings? I direct
4 you to 928, if that might assist.

5 A. Yeah, that little excerpt
6 from Ms. Auty would pretty much summarize what my
7 primary role would be in providing information as
8 requested on the claims, the Red Hill Valley
9 Parkway claims, and I would think be at the ready
10 to answer any questions that might come in related
11 to claims or possibly insurance coverage.

12 Q. The January 23rd closed
13 session of council included an in-camera
14 presentation from city solicitor Ms. Auty where
15 council was given a heads up about the Tradewind
16 report and about the FOI. Did you attend that
17 in-camera presentation on that day?

18 A. You know what, I don't
19 know if I've tied in the -- what day was that,
20 sorry, Emily?

21 Q. It was January 23rd.

22 A. And then there was
23 another meeting on February 6, I believe.

24 Q. Yeah, and that was the
25 one in which council asked for an apology from

1 staff. It was fairly long. Mr. McKinnon and
2 Mr. Hertel presented. Mr. Brown presented. I
3 don't know if that helps to distinguish --

4 A. No, I don't know if I've
5 merged those two meetings into one. I certainly
6 was at at least one, and if I had to pick one I
7 would say it was the February 6 one. It's quite
8 possible I was at both. I certainly -- I would
9 remember if I had to speak at either, and I didn't
10 have to, so there's that.

11 Q. I'm going to ask you some
12 questions about the meeting that you recall
13 attending. I'm going to save those until the
14 period of February 6th rather than January 23rd.

15 A. Okay, sure.

16 Q. Registrar, can you go to
17 423, please. You see at the bottom the underlined
18 portion. Mr. Boghosian e-mailed Ms. Auty an
19 updated signed opinion in this matter, which we
20 call in the inquiry documents the final Boghosian
21 opinion. We don't have any electronic evidence to
22 suggest that it was forwarded to you, and you in
23 fact rely on the one that you received from Mr.
24 Sabo on January 8th in your subsequent dealings
25 with others. Do you recall, did you receive a

1 copy of the final signed opinion from
2 Mr. Boghosian via one of your colleagues?

3 A. I would be surprised if I
4 didn't, but I can't tell you that I recall
5 receiving, ah, here's the final draft.

6 MS. LAWRENCE: I'm seeing the
7 time. It is 3:15, 3:16, which is usually a time
8 for our break. I have just a few more areas to
9 cover, but I would think it would be an
10 appropriate time for a break just for everyone's
11 comfort. Does that make sense?

12 THE WITNESS: Like a 15-minute
13 thing?

14 JUSTICE WILTON-SIEGEL: Yes.
15 We'll take 15 minutes and return at 3:30.

16 --- Recess taken at 3:16 p.m.

17 --- Upon resuming at 3:30 p.m.

18 MS. LAWRENCE: Commissioner,
19 may I begin?

20 JUSTICE WILTON-SIEGEL: Please
21 do.

22 BY MS. LAWRENCE:

23 Q. So before the break you
24 had said that you recall attending a meeting with
25 councillors and perhaps attended more than one.

1 At the February 6th closed session meeting, Mr.
2 McKinnon, Mr. Brown the auditor, Mr. Hertel from
3 communications all presented. Do you recall being
4 there for those presentations?

5 A. Yes, I do.

6 Q. What do you recall about
7 the -- that session?

8 A. My general impression?

9 Q. Yeah.

10 A. Well, I'm not someone who
11 was -- who regularly attended GIC or council
12 meetings, so, you know, I didn't have a lot of
13 experience to draw on. Generally I was there two,
14 three, four times a year maybe. Certainly there
15 was an air of tension.

16 You could tell the senior
17 staff involved, who were all veterans of being at
18 council, were tense and nervous, anxious, whatever
19 adjective you want to use, and that's my most
20 definitive memory, is one of palpable tension.

21 Q. What do you recall the
22 reaction of the councillors was to the disclosure
23 of the existence of the Tradewind report?

24 A. I would say it was
25 reactionary. I would say -- you know, having been

1 around the City for 20 plus years, I wouldn't say
2 that I was unsurprised by their response, but I
3 was hoping there would be maybe a more reserved,
4 thoughtful response, let's take in this
5 information and consider it. But to my
6 interpretation, and I could be wrong, this is just
7 my interpretation, the narrative turned very
8 quickly to who can we blame for this public
9 embarrassment. And I'm not saying all
10 councillors, but certainly the most vocal ones,
11 how do we distance ourselves from the staff who
12 may or may not be responsible for this, what's
13 being perceived as a massive public embarrassment.

14 Q. Thank you. I'm just
15 going to go back to the day before that meeting.
16 Registrar, can you bring up OD 9A, pages 445 and
17 446, please. Thank you.

18 Much of this is underlined
19 just because it was new information, so it's a
20 little hard to read, I find. But you'll see there
21 is an e-mail from Mr. Sabo to Ms. Auty, and it's
22 quite lengthy, it starts at the middle of page 445
23 and goes on to page 446.

24 Registrar, I would like you to
25 pull out the second-last paragraph of that e-mail

1 on 446, please.

2 So this is Mr. Sabo and
3 Ms. Auty are talking about the planning for the
4 following day, saying I assume David will be
5 covering liability issues. And the second
6 sentence is:

7 "Note John has said the
8 Insurer has not been
9 advised, but the broker
10 knows and has recommended
11 to let the situation
12 develop."

13 Is that your recollection,
14 that you advised the City's long-term broker who
15 recommended that the situation develop before
16 contacting the insurers directly?

17 A. Well, certainly that's my
18 recollection now as I read this. In my
19 recollection, I would have thought that the
20 insurer had been notified previous to the council
21 meeting. I don't specifically recall having
22 the -- certainly the broker is a woman by name of
23 Linda Papadopoulos, long-term broker for the City,
24 and certainly I would have been very comfortable
25 talking to her about it. And while I don't have

1 specific recollection of her saying this, I would
2 say that it's more than likely accurate.

3 You know, I was satisfied
4 advising the broker. You know, if it really came
5 right down to a coverage question, I had covered
6 off that part of the requirement certainly by
7 discussing the topic with the broker.

8 Q. Registrar, can you close
9 this document and go to 10A, please. While that
10 is coming up, do you recall having any discussions
11 with Mr. Sabo about the prudence of not contacting
12 the insurer until after the Tradewind report was
13 made public?

14 A. No, I don't.

15 Q. Registrar, can you go to
16 page 48, please. In paragraph 102, you received a
17 copy of Mr. Boghosian's draft opinion from
18 ricoh@cho.ca. Do you know who Ricoh -- what that
19 is, that e-mail address is?

20 A. No, I don't. No. Sorry.

21 Q. That's okay. I'm going
22 to skip down to paragraph -- maybe I'll just
23 actually stop there. Is it possible that's just a
24 scanning thing that gets --

25 (Speaker overlap)

1 A. I was just going to say,
2 someone must've scanned it and had the ability to
3 send from the scanner.

4 Q. I thought that might be
5 the case.

6 A. No one named Ricoh.

7 Q. Okay. Not at COH, which
8 I think is City of Hamilton.

9 A. Yes.

10 Q. So going down to
11 paragraph 104, Viano --

12 A. Ciaglia is how he
13 pronounces it.

14 Q. Ciaglia. Is that the
15 individual you were mentioning before, someone who
16 you -- who would be one of the people you would
17 report to --

18 (Speaker overlap)

19 A. He was with Frank Cowan
20 Company, so they were on coverage for the City at
21 the time the Red Hill was built up until 2011. So
22 their concern was really retroactive, you know, in
23 keeping with our concern that -- the
24 discoverability concern.

25 Q. Do you recall having a

1 phone conversation with him before he sent you
2 this, because it starts off with, can you do us a
3 favour and advise if you have any claims still
4 open related to this period? I'm just wondering
5 whether, as a result of the media coverage, he
6 reached out the following day, or if you reached
7 out to him?

8 A. It's very possible
9 that -- I mean, I had a good relationship with
10 Viano, and he would have been one of the few
11 people still around at Frank Cowan that I would
12 know. You know, from our time with them, they had
13 a lot of staff turnover, so it's quite possible
14 either myself or Diana would have called and said,
15 this is coming down the pipe, but specifically I
16 can't say.

17 Q. If you go up to paragraph
18 103, you also reached out to Megan Callahan, which
19 I think you mentioned earlier, from JLT, attaching
20 the draft Boghosian opinion, and you say, "As per
21 our discussion attached is David's opinion."

22 Was that the first contact
23 that you had with JLT? Looks like there's a
24 discussion ahead of time, but was that discussion
25 the first contact you had with Megan Callahan?

1 A. I would think so. I
2 don't know when that phone call or discussion
3 would have taken -- it most certainly would have
4 been a phone call. I don't know when that would
5 have taken place, but this sounds like the
6 inception of communication with JLT.

7 Q. Registrar, can you go to
8 page 64, please, and can you pull up 65 as well,
9 please.

10 You'll see the next day that
11 you e-mailed Ms. Callahan and L. Papadopoulos at
12 Pearson Dunn, which I think might be your broker,
13 and some other individuals at JLT, and Ms. Swaby,
14 copying Mr. Sabo, about a conference call with
15 them setting out three points which are at the top
16 of page 65. Do you recall that?

17 A. Yes, I do.

18 (Speaker overlap)

19 A. I don't have very clear
20 recollections of it but I do remember, you know,
21 orchestrating or organizing a conference call.

22 Q. The following day you'll
23 see at page 65, paragraph 150, Ms. Swaby forwarded
24 to you an e-mail chain between herself and
25 Mr. Moore and Ms. Crawford in which Mr. Moore

1 circulated a copy of the Tradewind report in
2 August of 2017, at least I suggested I would come
3 to this in due course.

4 Registrar, could you pull out
5 paragraph 150, please. She says:

6 "Just as an FYI, shown
7 below the public could
8 have accessed this report
9 long ago before the media
10 attention."

11 So this is February 14th. By
12 this point, after the public disclosure, did you
13 know from Ms. Swaby that she had had a copy of
14 this report as early as May 2018?

15 A. No. I don't think I
16 would have -- I don't specifically recall thinking
17 that and reading this. It doesn't -- I don't
18 interpret it as such. How I interpreted it now at
19 this point she is aware that the report did exist
20 and in theory could have been accessed probably as
21 far back as 2014 had someone known about it.

22 Q. Registrar, could you go
23 into this document, it's 54606, please. I think
24 it might be useful to see the whole document.

25 In August of 2017 at the

1 bottom Mr. Moore sends the report to Ms. Crawford
2 and then in May of 2018 Ms. Crawford e-mails back
3 Mr. Moore copying Ms. Swaby. And from this
4 document you can't tell if there's an attachment
5 or not but it does say:

6 "We're in the process of
7 preparing an affidavit of
8 documents. We likely
9 need to produce a copy of
10 this report in the City's
11 affidavit of documents."

12 And then Ms. Swaby sends it to
13 you. In the top e-mail there's the attachment
14 listed, so it's a forward, and that's a Tradewind
15 report, and I don't know if that helps with the
16 analysis but again I'm really just trying to
17 understand -- maybe I'll ask it this way.

18 Did you ever come to
19 understand that Ms. Swaby had had a copy of the
20 Tradewind report as of May of 2018?

21 A. Well, I guess I did on
22 February 14th of 2019, but I couldn't say
23 specifically that I knew in May or any point after
24 up until seeing what she forwarded to me in
25 February of 2019 that she was aware of the

1 Tradewind report.

2 Q. And you don't have any
3 recollection of having discussions with her in
4 which she conveyed oh, yeah, I got that months
5 ago, I'm just connecting it to this circumstance?

6 A. Not specifically, no.

7 Q. Not generally either?

8 A. No. I mean, Diana was --
9 she would often storm into my office and rant and
10 rave about a lot of things, but I certainly don't
11 recall her ever saying once -- post November 2018
12 saying that she knew about the report previous to
13 November 2018.

14 MS. LAWRENCE: Just give me a
15 moment to check my notes. I think I've covered
16 everything. Thank you, those are my questions.

17 THE WITNESS: So we're not
18 going tomorrow?

19 MS. LAWRENCE: There may be
20 questions from other counsel.

21 THE WITNESS: So I need to be
22 available?

23 MS. LAWRENCE: No, you need to
24 just stay for the moment. I know it's been a long
25 day.

1 Commissioner, I understand
2 both the MTO and Golder have reserved five
3 minutes. I've not followed up with them since.

4 MS. RAMASWAMY: Good
5 afternoon. I can confirm we have no questions.

6 JUSTICE WILTON-SIEGEL: So
7 Golder says no questions.

8 MR. BOURRIER: Good afternoon,
9 Commissioner. I confirm we have no questions as
10 well.

11 JUSTICE WILTON-SIEGEL: Thank
12 you. Mr. Mishra for the City.

13 MR. MISHRA: I just have a
14 couple of questions for Mr. McLennan. May I
15 proceed?

16 JUSTICE WILTON-SIEGEL: Yes,
17 before we lose Mr. McLennan.

18 EXAMINATION BY MR. MISHRA:

19 Q. Mr. McLennan, you were
20 asked about your knowledge of anecdotal commentary
21 about the Red Hill Valley Parkway being slippery.
22 You previously testified that you were aware of
23 some anecdotal commentary and/or water cooler talk
24 but you did not know when you learned of it.

25 Based on your experience and

1 knowledge of the claims history on the Red Hill
2 did you have any concerns with respect to the
3 safety of the Red Hill?

4 A. No, I didn't inasmuch as
5 I had extremely high regard for the people who
6 built it and for the people who were responsible
7 for maintaining it and monitoring it. As I've
8 said before, I'm not scientifically inclined but
9 certainly I knew Gary, Mr. Moore as a highly
10 regarded municipal engineer and he had the respect
11 of the City manager, the then City manager Chris
12 Murray, who had the upmost respect for and I would
13 say the same about the GM of public works at the
14 time Jerry Davis.

15 So if Mr. Moore had their
16 trust he certainly had my trust, and it also
17 occurs to me that unlike many other assets that
18 I'm asked to consider at the City of Hamilton the
19 Red Hill is one -- the Red Hill Parkway is one
20 that I am very familiar with, you know, as opposed
21 to claims that we have for sewer backups or people
22 falling off cliffs at Albion Hills or watermain
23 breaks or police excessive force claims. It is
24 something I am quite familiar with. I've driven
25 it hundreds of times, probably once a week, and

1 never felt that it was unsafe.

2 Yes, I acknowledge that it
3 requires a person to be driving defensively and
4 with the level of awareness that you should always
5 be driving with and -- if I had one concern about
6 the Red Hill Valley Parkway it would be the fact
7 that it's quite clear in my travels on the parkway
8 that your average driver is not inclined to drive
9 defensively or drive in keeping with conditions or
10 posted speed limits.

11 Q. Understood. I take it
12 from that answer that if somebody is driving in
13 accordance with the rule of the road and --
14 conditions that (indiscernible) was safe?

15 A. Unequivocally.

16 MR. MISHRA: Thank you. Those
17 are all of my questions.

18 THE WITNESS: Thank you.

19 JUSTICE WILTON-SIEGEL: Ms.
20 Lawrence, nothing further?

21 MS. LAWRENCE: No.

22 JUSTICE WILTON-SIEGEL: Then,
23 Mr. McLennan, you are excused and you're not
24 required tomorrow.

25 THE WITNESS: Thank you very

1 much.

2 JUSTICE WILTON-SIEGEL: Thank
3 you for attending and spending the day giving your
4 testimony. Appreciate it.

5 For the rest of us, we'll
6 stand adjourned until 9:30 tomorrow morning.

7 --- Whereupon at 3:51 p.m. the proceedings were
8 adjourned until Friday, October 7, 2022 at
9 9:30 a.m.

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I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately
transcribed the foregoing proceeding.



Sandra Brereton, RMR, CRR, CSR

Court Reporter