

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONOURABLE
HERMAN J. WILTON-SIEGEL
held via Arbitration Place Virtual
on Tuesday October 18, 2022 at 9:30 a.m.

VOLUME 70

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1 Arbitration Place Virtual

2 --- Upon resuming on Tuesday, October 18, 2022

3 at 9:30 a.m.

4 MS. LAWRENCE: Good morning,
5 Commissioner.

6 JUSTICE WILTON-SIEGEL: Good
7 morning.

8 MS. LAWRENCE: I would like to
9 open this hearing by acknowledging that the City
10 of Hamilton is situated based on the traditional
11 territories of the Erie, Neutral, Huron-Wendat,
12 Haudenosaunee and Mississaugas. This land is
13 covered by the Dish With One Spoon Wampum Belt
14 Covenant which was an agreement between the
15 Haudenosaunee and Anishinaabek to share and care
16 for the resources around the Great Lakes. We
17 further acknowledge that the land on which
18 Hamilton sits is covered by the Between The Lakes
19 Purchase 1792, between the Crown and the
20 Mississaugas of the Credit First Nation.

21 Many of the counsel appearing
22 at this hearing today are in Toronto which is on
23 the traditional land of the Huron-Wendat, the
24 Seneca and, most recently, the Mississaugas of the
25 Credit River.

1 Today this meeting place is
2 still the home to many indigenous peoples from
3 across Turtle Island and we are grateful to have
4 the opportunity to work on this land.

5 Commissioner, today we have
6 our next witness, Diana Swaby.

7 AFFIRMED: DIANA SWABY

8 EXAMINATION BY MS. LAWRENCE:

9 Q. Good morning.

10 A. Good morning.

11 Q. Just before we get
12 started, I heard your last name pronounced two
13 different ways. Is it Swaby?

14 A. Swaby, yes.

15 Q. Thank you. Ms. Swaby,
16 I'm going to start today with some questions about
17 your professional background and employment
18 history. I understand that you've been employed
19 with the City of Hamilton since 1989; is that
20 right?

21 A. Yes.

22 Q. Are you -- what is your
23 current position?

24 A. My current, technically
25 I'm called acting manager, but for the -- since

1 2012 I've been claims supervisor but I was sort of
2 put into that position due to some transition in
3 the department.

4 Q. So you're currently
5 acting manager and that's within the risk service
6 management services department?

7 A. That's correct.

8 Q. And that services
9 department, that's within the legal department; is
10 that right?

11 A. Yes, it would be the
12 legal services division. Risk management services
13 is a section of the legal services division.

14 Q. Thank you. And you've
15 had that acting manager role you've said in a --
16 since the period of transition, you've held that
17 role since November 2021; is that right?

18 A. Yes.

19 Q. And am I correct that
20 John McLennan held that role before you?

21 A. Yes.

22 Q. And you took over from
23 him?

24 A. Yes.

25 Q. And you said just a

1 moment ago that you've also been acting as a
2 claims supervisor?

3 A. Technically my position
4 was claims supervisor as of 2012 and I held that
5 role until November of 2021.

6 Q. Thank you. And prior to
7 that, from 2006 to 2012 you were a risk management
8 analyst?

9 A. Yes.

10 Q. And before that, back to
11 1989, you were a law clerk in the legal services
12 division; is that right?

13 A. Yes.

14 Q. What's your educational
15 background?

16 A. I'm a graduate from the
17 legal assistant program from Niagara College back
18 in 1986 I believe, '87.

19 Q. The inquiry have received
20 some documents that appears to refer to you using
21 a different name, I think an earlier name, Diana
22 Sabados; is that right?

23 A. Yes.

24 Q. When did you change your
25 name to Swaby?

1 A. 2015.

2 Q. Thank you. So I'm going
3 to start with asking you some questions about
4 your -- in fact most of my questions today are
5 going to be about the period of time between 2012
6 and 2021 when you were -- I have you down as
7 supervisor of claims administration. Is that your
8 technical title?

9 A. Yes.

10 Q. Okay. Who did you report
11 to in that position?

12 A. John McLennan.

13 Q. And who reported to you
14 in that position?

15 A. The three claims
16 representatives technically.

17 Q. What were your primary
18 roles and responsibilities? Pardon me. I think I
19 misspoke. What were your primary roles and
20 responsibilities in the supervisor of claims
21 administration role?

22 A. Dealing with claims,
23 investigation of claims received by the City of
24 Hamilton that were covered by its insurance
25 program, assigning them out to claims

1 representatives, as well as for the claims risk
2 management analyst, my former role, they received
3 claims as well. And I provided a leadership role
4 to the analyst position, although technically on
5 paper the analysts didn't report to me, they
6 reported directly to John.

7 That being said, so I would --
8 I was really an in-take person. So the majority
9 of the claims that came or were being pursued
10 against the City would come to me first for proper
11 assignment. So I would assign claims to myself,
12 to John McLennan in some cases, depending on the
13 types of claims and the volume of workload, the
14 risk management analysts as well as the claims
15 representatives. We all had claims under our
16 carriage.

17 Q. Thank you. So just
18 stopping there. When you say claims, as a lawyer
19 I hear legal claims like there's been a statement
20 of claim issued. Is that what you mean by claims
21 or is it something broader?

22 A. Much broader than that.
23 It could include a notice of a claim being
24 contemplated, could be the initial contact and
25 eventually a statement of claim may or may not

1 ensue thereafter. But my responsibility was to
2 investigate notice of those claims when they
3 arrived, if they were covered by the City's policy
4 of insurance.

5 Q. Thank you. And so when
6 we're talking about your definition of claims that
7 you were dealing with, roughly how many claims per
8 year was risk management responsible for
9 administrating?

10 A. I didn't keep a running
11 total of them, but I can say that it was -- there
12 were hundreds, if not thousands. I would estimate
13 somewhere between 2,000 and 3,000 claims that
14 might be received in a given year, and those
15 numbers could go up and down sometimes because of
16 weather events.

17 Q. When you assigned claims
18 to I'm going to stay staff -- so the risk
19 analysts, the supervisors, yourself,
20 Mr. McLennan -- how did you assign -- how did you
21 determine who would be assigned to which claim?

22 A. Because there were -- we
23 were a very small section, and recognizing that we
24 had a high volume of claims the process of
25 assigning them might have changed over the years

1 depending on who was available and their area of
2 expertise. But generally speaking, the property
3 claims, so third party property claims. So for
4 property damage those were all typically assigned
5 to the three claims representatives.

6 So in addition, they had their
7 own portfolios as well, different client groups.
8 For example, the HSR, that was quite a large
9 program so one individual claims rep was
10 responsible for that. Another claims rep had a
11 subrogation unit under their area. And the third
12 one also had -- there may be collision claims and
13 so forth.

14 So they all had their own, but
15 in addition -- that they would work on their own,
16 but insofar as third party liability claims, when
17 I talk about those, that was my primary area of
18 responsibility. Property claims were being
19 assigned to the claims reps. The odd personal
20 inquiry claim, the less complicated ones, if you
21 will, would go to some of the claims
22 representatives. But for a time period there was
23 a considerable bulk of the personal injury claims
24 that were assigned to myself for a period of a few
25 years.

1 And so we also had external
2 adjustors that we had that did a lot of the
3 groundwork for us, the investigation. Just
4 because of the sheer volume we did not have the
5 manpower inside to do a lot of them, do that field
6 work ourself, that adjusting work, the
7 communications with the claimant or their counsel.

8 But the property claims could
9 be dealt with internally on their own. They were
10 generally smaller. They may take -- you could
11 investigate them quickly; there's a determination
12 made. So certainly more of them, but opening and
13 closing them. So they were less involved.
14 Whereas the personal inquiry claims they may go on
15 for years, depending on that.

16 So for a considerable time
17 period I had a very significant caseload, and so
18 that was important that we use the external
19 adjustors to do much of that work for us so that I
20 could cover more ground, so to speak.

21 Q. Thank you. Thank you for
22 that answer. Just within it you mentioned a large
23 program called HSR. Just for the record, what
24 does that acronym stand for?

25 A. Hamilton Street Railway.

1 That's the -- our public transit service.

2 Q. So you said that you were
3 dealing with the third party liability claims.
4 Did that include claims related to the Red Hill
5 Valley Parkway?

6 A. Yes, they did.

7 Q. I'm just going to step
8 away for a minute from claims supervision. Did
9 you personally in your prior role have any
10 responsibility for negotiating the City's
11 insurance policies?

12 A. More on a peripheral
13 level, I'll say that, from -- because oftentimes
14 when you're completing the process of renewal or
15 securing insurance you look at claims histories,
16 you look at reserves, what were paid out before.
17 What the -- Hamilton's claims experience is,
18 prior, is an integral part of that process.

19 So I was often involved with
20 the claims, the disposition, the history, and to
21 address and talk about some of the issues in those
22 claims as part of the overall renewal process. So
23 if the insurers, prospective insurers had
24 questions about loss runs I was called upon to
25 provide that information.

1 Q. Thank you. But you
2 otherwise didn't have any responsibility for that
3 negotiation?

4 A. No, not until November of
5 last year when John McLennan was no longer there
6 and I was (garbled audio) and assist with that.

7 Q. Thank you.

8 A. Other thing I should
9 mention is I was also responsible for what they
10 call the insurance notice program. So it was
11 important for the City to report claims in a
12 timely fashion to the insurance -- our insurers,
13 the City's insurers, to ensure that coverage was
14 also in place if we had exposures that were in
15 excess of our self-insured retention or deductible
16 depending on the policy that was in place over the
17 years.

18 Q. Can you ballpark how many
19 claims of the -- between 2,000 and 3,000 related
20 to third party liability, a much smaller subset
21 than the property claims you were talking about
22 before?

23 A. It would have been less
24 than the number of property claims for sure. I
25 couldn't give you an exact number, but I'm going

1 to guess, you know, maybe around -- I don't know
2 to be honest, between 500 and 1,000. It really
3 depends. If you had a really bad year -- for
4 example, one year we had the polar vortex that
5 descended on the city back in 2014. You know, you
6 might get a hundred or 200 claims over what you
7 normally would. But generally speaking,
8 definitely a higher -- the majority were smaller
9 property claims like tree limbs falling, pothole
10 claims, sewer lateral backups, smaller property
11 claims, definitely many more of those.

12 Q. Thank you. So you said
13 earlier that you assigned the claims, you're an
14 intake person. Did all the claims that came in to
15 risk management cross your desk?

16 A. Not necessarily because
17 we would receive them through various sources. So
18 from a purely technical standpoint my preference
19 is that every claim would be served on the clerk
20 as per the Municipal Act, and they are the keeper
21 of records and they do track that, but that is
22 only -- and they should be in writing, but that is
23 only one way that we would receive them.

24 We would often receive them
25 perhaps from other departments such as the

1 councillors office. They may receive a call or a
2 complaint and that might get directed to John
3 McLennan and then eventually come to me. We also
4 have an e-mail account for -- a risk e-mail
5 account that sometimes claims would be submitted
6 via e-mail. And later on I became involved with
7 monitoring that. But for a considerable number --
8 I'm not sure when it actually was implemented, but
9 I didn't start reviewing those until much later,
10 2018. They could also come in from other
11 departments.

12 We were also proactive in the
13 sense that if we received -- lot of times risk
14 management receives calls and complaints that are
15 not necessarily relating to claims; they may be a
16 complaint. So if it was an operational matter, I
17 have a problem on my street, I would like to have
18 it addressed, we might forward that off to the
19 public works roads department. If a mailbox was
20 taken down that might go to somebody else to deal
21 with. Someone had a complaint about noise, that
22 might go to the municipal law enforcement
23 division.

24 So a lot of times we would
25 receive e-mails from a variety of sources and we

1 would certainly assist the public with having more
2 complaints addressed in addition to dealing with
3 claims.

4 So sometimes we might get a
5 complaint and say I fell over here and I need the
6 sidewalk fixed, they may not submit a claim but I
7 may proactively go and have a field investigation
8 completed just to make sure we get some pictures
9 of what it looked like before potentially a claim
10 could come in.

11 Q. On that, given that you
12 either received claims or you may have been
13 receiving public complaints or concerns, were you
14 aware of concerns from the public about the Red
15 Hill Valley Parkway?

16 A. No.

17 Q. I'm going say sort of
18 between its opening to when you took a
19 (indiscernible) position?

20 A. Well, typically speaking,
21 when we conduct any investigation for a claim we
22 will ask for a history of complaints for a given
23 location, so --

24 Q. I'm sorry to interrupt.
25 From whom would you ask for those complaints?

1 A. Whoever the -- well, it
2 would depend on each given claim. If we were
3 talking about the Red Hill claims we would be
4 asking for a history of complaints concerning the
5 Red Hill and how they were addressed over the
6 years. That's part of it, part of our review.
7 When citizens complain about a potential
8 intersection or a concern they might have how
9 public works would have addressed them as part of
10 our review.

11 Q. Who would you ask for --
12 for the Red Hill in particular, from whom would
13 ask you about a history of complaints?

14 A. Well, it depends on --
15 there are a number of different sections. So we
16 have -- in public works. So we have the
17 operations roads staff that deal with potholes,
18 spills, cleanups, clearing the road of snow.
19 That's one particular section. There will be
20 another section that would be traffic. They might
21 be dealing with -- they would deal with road and
22 pavement markings, signage, speeds, traffic
23 controls.

24 Then you also might
25 potentially also have the original design group.

1 Those might be three different areas in public
2 works where there may be relevant documents that
3 form part of the overall investigation.

4 In more recent years there is
5 now a coordinator at public works who is an intake
6 person as well that now oversees the dissemination
7 of all the different types of requests that we
8 have. They make the inquiries now to the various
9 sections, compiling information and bring it to
10 us. But it was not always that way. It has
11 changed over the years as people have come and
12 gone where those requests would go historically.

13 Q. Thank you. And that
14 intake person, that has been since -- just in the
15 last few years, couple years?

16 A. It's very recent.

17 Q. The -- my initial
18 question was were you aware of complaints on the
19 Red Hill during your time as the supervisor of
20 claims administration, and I'm not sure I quite
21 got that answer.

22 A. Was I aware of
23 complaints. I know that as a result of the
24 substance of this inquiry here today that there
25 were complaints that were voiced by citizens.

1 Q. And did you receive any
2 of those complaints?

3 A. No.

4 Q. Okay. And you said that
5 your -- at least I understood from what you said
6 that your process would have been to ask for a
7 history of complaints?

8 A. Yes. What --

9 Q. And where you would find
10 it. Did you actually ask for that in this case,
11 because we don't have any documents to suggest
12 that you did?

13 A. It would be in the form
14 of -- we would ask for Hansen records. So if a
15 complaint came in it would be logged on Hansen.
16 That is my understanding how that complaint system
17 would be documented by the operating client
18 departments, how they are able to address them.
19 They log it. They create service requests.
20 That's how they keep their documents.

21 So if I asked for -- give me,
22 can I have a history of complaints, depending on
23 the department, and in this case Hansen would be
24 the one for public works, that was my information,
25 they would search and look for anything.

1 And I know Hansen was a very
2 robust program. They logged -- I had seen it
3 before in other claims where they would log
4 everything as far as something as simple as my
5 house shakes when a bus goes by. Something as
6 small as that. Or my blue box is gone or --
7 anything and everything was typically captured on
8 Hansen.

9 Q. Thank you. Let's talk
10 about what you did as a claims supervisor, if I
11 can put it that way. So your work, while you were
12 the supervisor of claims administration, but when
13 you were actually were dealing with claims that
14 you would assign to yourself. What were your
15 practices upon receipt of a claim that you were
16 going to oversee?

17 A. If we were dealing with
18 personal claims, myself, the first thing I would
19 do is I would assign an external adjustor
20 immediately as soon as I had it, and it was their
21 responsibility to acknowledge receipt of the claim
22 with the claimant and/or their representative,
23 saying I am the adjustor that has been assigned to
24 investigate this claim, and they would be
25 responsible for communicating with the claimant or

1 the representative through the course of the
2 investigation.

3 So the external adjustor
4 would -- and when I assign the claim I usually
5 provide some -- not always, but in some times I
6 might provide some preliminary thoughts or
7 comments that I might have just really on a --
8 just on its face just to provide some direction.
9 If I have some concerns with the notice I might
10 indicate that. If there is -- if I had an issue
11 with the notice in the sense that it didn't comply
12 with what was expected under section 44 of the
13 Municipal Act insofar as providing enough
14 information about the location so that we could
15 (indiscernible) and get the information that we
16 need, the documents, the pictures and so forth, I
17 would provide those instructions to the adjustor.

18 And then eventually what would
19 happen is we would -- I would start receiving
20 their reports on, as their investigation proceeds,
21 what documents they have received, their review of
22 them, what further documents are needed, what
23 further investigation is required.

24 I would eventually review them
25 as it moves forward and provide instructions at

1 times that it was appropriate or required to do;
2 for example, should we interview these individuals
3 or should we not. And eventually there would be a
4 determination made or we would -- once we
5 determined whether we had enough documents, in
6 some cases we would either decide to deny a claim
7 or we would potentially consider offering some
8 compensation if we had identified some legal
9 exposure. And eventually if a statement of claim
10 was issued, depending on the outcome, if we
11 thought it was a denial, or not, it would go to
12 the hands of defence counsel as well.

13 And as that information is
14 gathered and gleaned I'm also -- I gleaned from
15 that what the significance of the damages are, how
16 serious the injury. Also consider whether or not
17 we need to put the insurer on notice and bring
18 them in the loop, so to speak, to ensure that we
19 don't prejudice its position to defend the matter
20 as well and to make sure that we secure everything
21 that we can.

22 Q. Thank you. I will come
23 back to the process that I think you set out about
24 how you work with adjustors and generally run
25 through up to the point of the statement of claim.

1 Just before we get there, you
2 said that you start by assigning an independent
3 adjustor. Is there also a file opening process
4 within the City's software?

5 A. Yes, there is a -- we
6 have a software system called RiskMaster. I think
7 it's called something else now. It's changed its
8 name over the years. It's pretty out of date but
9 that is our system that we use.

10 And -- we could all -- in the
11 years gone by we opened our claims ourselves on
12 the system. Everyone who had claims had a user ID
13 and could open the claims themselves. And in
14 later years when we hired a risk assistant, she
15 took a more active role in doing that for us to
16 free up some time for us as well. Because of the
17 sheer volume of the number of claims coming in and
18 it being really an administrative function, it was
19 great to be able to have another staff member to
20 do some of that work for us.

21 Q. What sort of information
22 was inputted into RiskMaster?

23 A. Definitely the claimant's
24 name, the date of loss, the location as described
25 on the notice letter if we had it. Sometimes we

1 don't have complete information, but certainly
2 anything that we can take from the notice letter
3 and input it onto the system we would.

4 So date of loss, a description
5 of the event. There is a location where you can
6 describe what it is. A motor vehicle accident, if
7 that's what we're going to talk about today, is
8 the Red Hill claims, the parties that were --
9 whatever information is on the notice letter we
10 would try to put on the system.

11 But definitely you need the
12 date of loss, you need the claimant's name and a
13 location, the file handler who has been assigned
14 it, who the external adjustor is. Those -- and as
15 well if there is an allegation about the cause of
16 the accident that's there. If -- so it could be
17 design, is it pothole, is it slippery because of
18 winter, was it a snow event. The client
19 department, if you will, that's a crucial piece of
20 information as well because the responsible
21 department is where those expenses are going to be
22 charged back to eventually. So you need to make
23 sure you have the right client group in there.

24 But those are the really I
25 would say mandatory fields, although RiskMaster

1 does have the capability of adding other on
2 information along as well if we can find time to
3 put that input, that further information as the
4 claim progresses.

5 Q. So a question on that.
6 Recognizing the resource constraints, was the
7 expectation that RiskMaster would be updated
8 periodically through the course of the assignment
9 of the claim when new information came in?

10 A. I think it's important --
11 the important parts of RiskMaster are ensuring
12 that you have the right client group for the
13 purposes of charging back so that the right
14 department gets charged, because risk management
15 is really a zero budget-based department;
16 everything gets charged back to the responsible
17 department.

18 So you can imagine that if it
19 ended up being something that was from the
20 operational side, was it traffic or was it a
21 pothole, that would be very important for the
22 purposes of making sure that the funds were
23 applied to the right client group.

24 I think the other things that
25 are really important to be consistent is making

1 sure that locations are up to date -- are updated
2 eventually. Definitely the client's name. And I
3 say this for the purpose of being able to run
4 accurate loss runs later on to be able to identify
5 and capture all of the relevant claims. So
6 certainly the more you can put in on a claim the
7 better. But really to come back later and to
8 update every single claim with every piece of
9 information, that was a definitely a big challenge
10 and very difficult to maintain. I don't think we
11 had reached that -- we certainly -- RiskMaster
12 hasn't been that intuitive as well. It's a very
13 manual-driven program. We're working on actually
14 getting a better software system to assist us with
15 that.

16 Excuse me, I'm sorry. I
17 didn't know my phone was on.

18 Q. No problem.

19 A. I thought I turned them
20 all off. I apologize for that.

21 Q. So what I'm hearing your
22 evidence to be is that RiskMaster is not a
23 repository where every -- where one could go and
24 find the current status of a claim as it's
25 progressed and all of the documents that have been

1 received, it's not that kind of repository; is
2 that right?

3 A. No, it's not. And before
4 the pandemic we were a very paper-driven
5 department. So you would rely heavily on the
6 paper of the -- we would print off our e-mails and
7 we would put them in a hard copy file. And since
8 the pandemic, obviously, we had to move into an
9 electronic world. We were forced to do that. And
10 I had been trying for a long time to move more
11 electronic. But to answer your question is no --
12 yes, I guess it's the hard copy --

13 (Speaker overlap)

14 Q. I'm sorry to interrupt
15 you. I'm going to actually ask you about your
16 other file practices with hard copy, not
17 electronic. Just one last question on RiskMaster.
18 You said that if there was an allegation about the
19 cause of the accident, so pothole design,
20 slippery, snow events, is that a like a drop-down
21 list or tick box list? Are there consistent
22 topics that one could choose for that?

23 A. There are cause codes
24 that you can choose from, and you do your best to
25 choose one that you think might be the most

1 applicable, one based on the information that you
2 have at the time, certainly on your notice letter.

3 Q. Thank you. So turning
4 now to your file management practice outside of
5 RiskMaster, and I'm most interested in your period
6 of time up to 2019, so pre-pandemic.

7 You said you kept hard copy
8 files of your claims and would that include pieces
9 of correspondence?

10 A. Yes. So we would receive
11 courses through the mail and we would receive
12 correspondence through fax and we would receive
13 correspondence through e-mail.

14 Q. And you would print out
15 your e-mails --

16 A. Yes.

17 Q. -- even though they're
18 electronic. Okay. And did you have a
19 correspondence brad or a correspondence sort of
20 file that was kept in chronological order?

21 A. Yes. They would
22 eventually -- on some of my larger files I started
23 creating subfolders just because they got so large
24 it was difficult to navigate through them without
25 putting them in some kind of semblance of order.

1 So I did that for myself. But typically yeah,
2 they were eventually printed off and put into the
3 hard copy file. It might take me a while because
4 we were dealing with high volumes.

5 Q. And I presume you would
6 also have to keep copies of pleadings when any
7 were received or sent?

8 A. Yes.

9 Q. -- statements of claim,
10 statements of defence --

11 A. If we get statement of
12 claim. I may or may not get the statement of
13 defence. I didn't -- it was not a requirement to
14 get the statement of defence. If I received them
15 I did obviously have them. I would keep copies
16 and I would make sure they would get to the
17 defence counsel assigned on behalf of the City.

18 Q. I was thinking the City's
19 own statement of defence, you would have a copy of
20 that?

21 A. Not necessarily, no.

22 Q. Defence counsel might
23 have a copy of that but they wouldn't necessarily
24 provide it to you?

25 A. I don't -- I don't really

1 need it.

2 Q. Would you include all of
3 the reports that you got from your adjustor on the
4 status of the investigation?

5 A. Oh, yes, and that
6 would -- anything and everything I compiled during
7 the course of an investigation would be forwarded
8 along to defence counsel assigned.

9 Q. Okay. I'm just asking
10 about things that would be kept in your file for
11 the moment. And what about notes from meetings
12 that you attended?

13 A. Everything in my file
14 would go to defence counsel.

15 Q. Okay. And how were your
16 documents -- no, I meant did you keep them or are
17 you talking about your file management rather than
18 what you sent to counsel?

19 A. I'm not sure I understand
20 the question.

21 Q. Would you keep in your
22 file notes from meetings?

23 A. Yes, if I kept notes. I
24 didn't generally keep notes. There was -- it
25 was -- like I said, if it was high volume we might

1 have discussions. But everything would be
2 confirmed usually in an e-mail or a report from
3 defence counsel.

4 Q. How did you keep your
5 electronic files back again before 2020? Did you
6 have a folder system within your in-box or was
7 there some other repository to keep electronic
8 communication that you received?

9 A. If electronic
10 communications were received on a claim they would
11 go in my claim file. If I had -- sorry?

12 Q. And then would you delete
13 them from your in-box?

14 A. Yes. The only times I
15 would keep some would be potentially for future
16 reference for potential application to other claim
17 files, something useful that I could use for
18 another claim.

19 Q. I have some questions now
20 about document collection. You went through a
21 little in terms of the adjustor doing an
22 investigation and sending you information that
23 they had collected like photographs, for example.
24 Who was responsible for document collection on a
25 claim once a statement of claim was issued and

1 there was defence counsel?

2 A. Once -- if there was
3 defence counsel that was retained they took over
4 the assembling of the documentary collection,
5 definitely, because risks involvement,
6 appreciating that we receive thousands of claims,
7 we don't investigate or necessarily collect every
8 single document that might be out there. We
9 collect enough to be able to make a determination.

10 When a matter goes to
11 litigation and there's a statement of claim, now
12 we're going through the process as per the rules
13 of civil procedure. It goes to defence counsel,
14 they have everything that we would have gathered,
15 and then they would take over dealing with the
16 client department directly, work with the City's
17 discovery representative moving forward insofar as
18 compiling all of the documents or reviewing all of
19 the documents for the purposes of the affidavit of
20 documents.

21 So basically that torch is
22 pushed -- I guess passed over to defence counsel,
23 if you will, to carry on that documentary
24 investigation.

25 Q. Did you assist defence

1 counsel with identifying relevant departments
2 within the City for document collection purposes?

3 A. They are primarily
4 responsible, but I am there to assist them or
5 facilitate or provide my experience or contacts
6 for or suggestions how to get those documents, who
7 to contact, who I might think they might be --
8 should deal with.

9 Q. Did you act as a liaison
10 between defence counsel and City staff from whom
11 they wanted documents?

12 A. Yes. I typically put
13 them in touch with each other. I really was not
14 involved -- I didn't -- my preference was not to
15 be a middleman, so to speak, or to be getting all
16 those documents for defence counsel, looking at
17 and then providing them.

18 I put the deponent on the
19 affidavit of documents or the representative
20 directly in contact with defence counsel so that
21 they would ask the questions and get what they
22 needed, or make sure I guess, because I know about
23 affidavits of documents, schedule A productions,
24 that they complete the necessary investigation to
25 be able to satisfy themselves that the affidavit

1 of documents is as accurate as possible.

2 Q. Did you have a practice
3 of reviewing documents you received in one piece
4 of litigation and cross-referencing it to other
5 litigation where it might be helpful or relevant?

6 A. That wasn't my practice.
7 Unless it really stood out to me it was not my
8 practice to do that. Every claim is looked at on
9 its face and individually. There are hundreds and
10 hundreds and hundreds of them that I was dealing
11 with, and so each claim was -- unless, for
12 example, something came out to me or it popped
13 into my mind that I think might be useful to
14 another defence counsel.

15 I certainly was a purveyor of
16 trying to share information and make sure that
17 everyone had the kind of information or undertook
18 the same kind of insistent approach with dealing
19 with claims. I wanted to make sure that others
20 had the information.

21 Q. Thank you. And the
22 inquiry has received information that both
23 external legal counsel worked on City claims, but
24 there was also internal legal counsel who worked
25 on claims. In what instances are external legal

1 counsel retained versus when is something -- when
2 does something stay in-house?

3 A. From my perspective this
4 comes back to the insurance notice program now.
5 So when we're dealing with claims that have the
6 potential or possibility of exceeding the SIR of
7 the City, insurers would be involved in the course
8 of the investigation. And oftentimes their
9 preference is to have external legal counsel of
10 their choice overseeing the defence of those
11 claims to ensure that there is appropriate
12 resources to be able to defend them. And external
13 resources are sometimes in a better position to do
14 that, and it's ultimately the insurers call when
15 files went to external counsel. Otherwise we have
16 an in-house legal team that would deal with the
17 majority of the claims that went to litigation.

18 Q. What are your
19 expectations of the kind of updates that you would
20 receive from defence counsel, both internal and
21 external?

22 A. My expectations are that
23 we would first get a preliminary report from
24 defence counsel assigned if their review --
25 certainly in-house, the reporting levels in-house

1 probably weren't at the same level as external
2 counsel and I think it's because of sheer volume
3 again.

4 So -- but certainly external
5 counsel would usually -- would provide a
6 preliminary review of all the documents that have
7 been compiled. Really it's based on risk
8 management's file. Everything that we have they
9 review it, they look at it. They provide their
10 opinion on liability and damages, what further
11 investigation might be required through the City's
12 representative through the discovery process, what
13 they also will be doing from a damages
14 perspective. They might provide a preliminary
15 assessment on potential exposures and then will
16 continue to report as litigation moves on.

17 So there will be a preliminary
18 report. The next expectation would be milestone
19 events or something, you know, raised that
20 requires or behooves counsel to want to
21 communicate a material change to their initial
22 report. Otherwise, we would be looking for
23 something after discoveries are completed, a
24 discovery report. And then thereafter there would
25 probably be a consideration for retaining experts

1 and strategy moving forward and having -- those
2 would be the milestone reports that I would be
3 looking for.

4 Q. Thank you. You mentioned
5 before the affidavit of documents. But just so
6 that I have your evidence clearly, do you have any
7 role in identifying the appropriate City staff to
8 affirm an affidavit of documents or to participate
9 in examinations for discovery?

10 A. No, I don't typically do
11 that. We will go to the client group and ask who
12 the discovery rep would be, but I'm not -- and
13 they would certainly appoint somebody and the
14 defence counsel works with that deponent, but as
15 they have those discussions they might find well,
16 this person really isn't the best person to be the
17 discovery rep.

18 So those kinds of discussions
19 sometimes happen thereafter, and I may be a
20 facilitator, again going back is there somebody
21 else that is -- you know, we would prefer a person
22 who has knowledge in this area or that one. So
23 it's not -- it's not an arbitrary this is the
24 person and you have to work with it. Certainly we
25 want to make sure that the best representative is

1 available to give evidence at discoveries.

2 I gave evidence once in my
3 career as a discovery rep, and I really didn't
4 want to do it but I did it because we had multiple
5 departments that were involved and it was just --
6 it was more streamlined if I had attended instead
7 and eliminated many of the undertakings. I was
8 able to answer many more of the questions because
9 it was across multiple departments. But that was
10 a very unique situation. Otherwise, the -- it's
11 always going to be somebody in the most relevant
12 department having regard to the allegations in the
13 claim that would be attending.

14 Q. Do you review draft
15 affidavits of documents before they are filed?

16 A. No, I don't typically see
17 them. I don't need to see them at all. I have
18 received the odd one over the years, but I often
19 say to counsel you don't need to send these to me,
20 it's fine to stay in your own files.

21 Q. Turning now to some
22 specific questions about the Red Hill. The
23 inquiry has received documents that as of 2008
24 members of council and public works work staff
25 started to receive these anecdotal complaints. So

1 just again -- I know I asked you this before about
2 Hansen, but were you personally made aware of
3 anecdotal complaints about slipperiness on the Red
4 Hill?

5 A. No. Going back to 2008,
6 that's a long time ago. I couldn't say one way or
7 another, but that would be something that traffic
8 and design would be responsible to respond to. I
9 wouldn't get involved in that. Matters of
10 safety -- safety matters, traffic controls, design
11 of the roadway, that really falls to the experts
12 and they are the experts there, the engineers.

13 Q. Understood. My question
14 was really about your knowledge rather than about
15 your responsibility. So you didn't have any sense
16 from reports, from discussions internally with
17 staff, from media, that there was any anecdotal
18 complaints or concerns about the Red Hill --

19 A. I couldn't remember that.

20 Q. Okay. In 2013 public
21 works staff started to conduct safety reviews and
22 assessments on the Red Hill. The Tradewind report
23 is one piece of the work from public works and we
24 know it came to your attention at a later time.

25 But just going back to 2013,

1 were you aware in the fall of 2013 that Golder
2 Associates had been retained to review aspects of
3 the Red Hill?

4 A. No.

5 Q. Were you aware that
6 Golder had hired Tradewind to conduct the friction
7 testing -- a friction test on the Red Hill?

8 A. No.

9 Q. Were you aware in the
10 fall of 2013 that CIMA was retained to conduct a
11 safety review on a portion of the Red Hill?

12 A. No.

13 Q. And there were subsequent
14 studies conducted by CIMA in 2015, 2017 and 2018.
15 Were you aware of these studies at the time?

16 A. No. I think it came up
17 through counsel, Shillingtons, who was I think
18 somewhere around 2017, 2018.

19 Q. So we will come to those
20 certainly. But that was -- that's the source of
21 your understanding and awareness about the public
22 works initiatives in respect of the Red Hill?

23 A. Yes. No, public works
24 did not communicate those studies to me.

25 Q. So we're going to start

1 in 2013. There was a very heavy rainfall incident
2 on the Red Hill and there were a number of
3 accidents reported. Following this incident there
4 were a number e-mails exchanged amongst City staff
5 about the accidents and about complaints about the
6 Red Hill road surface being slippery when wet.
7 You're not copied on those, but I'm going to ask
8 you some questions to understand whether you were
9 brought into the loop by anyone who was copied.

10 Registrar, can you go to
11 GOL2641, please. Go to image 4, please.

12 Ms. Swaby, just so that we do
13 a little tech test because this is the first time
14 we're looking at a document, can you see both the
15 screens where Ms. Hale and I and the commissioner
16 are?

17 A. Yes.

18 Q. And you can also see the
19 document?

20 A. Yes.

21 Q. Great. I will ask the
22 Registrar to call out documents to make them a
23 little bigger, recognizing the font might be a bit
24 small.

25 Registrar, can you pull out

1 the bottom e-mail on this e-mail chain, please.

2 Ms. Swaby, this is to orient
3 you to time. This is September 22, 2013, and this
4 is an e-mail amongst staff in the operations
5 department, those who were actually on the
6 roadway. And it's a district supervisor reporting
7 to his superintendent about heavy rain we had.
8 This is not a flooding incident; this is just a
9 very heavy rainstorm.

10 Recognizing it was a long time
11 ago, do you remember this rainstorm in
12 September 2013.

13 A. No.

14 Q. The district supervisor
15 Sam Capostano said it's very slippery, we've
16 checked the ramps and the road and it's very
17 slippery. There is not much we can do.

18 Registrar, you can close this
19 down.

20 So you are not copied on that
21 e-mail, but this e-mail starts to make its way
22 through first operations and then into traffic
23 safety staff.

24 Registrar, can you go to
25 image 3. And can you call out Mr. White's e-mail

1 on the bottom half of that page, please.

2 So it gets sent to -- staff
3 who get involved in this discussion include
4 Mr. White who is in traffic. Do you know
5 Mr. White?

6 A. I knew of him, yes.

7 Q. And Mr. Moore?

8 A. Yes, I know they're both
9 individuals that work in public works. Some of
10 these names look familiar, yes.

11 Q. And you'll see that
12 Mr. White -- and, Registrar, perhaps just to
13 assist you could help with this. About seven
14 lines down they are talking about this issue,
15 Mr. White is, and he says "we will also confer
16 with risk management regarding this matter."
17 Thank you, Registrar.

18 You see that, Ms. Swaby?

19 A. Yes.

20 Q. And you'll see that
21 Mr. McLennan is also copied on this e-mail; in
22 fact Mr. White copies him in.

23 Registrar, could you close
24 this down. If you can go to image 2, please, and
25 call out Mr. McLennan's e-mail.

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

9 And then he says:
10 "We can run a location-based
11 report on RiskMaster and by
12 copy to Gavin Chamberlain I
13 will ask to discuss this with
14 me."

15 So just stopping there, I
16 think you said earlier that location of loss was
17 something that would go into RiskMaster. Back in
18 2013 were you confident that doing a
19 location-based report on RiskMaster would actually
20 bring up the documents that would be relevant to a
21 particular location?

22 A. It would depend how the
23 location was inputted. And RiskMaster wasn't a
24 kind of software program where perhaps every
25 location could be -- might be populated, and you

1 had to find it and then click on it to pick it --
2 I'm not sure if you understand what I mean by
3 that, having that information predisposed in
4 there, that wasn't there.

5 So whatever was inputted is
6 what you would have to input as well in your
7 search requirements to capture it. So I don't
8 know what Gavin was -- what type of search or what
9 went into his search to capture the claims, but he
10 would have had to have considered things like
11 RHVP, Red Hill Valley Parkway, different
12 descriptors to be able to capture all of them.

13 So I'm not sure how
14 comprehensive his search would have been, whether
15 he would have tried a number different ways. It
16 was a very challenging and it still remains a
17 challenging system to deal with from that respect.

18 Q. Thank you. Registrar,
19 you can close this down. And you can call up
20 Mr. Moore's e-mail.

21 Ms. Swaby, you've already
22 given evidence you don't recall any friction test,
23 knowing about any friction test. So Mr. Moore on
24 September 30th of 2013 indicates to those copied,
25 which do not include you but do include

1 Mr. McLennan, that we will have skid resistance
2 testing completed on both the Red Hill and the
3 LINC.

4 So just stopping there. Were
5 you told by anybody that this friction test was
6 going to be completed for the purposes of, you
7 know, as you'll see Mr. Moore says this should be
8 sufficient for any due diligence required
9 eliminating the ought to have knowns as well as
10 dealing with we think it has slippery issues?

11 A. I don't recall. I
12 typically -- my area was claims so I didn't really
13 get involved with the whole lot of day-to-day
14 operations or decisions being made that weren't
15 specific to a claim or any risk management
16 involvement with the day-to-day operations, if you
17 will.

18 Q. But you can see how
19 having a skid resistance test might -- and
20 findings that skid resistance is good might be
21 useful to you in claims that the parkway was
22 slippery when wet?

23 A. Sure, and I would expect
24 that eventually that would be gleaned through the
25 litigation and/or claims investigation process.

1 Q. In any event, you don't
2 remember having any discussions with anybody about
3 Mr. Moore's commitment to do this test?

4 A. No, I don't remember.

5 Q. Registrar, you can close
6 this down and if you can go to image 1, please.
7 If you can pull out the very bottom e-mail.

8 This is a short one.

9 Mr. McLennan says the claims history for this
10 slippery pavement is basically non-existent, only
11 when claimed, although I suspect we will get a few
12 from the recent incident.

13 So I know that he has asked
14 Mr. Chamberlain to run the claims report. Do you
15 recall if you did any assessment of the number or
16 type of claims on the Red Hill during this time?

17 A. No. I had a number of
18 claims on the Red Hill, yes. What was the
19 question again, sorry?

20 Q. The question was did you
21 do any assessment of the type of claims on the Red
22 Hill?

23 A. No.

24 Q. Registrar, you can close
25 this down. You can close this document down. If

1 you could call up RHV1017, image 5, please.

2 This is an appendix to an
3 affidavit that Mr. McLennan filed in the inquiry,
4 and it has a list of claims involving the Red
5 Hill. Just looking -- we were just looking at
6 September of 2013, and just looking at the first
7 four of those, recognizing the last doesn't come
8 in until November 2013, but looking at that period
9 of time, were all of those claims assigned to you
10 when they came in?

11 A. Of the first four you
12 say?

13 Q. Yes.

14 A. I don't recognize the
15 first two. I do recognize Ghulam-Mastafa and
16 Gawrylash.

17 Q. And just so that we don't
18 have to come back to this later, going forward
19 were you also assigned to the other claims that
20 are listed on this appendix?

21 A. Eventually they all were.
22 I'm not sure that they were all originally.

23 Q. There's a couple more on
24 the next page as well. If you wouldn't mind -- so
25 you can see those names?

1 A. I don't -- I don't
2 recognize the Salonen name. I do -- Gapeev was
3 mine, yes.

4 Q. So just more generally, I
5 think you said earlier the Red Hill claims were
6 generally assigned to you by you?

7 A. Yes, but there were a few
8 that -- I noticed afterwards when we started
9 putting this list together I saw some names that I
10 didn't recognize, and I looked back at least in
11 one or two of them well, how come I don't see that
12 one. Oh, it came in, John assigned it, it went to
13 Cathy or another claims representative. So there
14 was the odd one that wasn't with me.

15 Q. Okay. Registrar, you can
16 close those down.

17 Before we turn to more
18 RHV-specific questions, in terms of you and
19 Mr. McLennan's respective roles, how frequently
20 did you check in with him about your files?

21 A. Not very often.
22 Certainly only when I -- I thought there was
23 something that he -- I might think he should be
24 aware of from a large issue potentially that might
25 cross into what he might be working on or what he

1 should potentially know as a manager of a
2 potential exposure.

3 My primary dealing is with
4 those claims making sure there's coverage, making
5 sure they are dealt with properly, making sure the
6 insurer is involved. And I wouldn't be going to
7 him -- when would I go to him? If we were
8 potentially dealing with a loss that had an
9 exposure that was over risk management's authority
10 to settle a claim and that we need to seek
11 approval of certain settlements. In that respect
12 that would be certainly a time that I would always
13 go to him, obviously because it has to go through
14 him and then up through the chain of approvals.

15 But generally speaking, I
16 trudged ahead with the claims myself. And he was
17 busy doing other matters that weren't so claims --
18 you know, he had his own claims, but he was also
19 dealing with all of the operational day-to-day
20 risk management advice and questions that would be
21 coming in. That was more his area.

22 Q. In terms of -- rather
23 than sort of a formal reporting to him as your
24 boss, so leaving sort of that aspect aside, did
25 you have regular discussions and interactions with

1 him over the status of your cases even just to
2 vent or to chat as colleagues?

3 A. Sure. His office was
4 right next door to me so he would often hear me
5 talking about claims. So we would talk from time
6 to time about claims very generally. Generally
7 speaking, if there was one that came by that I
8 wanted -- it was worth a discussion to talk about
9 on whatever level, you know, if it was interesting
10 or for whatever reason, it's just really more of a
11 casual -- casual discussions.

12 Q. Turning now back to the
13 Red Hill, Registrar, can you bring up HAM61930.
14 If you go to image 3 first, please. And if you
15 can call out Ms. Crawford's e-mail at the bottom,
16 just a little bit bigger.

17 So this is an e-mail from
18 Ms. Crawford to you and to Gary Kirchknopf as well
19 to Mr. Shillington with whom she worked. And she
20 writes to Gary we have three separate matters for
21 the City of Hamilton involving accidents on the
22 Red Hill.

23 So just stopping there, did
24 you give Ms. Crawford or Mr. Shillington
25 Mr. Kirchknopf's name as a person to contact about

1 these three separate matters?

2 A. Yes, I'm sure I would
3 have given them his name as a contact. I seem to
4 recall going back then it was after Hart Solomon
5 had left and Gary I think was kind of put into
6 that position. He was certainly the person I was
7 going to start with to say where are we going to
8 get what we need for defence counsel to do their
9 jobs.

10 Q. Why were you copied on
11 this e-mail, if you know?

12 A. Because I think Gary may
13 or may not have been aware of Colleen and
14 Shillingtons because they were external counsel,
15 and public works and City staff are usually
16 accustomed to dealing with internal legal counsel.
17 So they are going to get a request from Colleen.
18 They may not know who Colleen is, and they -- she
19 would be copying me on it so that Gary knew that
20 this is certainly City of Hamilton's counsel, and
21 if they had any questions or concerns about
22 working with Colleen they could reach out to me.

23 Q. Registrar, you can close
24 this down and if you could go and pull out the
25 image 1 and 2.

1 And at the very bottom of
2 image 1 you'll see it says "hi, Dan," and this is
3 from Gary.

4 Registrar, can you pull out
5 the top of image 2.

6 So Mr. Kirchknopf said that
7 he:

8 "My director advised me to say
9 that due to the complex nature
10 of these claims -- across
11 three different divisions, we
12 should set up a meeting with
13 Mr. Moore, Mr. Mater and Mr.
14 Shynal." (As read)

15 Registrar, you can close that
16 down.

17 Was that unusual to have three
18 different divisions involved at the outset of a
19 claim?

20 A. Was it unusual? It's not
21 unusual to have multiple divisions involved in a
22 claim.

23 Q. And then if you could
24 call out the second e-mail down on January 15th,
25 from Diane Sabados. Registrar. Thank you.

1 So you said suggested that you
2 would attend this meeting on behalf of risk
3 management along with Mr. Shillington's office.
4 Do you see that?

5 A. Yes.

6 Q. Was it your practice to
7 attend meetings between defence counsel and City
8 staff?

9 A. No, it wasn't. It
10 wasn't, but sometimes I would offer myself to be
11 there, especially if staff were not used to
12 dealing with external counsel. And really my role
13 there is more to again hold hands and facilitate
14 and, you know, provide some direction or
15 reassurance to staff if they had any questions
16 about Mr. Shillington's involvement.

17 Q. Registrar, could you
18 close this down and go to OD6, page 104, please.
19 If you could call up 275.

20 So tracking that process, that
21 meeting is scheduled on -- for February 21, we can
22 see through e-mails I'm not going to take you to
23 now. And Mr. Mater can't attend and sends
24 Mr. Chris Jacobson. Do you recall attending a
25 meeting with Mr. Moore, Mr. Shynal and

1 Mr. Jacobson and Shillingtons in February of 2014?

2 A. I don't remember. It
3 doesn't mean I wasn't there; I just don't
4 remember.

5 Q. Do you recall if there
6 was any discussion at this meeting about friction
7 testing or friction levels on the Red Hill?

8 A. No.

9 Q. No, you don't remember?

10 A. I don't remember. Sorry,
11 I don't remember, no.

12 Q. That's all right.

13 A. If I was there it was
14 really to coordinate getting the information to
15 Shillingtons that they need insofar as disclosure
16 for the purposes of the productions and the
17 affidavit of documents, and if it turned out that
18 we had to go to different individual employees to
19 gather all this information, that would have been
20 purpose of that meeting.

21 Q. Registrar, you can close
22 this down. If you can call HAM64294. And if you
23 can call out all the text just to make it a little
24 bit bigger.

25 Ms. Swaby, you spoke earlier

1 about retaining independent adjustors to
2 investigate. Is Mr. Tollis, to whom this e-mail
3 is sent, is he one of those independent adjustors?

4 A. Yes.

5 Q. And you are referencing
6 the subject line as Hansen and it says this is an
7 attached statement of claim. Hansen is a case
8 that was assigned to you; is that right?

9 A. Yes. Well, it looks like
10 a statement came in and was -- either I received
11 it personally or John would have received it and
12 forwarded it to me.

13 Q. And in terms of who
14 actually had assignment within risk management for
15 it, you were the assigned file handler?

16 A. Yes.

17 Q. And we know there is a
18 second accident that is related to the accident in
19 Hansen, the Bernat matter. Were you also assigned
20 to that one?

21 A. I believe so, yes.

22 Q. And Mr. Tollis as well?

23 A. Yes, I would have to -- I
24 would imagine so, yes.

25 Q. In the third paragraph it

1 says -- so you say -- in the second paragraph you
2 say "I want a police report and a police file,"
3 and then you say:

4 "I can say that unless there
5 is some evidence of a slippery
6 substance on the roadway,
7 which I seriously doubt, we
8 will be denying the claim and
9 looking to the plaintiff for
10 the City's costs."

11 So just stopping there. Can
12 you explain -- you referenced the potential of a
13 slippery substance.

14 A. We have had a few claims
15 over the course of the years involving either a
16 spill on a roadway or incorrect application of a
17 material that we used for winter maintenance
18 conditions, you know, an indication that there was
19 some foreign material on the roadway. And so
20 that's where that reference came from. If I
21 recall correctly, this was an issue of a tire
22 blowing and I would have really honed in on that
23 fact when I was assigning this claim.

24 Q. So there wasn't anything
25 particular in your mind in 2017 that you had

1 knowledge about in terms of slippery substances or
2 slipperiness on the roadway --

3 A. No, I was just thinking
4 of my prior claims experience dealing with a
5 couple of claims involving either spills from
6 vehicles that are driving along, mechanical
7 dysfunction, previous accident, and/or
8 inappropriate application of a treatment on the
9 roadway for the purposes of winter maintenance.
10 So that would have been what was in my mind at the
11 time, my previous claims experience.

12 Q. Thank you.

13 JUSTICE WILTON-SIEGEL:

14 Ms. Lawrence, a matter has come up that I have to
15 deal with very quickly. Could we take a 5-minute
16 break at this point?

17 MS. LAWRENCE: It is 10:45.
18 It's 15 minutes before the time we would normally
19 take our 11:00 o'clock break. I'm in your hands,
20 Commissioner, if you would like to take 5 minutes
21 or if you would like to take a break a little
22 earlier than we would and --

23 JUSTICE WILTON-SIEGEL: Why
24 don't we take a break a little bit earlier and
25 we'll return at 11:00 o'clock.

1 --- Recess taken at 10:46 a.m.

2 --- Upon resuming at 11:00 a.m.

3 MS. LAWRENCE: Commissioner,
4 may I proceed?

5 JUSTICE WILTON-SIEGEL: Yes,
6 please do.

7 MS. LAWRENCE: Thank you. I
8 note the document that we were looking at just
9 before the break is not in evidence yet and I
10 would like to mark it as the next exhibit. It's
11 HAM64294.

12 THE REGISTRAR: Noted,
13 counsel. Thank you. It's Exhibit 180.

14 EXHIBIT NO. 180: One-page
15 e-mail from Diana Sabados to
16 Adam Tollis dated June 5,
17 2017; HAM64294

18 BY MS. LAWRENCE:

19 Q. Registrar, can you bring
20 up HAM52704, please. Can you pull up the next
21 page as well.

22 Ms. Swaby, this is a six-page
23 Spectator article. At least it's six pages in
24 this electronic form. So it's a lengthy article.
25 Do you remember reviewing this article when it was

1 published in July of 2017?

2 A. When it was published
3 likely not. I think it was forwarded to me by
4 Shillingtons potentially as a matter of FYI, if I
5 recall correct.

6 Q. It is correct.

7 Registrar, can you take this
8 down for the moment and bring up HAM61962.

9 Ms. Swaby, you'll see this is
10 July 15, so that's the day it's published.
11 There's a Google alert on the bottom that goes to
12 Ms. Crawford, and then Ms. Crawford on the 17th
13 forwards it to you and to Mr. Thompson and
14 Mr. Shillington at her office. And then you
15 respond:

16 "Hi, Colleen, the site is
17 blocked. Can you confirm
18 which file."

19 Is that what you were thinking
20 of?

21 A. Yes. I know that Colleen
22 would often send me some of the media coverage or
23 would attempt to send me some of the media
24 coverage on various files.

25 Q. Registrar, could you call

1 up now HAM61963.

2 Ms. Crawford then sends you a
3 link rather than the Google alert. She sends a
4 separate link to the Spec website. And you said
5 yes, it was blocked. It might be because we --
6 I'm going through your typos -- are not permitted
7 to blog or write e-mails to the Spec.

8 Just stopping there. So that
9 I understand the internal processes, if you click
10 on that Spec article in this form that she sent,
11 now you would be able to access it or would you
12 not?

13 A. No. I would have tried
14 to and I still couldn't get at it. So it could
15 have been two reasons, and one is -- like at one
16 point there was an account that we had been
17 provided through another department that we might
18 be able to access it without a subscription, but I
19 didn't have a Spectator subscription. The other
20 part of it, sometimes IT blocks certain websites
21 as not being something that they allow us. It
22 might be questionable from a virus standpoint or
23 something along those lines, so sometimes when I
24 try to search things I can't access them through
25 the internet.

1 Q. Mr. McLennan also
2 forwards it to you, and we'll get there in a
3 moment. But just before we do, for Ms. Crawford,
4 I think you said it was not uncommon for her to
5 send you news clippings on relevant cases?

6 A. Yes.

7 Q. Did you review the
8 article sometime around July?

9 A. I couldn't say
10 definitively when I reviewed the article.

11 MS. LAWRENCE: Okay. Before
12 we move on, both the last two documents from --
13 e-mails with Ms. Crawford are not in evidence and
14 need to be marked. So the first one would be
15 HAM61962, which by my count would be Exhibit 181,
16 and then this document, HAM61963, which would
17 be 182.

18 THE REGISTRAR: Thank you
19 counsel. Noted.

20 EXHIBIT NO. 181: One-page
21 e-mail from Diana Sabados to
22 Colleen Crawford dated
23 7/17/2017, 10:23 a.m.; HAM61962

24 EXHIBIT NO. 182: One-page
25 e-mail from Diana Sabados to

1 Colleen Crawford dated 7/17/2017,
2 11:56 a.m.; HAM61963

3 BY MS. LAWRENCE:

4 Q. Registrar, you can close
5 this down, and if you can bring up HAM61 -- sorry,
6 let me make sure I have it right -- HAM26216. You
7 can call that out just to make it a little bigger.

8 This is the same day and this
9 is the e-mails between you and Mr. McLennan. And
10 you'll see he forwards it to you from the
11 Hamiltonnews.com service. Were you able to access
12 the Hamiltonnews.com link?

13 A. I would say no from this
14 only because it says I couldn't access because IT
15 blocked it. Not all bad. I'm not sure,
16 apparently there's an e-mail to a journalist on
17 one of my claims saying they are not pursuing -- I
18 would have probably been providing that, again
19 going back to my claims experience and talking
20 about previous claims, somewhere I got that
21 information but I can't recall now where it came
22 from.

23 Q. Do you recall if you
24 spoke to Ms. Crawford who conveyed that to you?

25 A. It could be. She would

1 have been my source of giving me some information
2 because I didn't proactively review media
3 coverage.

4 Q. Did you speak to
5 Mr. McLennan about the article that he forwarded
6 to you?

7 A. I likely had some
8 conversation with him about them, a candid
9 conversation about media coverage.

10 Q. In that conversation did
11 he explain what he meant by "not all bad"?

12 A. I can't recall any
13 specific conversation about it and what he would
14 mean by "not all bad." I would have to look at
15 that article again to form an opinion about what
16 he meant by that.

17 Q. So I presume this is not
18 the first or only instance where you receive a
19 media report that's related to your claims. You
20 said Ms. Crawford sent it to you. Typically what
21 were your practices upon receipt of an article
22 like this in terms of files management?

23 A. I -- what would I do with
24 them? It might go in my file as a matter of an
25 FYI as some information that came in which would

1 ultimately -- if it was pre-litigation it would
2 end up being shared with defence counsel assigned
3 if it ended up going to litigation.

4 Sometimes when I get a notice
5 of a claim in and it doesn't have very much
6 information I might try going on the internet and
7 seeing if I could find some information about an
8 accident on a particular roadway. That might be
9 the only time I do a proactive search looking for
10 some information, just to try and assist our
11 external adjustor insofar as identify perhaps a
12 specific location in order to conduct a field
13 investigation.

14 Q. Here, where defence
15 counsel already been assigned, would you review
16 media articles to assist defence counsel?

17 A. In this case defence
18 counsel is giving it to me, so it would be more of
19 an FOI to me as opposed to me doing something for
20 them, I suppose. Does that answer the question?

21 Q. It does. But of course,
22 you have more knowledge about the way the City
23 works internally, and there may be nuances within
24 City departments or information that would be in
25 your knowledge but not necessarily defence

1 counsel. And so would you review it for that
2 purpose?

3 A. No, and really to
4 dovetail that point, I'm really almost in the same
5 position as defence counsel is. Whatever
6 information they have is the last information that
7 I have.

8 And so if they are actively
9 involved in it, now they have -- there might be
10 information that's gleaned from that article and
11 that would certainly behoove them to review that
12 with the contact in the client group to get
13 whatever further information is needed for the
14 purposes of defending that particular claim or any
15 of the claims that they were handling.

16 Q. In this case this is
17 involving the Red Hill. So it's not just
18 Shillingtons who has cases or could have cases
19 about the Red Hill so you are repository for
20 information for others. Would you agree with
21 that?

22 A. Yes, but in my mind I
23 thought I had all of the Red Hill claims. I
24 didn't realize that there were some other ones
25 that were out there. Well, I suppose there were

1 some with in-house counsel, but I don't recall
2 them being as active as the Shillingtons
3 litigation, which would have been the top of my
4 list, having regard to them being reported to the
5 insurers and we're working with the insurers and
6 staying on top of them.

7 So I was very certainly
8 reactive to -- as a matter of priority to the
9 communications as people are reporting, as defence
10 counsel reporting to us, those are the ones that
11 are at the top of my list.

12 Q. Registrar, could you call
13 out HAM52704 image 2, please.

14 This is the second page of the
15 article. That first page has the picture and then
16 this is where the text starts.

17 Registrar pull up the first
18 five paragraphs, please.

19 Ms. Swaby, in the second
20 paragraph there's a reference to City of Hamilton
21 statistics that show many crashes happened in the
22 curvy parts of the road. Were those statistics
23 generally, City of Hamilton statistics about
24 crashes, provided to risk management?

25 A. Not to me. They

1 weren't -- they might be eventually in the context
2 of a specific claim, and as we investigate each
3 claim we would be -- we would ask for such things
4 as a collision history as part of the
5 investigation for each individual claim. But as
6 an aside, if there was no claim I wasn't involved
7 in monitoring ongoing collision histories on a
8 general level.

9 Q. The fourth paragraph says
10 rumour and speculation about the Red Hill being
11 slippery have plagued the parkway since it opened
12 in 2007. And you've already given evidence that
13 you didn't have any sense of anecdotal complaints.
14 If you have any -- did you know about the rumours
15 and speculation that are referenced in this
16 Spectator report?

17 A. No, not -- it would be --
18 it would be these very articles that bring that to
19 my attention as something that certainly the
20 Spectator has that information. They probably
21 have more than me at that point.

22 Q. The last paragraph in
23 this callout, the fifth paragraph of this image,
24 the City has done limited friction testing on the
25 road but refuses to make the results public,

1 saying only that they were ultimately
2 inconclusive.

3 When -- perhaps I'll just
4 circle back. Can you pinpoint when you did read
5 this article?

6 A. No, I don't think I can
7 remember when exactly I did it. It would be
8 unlikely I read it when it was published. It
9 would have been sometime after it was brought to
10 my attention.

11 Q. When you read it did you
12 turn your mind to the fact that friction testing
13 might be a responsive document in the lawsuits
14 that you were overseeing?

15 A. Not really, no. That
16 would be the responsibility of defence counsel and
17 they would be doing -- looking at as they -- in
18 the context of each individual claim.

19 Q. Registrar, could you
20 close this down and go to image 4. Can you go to
21 the next image, please.

22 Ms. Swaby, this is quite a
23 long article. I'm not going through all of it.

24 Registrar, could you call out
25 the bottom half of this page, please.

1 So the third paragraph down it
2 says the 2015 engineering report on the Red Hill
3 stated crashes on the road between 2008 and 2015.

4 By this time, so this is
5 July 2017 when this is published, had you seen the
6 2015 CIMA report which I believe is what is being
7 referenced here?

8 A. No, I don't believe so.

9 Q. That same paragraph goes
10 on to say there is median-related collisions and
11 there is -- more than half of these crashes
12 happened when the road was wet.

13 As of July 2017 do you recall
14 discussing with anyone the frequency of wet
15 weather accidents on the Red Hill?

16 A. No.

17 Q. Registrar, you can close
18 this callout.

19 So you told us earlier that
20 your practice was to print out relevant
21 correspondence and file them in a particular file.
22 Did you do that with this article?

23 A. I'm not completely sure
24 that I was able to print it off, based on looking
25 at this. I would have to look at my file.

1 Certainly Shillingtons would have had it at that
2 point. Shillingtons is reporting to myself and to
3 the insurer, and I gather from the communications
4 happened that (sic) thereafter, Shillingtons was
5 actively looking for some more documents from our
6 client group likely to certainly deal with some of
7 the information that's been put forth in this
8 article.

9 Q. You said also that
10 sometimes you would file something within your
11 e-mails for reference if you thought it might be
12 useful later. Was this a document -- or the
13 article, is this a document you did that with?

14 A. No. Articles are not
15 evidence to me. They are reporting and I don't
16 put a lot of weight on newspaper articles.

17 Q. Registrar, could you
18 bring up HAM64106, please. Could you call out --
19 go to image 3, first, please. Sorry, image 2.
20 Thank you. Registrar, can you call out
21 Ms. Lezau's e-mail at the bottom. There's just
22 some weird spacing on this. Registrar, can you
23 close that down and can you go to image 5, please.

24 Okay. It was image 4, all
25 right. That's where I wanted to be. Thank you,

1 Registrar. That wasn't coming up before for me.

2 Can you call out Ms. Swaby e-mail there, please.

3 You send an e-mail to

4 Ms. Lezau attaching a statement of claim in

5 Bernat, which we already talked about, relating to

6 the Hansen matter. And it says Adams

7 investigation is continuing, and you say please

8 deliver a defence based on the same principle.

9 Just stopping there.

10 Ms. Lezau, she is a solicitor within the City's

11 legal services division; is that right?

12 A. Yes. Was.

13 Q. And she at the time was

14 the defence counsel assigned to the Hansen and

15 Bernat matters?

16 A. Yes, I think so.

17 Q. Was there a reason that

18 the Hansen and Bernat litigation stayed in-house

19 where some other Red Hill files went -- were

20 assigned externally?

21 A. If it came to me and it

22 was -- and it certainly met the criteria for

23 reporting to the insurer such that Shillingtons

24 was involved, those large ones, I was of the -- I

25 certainly was of the preference that Shillingtons

1 handled all of them if I could get them -- because
2 that way they would be aware and deal with them
3 all consistently and be able to make sure they had
4 all of the information on all of them.

5 This particular one stayed
6 in-house. Dana Lezau wanted to keep it in house
7 and it may or may not have at that time, I may not
8 have had enough information yet. I'm not quite
9 sure. It met criteria to remain in-house. And so
10 that may have been the reason why this one stayed
11 in-house at that particular time.

12 My comments here as well again
13 come from a claims experience perspective.

14 Q. Registrar, you can close
15 this callout, and can you go to image 2, please.

16 I called out a moment ago but
17 we didn't actually go through the bottom e-mail
18 from Ms. Lezau, which you're not copied on, just
19 dealing with logistics of defence.

20 A. Yes.

21 Q. Registrar, you can close
22 that down. If you can call out Mr. Sabo's e-mail.

23 So Mr. Sabo, again on an
24 e-mail you're not copied on, says this may be
25 somewhat related to recent articles in the

1 Spectator questioning the choice of paving
2 material. This story has a staffer saying they
3 wouldn't release a study done on the surface to
4 the effect that everyone would sue us so I expect
5 the study will be a relevant record.

6 Close that down and if you can
7 go to image 1, please. So you do get brought back
8 into this after that exchange.

9 Registrar, could you bring in
10 the bottom e-mail. You say: "Are you aware of
11 this study? Do you know where Donna (sic) --" and
12 she says, "Do you know where Donna and I can
13 obtain a copy?"

14 Registrar, you can close this
15 down. And then at the top if you can call out
16 Ms. Swaby's e-mail and response. You say:

17 "I fail to see how the type of
18 material used on the roadway
19 -- used on the road caused the
20 tire to blow. Thousands of
21 vehicles traverse this road
22 every day. In the event I'm
23 not aware of any City I would
24 try Marco Oddi."

25 Registrar, you can close that

1 down.

2 So at the time you're having
3 this e-mail exchange, which is August 10th of
4 2017, it's about three weeks after the Spectator
5 has released that article, do you make the
6 connection between Mr. Sabo's e-mail and his
7 reference to the Spectator and the article that
8 you were sent from Ms. Crawford and Mr. McLennan?

9 A. Have I made the
10 connection? Well, to me it would seem that Ron
11 Sabo is certainly providing that information on
12 the same wavelength as John McLennan has and
13 Colleen Crawford has in the sense that there's an
14 article out there that suggests that the pavement
15 and surface material might be an issue. Again, so
16 I'm hearing it from three different sources. We
17 all know it now. The next step is go to Marco
18 Oddi and find out that information.

19 Q. Why would you go to
20 Mr. Oddi instead of Mr. Moore who is referenced in
21 the article?

22 A. Marco Oddi was our
23 contact for all of the Red Hill litigation, our
24 primary discovery deponent, and as I understood
25 it, he -- he reported to Gary Moore.

1 Q. So is your response here
2 consistent with your practice where defence
3 counsel asks about a document you don't have or
4 you aren't aware of, that is, here you direct them
5 to a staff member?

6 A. Absolutely. It always
7 goes to the deponent or the representative of the
8 City as the litigation moves forward. I have what
9 I have in the course of our risk management
10 investigation, and then when counsel takes over
11 and we start pulling away the layers it's quite
12 normal to have considerable more documents
13 produced once defence counsel is assigned.

14 Q. But you didn't take any
15 other steps to provide information to Ms. Morrison
16 or Ms. Lezau?

17 A. The expectation is
18 defence counsel and their team deal directly. I
19 don't normally get involved with further
20 investigation requests once defence counsel is
21 involved unless they are asking for an external
22 person to be retained to do some sort of field
23 investigation.

24 Q. Registrar, can you bring
25 up OD7, page 190 and 191, please. Thank you. Can

1 you call out 560 to 562.

2 I'm just jumping back in time
3 a little to July 20th. Ms. Crawford e-mailed
4 Mr. Ferguson under a subject line Melo/Lee/Barlow.
5 And just stopping there, when she sent you the
6 link to the Hamilton Spectator she doesn't
7 reference the particular file name and you say
8 which file.

9 Was it clear from your back
10 and forth that Ms. Crawford was talking about the
11 Melo/Lee/Barlow file when she sent you that
12 Spectator link?

13 A. No, because they had
14 claims on the LINC and on Red Hill that they were
15 defending for the City.

16 Q. So Ms. Crawford e-mails
17 Mr. Ferguson, that's David Ferguson in traffic,
18 and says:

19 "We represent the City, we
20 would like to arrange a
21 telephone conference with you
22 to review the roads, the
23 recent friction study
24 completed by the City and the
25 proposed road work."

1 Why was Ms. Crawford reaching
2 out to Mr. Ferguson? Did they have some previous
3 interaction that would lead to her viewing him to
4 be the appropriate person?

5 A. I'm not -- I'm not sure
6 where she got Mr. Ferguson's contact information
7 from, whether it was through previous e-mails that
8 had been exchanged that she was already -- had in
9 her possession or whether -- I know that she was
10 making inquiries trying to get information from
11 different people, recognizing that we had two or
12 three different sections that potentially could be
13 responding. So I'm not sure why she chose
14 Mr. Ferguson.

15 Q. Okay. Registrar, you can
16 close this down and if you can call out 567.
17 Actually, sorry, before you close that out.

18 Just to orient you, Ms. Swaby,
19 Mr. Ferguson says when it comes to friction
20 testing, Gary Moore should be approached as I've
21 not seen the results nor have I been involved in
22 the process. So sorry, just to close that loop.

23 Registrar, if you can close
24 this down. If you can call out 567.

25 So this is our overview

1 document which is a summary of e-mails. I'm not
2 going to take you to the underlying e-mail, but
3 you'll see here Ms. Cameron, who is Mr. Moore's
4 assistant, and Ms. Crawford exchange e-mails on
5 August 11th to set an appointment for Mr. Moore
6 and Ms. Crawford to speak.

7 You're not copied on those
8 e-mails. Did you attend the conference call
9 between Mr. Moore and Shillingtons?

10 A. I don't believe so. I
11 certainly don't have a recollection of that.

12 Q. Were you otherwise aware
13 that Ms. Crawford was going to have a call with
14 Mr. Moore?

15 A. I don't know specifically
16 that there was going to be a call, but I know that
17 Colleen was actively working on trying to get all
18 of the documents assembled, and I gave it -- I
19 certainly suggested to her to go ahead and reach
20 out to staff as she felt the need to get what she
21 needed.

22 Q. My question was more
23 about your knowledge at the time -- in this way.
24 You're not copied on that. Was that consistent
25 with your practices with Shillingtons about how

1 involved you were when their staff were dealing
2 with City staff?

3 A. I did not need to be
4 copied on every communication. There was no
5 expectation that that happened.

6 Q. What about updates? If
7 Shillingtons was going to speak to a City staff
8 member would they let you know that?

9 A. No, not necessarily.

10 Q. And would they let you
11 know that if such a call had happened after it
12 happened?

13 A. Eventually it would
14 happen in a reporting letter when they are
15 summarizing their further investigation or further
16 assembling documents and what they glean from it,
17 eventually I would. They are more likely to reach
18 out to me when they are not getting the
19 cooperation from the client department and not
20 getting what they need and they need me to help.
21 That's more likely when I would expect them to
22 call me.

23 Q. I see.

24 Registrar, can you close this
25 down and go to the next page, 192. If you can

1 call out the top half of that page before
2 heading FF.

3 On August 15th, which is the
4 day of the call, Mr. Moore e-mailed Ms. Crawford
5 under the subject line "Red Hill friction report."
6 He didn't copy you on that e-mail or anyone
7 besides Ms. Crawford. And he says:

8 "As requested, the testing was
9 done in late 2013 and I
10 received it in early 2014."

11 And he attached a copy of the
12 Tradewind report to that e-mail.

13 We know that you later
14 received a forward of this e-mail and the attached
15 Tradewind report from Ms. Crawford in July 2018
16 and that you also received a reporting letter from
17 Shillingtons in which it's mentioned.

18 Leaving those aside and
19 casting your mind back to mid-August 2017, did
20 anyone at Shillingtons advise you that they had
21 received the Tradewind report from Mr. Moore in
22 August?

23 A. I can't remember. I
24 would have to look for an e-mail confirming that.

25 Q. Well, we're several years

1 into this inquiry. Have you not already gone and
2 looked?

3 A. No. They would be in
4 my -- I did not review all my Red Hill or my
5 claims files, if that's what you're asking.

6 Q. Ms. Swaby, this is a
7 critical point. Casting your mind back to 2017,
8 can you please really search your memory, and I
9 think we've received all of your documents, we
10 don't have a document that suggests that
11 Shillingtons advised you. Do you recall either
12 way if Mr. Shillingtons or anyone at his staff
13 advised you that they received a Tradewind report
14 from Mr. Moore in August of 2017?

15 A. I can't remember. It's
16 seven years ago.

17 Q. Okay. If you had
18 received such an update would you have made a note
19 of it?

20 A. It would be in my file.
21 There would be -- it would be the e-mail with it
22 attached and it printed off. It would be in the
23 file.

24 Q. Leaving aside a document
25 exchange or an e-mail exchange, would Ms. Crawford

1 in her usual practice, knowing her as you do, have
2 sent you -- have called you or left you a voice
3 mail about this, or would that be over and above
4 her usual practice with you?

5 A. It's probably -- they
6 don't report everything that they do on their
7 files. I get milestone reporting -- reports. She
8 may have called me, she may have not, and either
9 would have been completely acceptable.

10 Q. Registrar, can you go to
11 HAM64111. And can you call out from "Dear
12 Mr. Thompson" to "yours very truly."

13 So this is an e-mail that
14 you're not copied on, and it's an e-mail to
15 Mr. Thompson at Shillingtons from counsel in the
16 reference cases Maria, Lee and Vanderburg, which
17 am I correct is part of the Melo/Lee/Barlow
18 litigation? That's the L-e-e.

19 A. Yes, I believe there was
20 two or three statement of claims issued as arising
21 from that motor vehicle accident.

22 Q. Counsel asks:
23 "Will you please immediately
24 provide our office with your
25 client's affidavit of

1 documents and copies of all
2 Schedule A productions
3 including -- to include copies
4 of friction testing conducted
5 by the City of Hamilton." (As
6 read)

7 So this goes to Mr. Thompson;
8 it doesn't go to you. Were you aware that
9 plaintiff's counsel was making these requests for
10 friction testing -- sorry, Registrar, you can
11 close this down for a moment. You'll see this is
12 August 11th.

13 Were you aware then or in
14 about August of 2017 that plaintiff's counsel was
15 making this request for friction testing results
16 in particular?

17 A. I know that plaintiff's
18 counsel were asking for friction testing
19 specifically and Shillington's office was working
20 on getting that information.

21 Q. How did you know that
22 plaintiff's counsel was asking for friction
23 testing specifically?

24 A. I think it was as a
25 result of the Shillington's inquiries about

1 friction testing to the client group.

2 Q. You weren't copied on
3 those. How did you know?

4 A. How did I know? Isn't
5 there -- I seem to recall there was a previous
6 e-mail where they are asking about friction
7 testing. It's raised in the article; they are
8 looking for it. That's my best recollection, that
9 it did come up, that people were asking about the
10 friction testing in the course of the litigation.
11 Whether it was before or after this, I'm not sure.
12 I'm not good with dates and timings.

13 Q. So I know it's quite
14 difficult to separate out what you knew at the
15 time with what you know now, and you've prepared
16 for today and you've gone through interviews and
17 you've looked at documents and it's very hard to
18 not pollinate your memory with what you know now.
19 But going back in time, do you recall that anyone
20 from Shillingtons who specifically advised you
21 that the plaintiff's counsel was looking for these
22 friction testing reports?

23 A. I can't recall without
24 looking at a report saying plaintiff's counsel is
25 asking for it. I wouldn't be able to recall that

1 now. I do not have an independent recollection.

2 I rely heavily on the reporting letters.

3 Q. Okay. There was a report
4 letter that came in January of 2018, so that's
5 several months after what we're looking at now in
6 August of 2017. So you don't remember either way
7 whether Shillingtons advised you between August
8 of 2017 and January of 2018 when they sent a
9 reporting letter about the specific request for
10 friction testing?

11 A. No.

12 Q. Registrar, could you make
13 this document the next exhibit. It's HAM64111,
14 and it's Exhibit 183, by my count.

15 THE REGISTRAR: Noted,
16 counsel, thank you.

17 EXHIBIT NO. 183: Letter dated
18 August 11, 2017 to David
19 Thompson; HAM64111.

20 BY MS. LAWRENCE:

21 Q. Thank you. Let's go to
22 that reporting letter in January of 2018. It's
23 HAM64357.

24 So the first page, at least of
25 the document the inquiry has, is not very helpful.

1 But just looking through, it's sent you to
2 January 31, 2018, and it's referenced to Melo,
3 Barlow and Lee. See in the subject line.

4 A. Yes.

5 Q. Go on to the next page,
6 please.

7 Ms. Swaby, have you had a
8 chance to review this document recently?

9 A. Yes.

10 Q. So I'm not going to take
11 you through all of it, I do have some questions
12 about the substance of it. But before we get into
13 it I would like your -- to understand what your
14 expectations were of defence counsel.

15 What information did you
16 expect defence counsel to include in a reporting
17 letter to you? And perhaps I'll just direct you,
18 or maybe I'll ask you a few different things and
19 then you can speak to it just so that we can
20 tailor your response to the questions I'm
21 interested in.

22 Did you expect defence counsel
23 to provide you about updates with meetings with
24 staff?

25 A. Yes. Not every detail,

1 but what's material and relevant, yes.

2 Q. What about the status of
3 document collection?

4 A. If there were still
5 matters outstanding that they were looking to get,
6 they would say that we're still working on getting
7 those documents and that there might be a further
8 opinion that happens after that, after they review
9 those documents.

10 Q. What about identifying
11 gaps in document collection or knowledge of
12 defence counsel?

13 A. What do you mean by
14 "gaps"? Meaning that something exists and it's
15 not there, or not being able to answer some of the
16 questions because there's -- there aren't
17 documents?

18 Q. Would you expect updates
19 about both of those things?

20 A. Eventually if once the
21 investigation is complete and all the inquiries
22 have been exhausted and they determine, yes, there
23 is more or there isn't any more and this is it and
24 this is the assessment we have now based on a
25 complete review, yes, eventually it would come.

1 Q. Would you expect an
2 update on the status of litigation, you know,
3 where they were in the process of whether
4 pleadings had closed, whether they had -- how they
5 were doing in their affidavit of documents, if
6 there was examinations for discovery scheduled,
7 that sort of thing?

8 A. Yes.

9 Q. And you told us earlier
10 that your practice was to print documents and put
11 them in your physical file. Reporting letters
12 would be included in that practice?

13 A. Yes, yes, I would print
14 off the communications from counsel once they took
15 over.

16 Q. Was it your practice to
17 review reporting letters upon receipt?

18 A. Eventually. Not upon
19 receipt. I had hundreds of claims, and so I may
20 look at them. I would try to look at them as soon
21 as I can to make sure, skim through it quickly to
22 see what they need from me, but if it was just
23 moving forward status quo, nothing particular,
24 nothing -- no real change, just moving ahead, it
25 might be shelved and looked at a little bit later,

1 because my primary purpose is to look for, A,
2 material change in opinion.

3 I got to worry about reserves,
4 making sure reserves are being increased or
5 decreased appropriately. Any requests of me for
6 assistance, whether finding they're having
7 difficulty getting information from the client
8 department, and looking for information that way,
9 I would assist with that.

10 Yeah, anything specific to me
11 that they needed my attention to do to help with,
12 that would be my priority right away. But it
13 wasn't uncommon for me for a report to sit for a
14 few months before I looked at it.

15 Q. Do you have a specific
16 recollection of reviewing this particular
17 reporting letter?

18 A. I don't have a specific
19 recollection of reviewing it, but I assume I would
20 have at some point.

21 Q. Do you know when you
22 would have?

23 A. No, not offhand.

24 Q. Image 2, the image we're
25 on right now, Registrar, could you pull out City

1 of Hamilton records and the content that's under
2 that heading up to pre-accident concerns.

3 So this contains a bit of a
4 summary of the information that follows. And
5 Shillingtons says:

6 "It's difficult to separate
7 the pre-accident and
8 post-accident complaints and
9 traffic tasks pertaining to
10 the LINC."

11 Just stopping there. To your
12 recollection, the Melo, Lee and Barlow matters,
13 they involved accidents on the LINC, not the Red
14 Hill; is that right?

15 A. Yes.

16 Q. Shillingtons says:

17 "As many of the issues in the
18 studies were over a lengthy
19 period of time which overlaps
20 with the collision, traffic
21 engineer reports received post
22 accident addressed several
23 traffic issues that have
24 arisen in the years leading up
25 to the 2014 collision. To

1 further complicate matters,
2 certain engineering studies
3 commissioned prior to the
4 accident were never submitted
5 to council due to deficiencies
6 of the calculations. Overall,
7 the results are that
8 post-accident traffic
9 engineering reports don't
10 raise concerns regarding the
11 design or operation of the
12 LINC. Inter-office e-mails
13 and buried reports, however,
14 do raise issues that have to
15 be addressed in order to
16 successfully defend these
17 actions."

18 Stopping there, and then we're
19 going to go to what I think is a further reference
20 to the complicating matters.

21 Registrar, can you close this
22 down and go to image 5, please. If you can call
23 out the first third of that under "Friction
24 Testing Survey Summary Report."

25 Shillingtons references they

1 have been provided with a copy of the friction
2 testing survey summary report, and they reference
3 that:

4 "I, Gary Moore, advised that
5 the City commission the report
6 as it was considering repaving
7 operations."

8 Just stopping there. Is it
9 unusual that in this case there's a reference to
10 Mr. Moore, but it's not very clear whether
11 Shillingtons has spoken to Mr. Moore or if he's
12 the one who provided the friction testing survey?
13 Is this level of detail consistent with your
14 expectations for reporting letters?

15 A. Yes.

16 Q. The Shillingtons
17 reporting letter goes on to say:

18 "Testing confirms that
19 friction values for the LINC
20 were superior to the Red
21 Hill."

22 And it references the
23 manufacturer used and that there are no directly
24 applicable reference standards or guidelines to
25 compare to in Canada or the U.S. And then it

1 says:

2 "In conclusion, all areas of
3 LINC measured had friction
4 values comparable to or above
5 the relevant UK investigatory
6 level 2 consistent values
7 across lane positions, which
8 indicate generally uniform
9 pavement structure, texture
10 and composition. We are
11 advised that the friction
12 report did not go to counsel."

13 (As read)

14 Spelled as if like legal
15 counsel, and the other one earlier spelled as
16 council like city council.

17 When you read this did you
18 understand that Shillingtons was raising a concern
19 that this report had not been provided to the
20 public works committee or to City council?

21 A. No, I didn't glean that
22 from reading this report. It's a report about the
23 pavement -- it's about we know the accident
24 happened on the LINC. He has the friction
25 testing. It's saying that it is -- that

1 there's -- what did he say here? Concerning
2 repaving, testing and friction levels, values for
3 LINC were superior to the Red Hill; that there's
4 no standard. The LINC had friction values
5 comparable to or above a UK standard. That
6 doesn't cause concern to me.

7 Insofar as the reference to
8 going to City council, I really wouldn't turn my
9 mind to that because that typically is not
10 something that would affect the legal exposure of
11 a claim. Whether or not something went to
12 council, that might be an ancillary or a
13 subordinate fact if that was an issue whether or
14 not something went to council. That typically
15 wasn't something that was relevant to assessing
16 legal exposure.

17 Q. Registrar, can you close
18 this and go back to image 2, please. If you can
19 call out the same callout as before under City of
20 Hamilton records. It says specifically in the
21 third paragraph:

22 "Inter-office e-mails and
23 buried reports, however, do
24 raise issues that will have to
25 be addressed in order to

1 successfully defend these
2 actions."

3 I infer from that that there
4 actually -- that there could be some impact on
5 liability and the defence of this claim. Is that
6 how you read that as well?

7 A. No, and I don't know --
8 well, I think there's an expectation that you have
9 to explain -- when City staff choose to take a
10 certain course in their responsibilities and their
11 work, if there's something out there and it wasn't
12 addressed or dealt with, they have to be prepared
13 to explain it, and that will fall to them.

14 So I'm not sure about the
15 reference to the word "buried." I don't know I
16 would classify it that way, but I really have no
17 knowledge about when public works decides what
18 needs to go or be reported to City council or not.
19 I've never historically been involved in that
20 process or understand how they operationally work
21 and decide when things go to council -- City
22 council or not.

23 Q. Buried reports is
24 really -- it's a term that might leap off the page
25 as you're reading it. Did you take any steps to

1 confirm with Shillingtons what they meant by
2 buried reports?

3 A. No, I don't know that I
4 would agree with it. It jumps off the page
5 obviously because it suggests some kind of
6 nefarious activity, but I don't know that I would
7 necessarily agree with that.

8 Q. I'm not asking if you
9 would agree with it. I'm not asking anything
10 about the characterization of that. I'm saying
11 when you saw that phrase, which leaps off the
12 page, did you go back to Shillingtons and say,
13 what are you talking about, buried reports? Which
14 reports? What do you mean?

15 A. No, I wouldn't say that.
16 A lot of times there are documents that are out
17 there that if you don't specifically ask a client
18 group for it, they aren't necessarily going to
19 pick up that it's relevant or not or that it
20 should be produced.

21 Q. Do you think that
22 Shillingtons would have called something that
23 just -- that City staff might not have realized
24 was important, a buried report?

25 A. Do you think they -- I

1 don't know what was going through -- I don't know
2 why he chose the reference to "buried." If he had
3 given me more of an explanation in here about why
4 he calls it buried, then I will would be able to
5 respond to that better.

6 Q. And you didn't ask for
7 more clarification about what he meant by that?

8 A. Well, it is what it is.
9 We were going to deal with that as it moves
10 forward in the course of this litigation. That's
11 why he's saying he's going to have to address it
12 to successfully defend these actions. I would
13 expect that there's going to be a further
14 explanation that comes out about that.

15 Q. You didn't ask him in
16 respect of this letter for clarification about
17 what he meant by that phrase "buried reports"?

18 A. Well, I would assume that
19 he's going to be writing me further about it.

20 Q. It is a yes or no
21 question. Did you ask for more clarification
22 about what -- Mr. Thompson is the author. What he
23 meant by buried reports?

24 A. Did I did ask him? No, I
25 didn't ask him, not at that time, but there would

1 be an expectation at some point that we deal with
2 that issue.

3 Q. Thank you. We looked
4 before at e-mails from Mr. Sabo and Ms. Morrison
5 from August of 2017 where they are referencing
6 information about studies on the Red Hill and the
7 pavement surface that was used. Did you make the
8 connection between the studies referenced in the
9 Shillingtons letter and the summary -- and
10 particularly the summary of the Tradewind report
11 on image 5 that we were just looking at and the
12 studies that legal service staff had inquired
13 about?

14 A. So again reference --
15 that Cheryl Morrison e-mail, when was the date of
16 that?

17 Q. It was August of 2017, so
18 about six months before you received this
19 reporting letter.

20 A. So the question is?

21 Q. Did you make the
22 connection between that e-mail exchange you had
23 with Ms. Morrison and referencing Mr. Sabo's
24 information about pavement surface to the
25 information that is set out in this reporting

1 letter?

2 A. No, likely not, because I
3 would have been having my LINC and Barlow hat on,
4 if you will, the Melo/Lee matter. I'm thinking in
5 the context of the LINC and not that context.

6 Q. The letter -- this
7 reporting letter is addressed only to you. To
8 your knowledge, did anyone else at the City
9 receive a copy of this letter?

10 A. The letter was only
11 addressed to me, but it would have been sent to
12 the City's insurer as well. It wouldn't have been
13 sent to anyone else at the City.

14 Q. Did you provide a copy of
15 this letter to anyone else at the City when you
16 received it?

17 A. No.

18 Q. Registrar, you can close
19 the call out. Was there anything in this letter
20 you that felt needed to be escalated to a
21 superior?

22 A. No. We're in the middle
23 active litigation. It typically does not get
24 escalated until we are at that point where we
25 identify a real exposure, and we're not there yet

1 necessarily.

2 Q. Registrar, you can close
3 this down, and can you go to HAM64296, please.
4 Can you call out from the first half of this, top
5 half of this document. That's perfect. Thank
6 you.

7 This is just a little bit
8 before in time, so we're just looking at the
9 reporting letter that is January 31, 2018. This
10 is about a month before December 22nd, 2017, just
11 before the December holiday period. And you
12 e-mail Adam Tollis about the Hansen case and you
13 say:

14 "This claim has morphed into a
15 large loss. We can't leave
16 any stone unturned. So far we
17 have traffic records. There's
18 much more to do. Please
19 review with John the
20 investigations in
21 Ghulam-Mastafa and Gawrylash."
22 Who is John there?

23 A. John Kirshenblatt -- it
24 would be John Kirshenblatt, and he was an
25 adjustor, a senior adjustor if you can call him

1 that, at I guess it would've been Cunningham
2 Lindsay at the time who had familiarity and
3 experience in dealing with some of our large loss
4 Red Hill claims adjusting.

5 Q. Thank you. So you say:

6 "We need to interview
7 witnesses and we need to
8 likely retain experts, review
9 black books information if
10 available, roads patrol, et
11 cetera, a full work-up."

12 And then you say:

13 "Donna Lezau is handling this
14 file. It is her first on the
15 Red Hill involving a large
16 loss."

17 And then you say:

18 "She'll be attending my office
19 to review all of Shillington's
20 previous reports to make sure
21 we do all that can be done to
22 fully defend these actions. I
23 will be in touch in the new
24 year to set up a meeting with
25 her and I will include you in

1 the invite."

2 Is it your general practice to
3 have in-house counsel review reports from external
4 counsel the way that you're suggesting Ms. Lezau
5 does here?

6 A. Well, if there were
7 unique circumstances such as this when we have
8 external counsel handling the bulk of them and now
9 having internal counsel handling -- we'll call
10 them one-offs, the odd one that's there, I would
11 invite them to reach out to external counsel, and
12 also, you know, we do have our -- we already have
13 defence files with Shillingtons doing quite a bit
14 of the work and the leg work on some of these
15 previous files, and I would invite Donna for sure
16 to have a look to make sure that she sees or has
17 access or can turn her mind to a lot of the issues
18 that have already been addressed or identified by
19 Shillingtons. It's an efficient use and can
20 expedite some issues and some matters, and I'm
21 always trying to facilitate the sharing of
22 information so that we take a consistent approach
23 to all of the litigation files.

24 Q. Did Ms. Lezau come to
25 your office to review Shillingtons' reports as you

1 suggested that she would here in this e-mail Mr.
2 Tollis?

3 A. At some point I know that
4 I had made arrangements to pull some of these
5 boxes and have them out and left them there for
6 Donna to review at her leisure when she could.

7 Q. Do you recall knowing
8 whether she actually did come and review those
9 boxes?

10 A. I believe she did go
11 through them at some point; I'm just not sure
12 when.

13 Q. Can you nail it down to
14 whether it was in the first month coming back
15 after the December holidays?

16 A. It likely wasn't.
17 There's the shut down. It would've been a really
18 busy time then coming back, it's always busy
19 coming back. If the files were in storage, it
20 would have taken some time. I would have had to
21 ask staff to pull them, have them there. So, you
22 know, it wouldn't be outside the realm if it was a
23 few months before she reviewed them.

24 Q. Would you ensure that all
25 of the files were as up-to-date as possible while

1 they were sitting there waiting for her to review?

2 A. If Ghulam-Mastafa were
3 closed and put away, normally what I do I would go
4 through all my e-mails and make sure if there is
5 anything on there, to get them printed off and
6 make sure it's in the file. I would go through
7 that process before things get closed and sent
8 away.

9 Q. Just stopping there. Do
10 you recall which files you pulled for Ms. Lezau?

11 A. No, I don't recall
12 offhand which files I pulled. I'm assuming it was
13 Mastafa and Gawrylash because they would have been
14 claims that really were advancing in the
15 litigation and had gone quite a bit of a distance
16 I believe, so there would be more there.

17 Q. What about Gapeev?

18 A. That's possible. Gapeev
19 could have been in there.

20 Q. For the Melo/Lee/Barlow,
21 would they have been -- would you have pulled
22 those ones as well?

23 A. Likely not, because it
24 was on the LINC.

25 Q. We know that you received

1 Shillington's letter, the one we were just looking
2 at, in January of -- late January of 2018. At any
3 point after you received this letter did you
4 provide a copy to Ms. Lezau?

5 A. I don't think so.

6 Q. Why not?

7 A. For the same reason as my
8 previous answer, that it was a LINC file.

9 Q. Registrar, could you
10 close this down and go to OD 9A, page 13. Can you
11 call out paragraphs 18 and 19, please.

12 We jump forward to May
13 of 2018. Ms. Crawford forwarded an e-mail she
14 received from Gary Moore, the one that we
15 referenced before I took you to the OD references,
16 and this time she copies you in, and the copy of
17 the Tradewind report that Mr. Moore had provided
18 to Ms. Crawford is attached to that e-mail. In
19 fact, just so that you can see that because I'm
20 not sure if I have well explained it.

21 Registrar, can you leave this
22 up but can you also bring up HAM53107. You can
23 close the call out for the moment.

24 You'll see, Ms. Swaby, at the
25 bottom of this e-mail chain on the right there's

1 the e-mail from Mr. Moore to Ms. Crawford on
2 August 15, 2017, where he says, "as requested, the
3 testing was done," and that one has an attachment
4 in the -- when we went back and looked, that one
5 definitely has an attachment of the Tradewind
6 report. And then you'll see Ms. Crawford is
7 forwarding that e-mail, along with the attachment,
8 and copying you in on a subsequent e-mail to
9 Mr. Moore.

10 I'm going to close that down.
11 I just wanted you to see that as an e-mail and
12 sort of in native form, but let's go back to the
13 OD.

14 And again, Registrar, if you
15 can call out paragraph 18 and 19, please.

16 So Ms. Crawford says:
17 "Good afternoon Gary, you may
18 recall speaking to
19 Mr. Shillington and myself
20 last August...We are in the
21 process of preparing the
22 City's affidavit of documents
23 in respect of a litigation
24 matter involving a median
25 crossover on the LINC.

1 Plaintiff's counsel has
2 specifically asked about
3 friction testing. We will
4 need to produce a copy of this
5 report in the City's AOD."

6 (As read)

7 And then she wants to confirm
8 if it's been presented to council.

9 A few sort of questions of
10 clarification before we get into the substance.
11 Where it says "a litigation matter involving a
12 median crossover on the LINC," from that
13 information were you able to identify what piece
14 of litigation Ms. Crawford was preparing the
15 affidavit of documents for?

16 A. It was likely the Melo
17 matter. I believe that file was theirs. I don't
18 think they had any other files on the LINC.

19 Q. You said before that at
20 some point you came to learn that plaintiff's
21 counsel specifically asked about friction testing,
22 and at the time I was referring you to the letter
23 from plaintiff's counsel asking about that, which
24 is from August of 2017.

25 Here Ms. Crawford actually

1 says plaintiff's counsel has specifically asked
2 about friction testing. With that information and
3 seeing that this is from May of 2018, can you
4 assist in when you first learned that plaintiff's
5 counsel was specifically asking about friction
6 testing? Was it here or was it some point
7 earlier.

8 A. It was likely here.

9 Q. You don't remember either
10 way --

11 A. No.

12 Q. -- if there was some
13 prior communication?

14 A. No, I would rely heavily
15 on the documents.

16 Q. By which you mean you
17 don't remember either way?

18 A. No, I don't -- I have
19 difficulty on a lot of my claims. I can't imagine
20 that I have an independent recollection about many
21 of my claims just by the sheer volume. It would
22 have to be something really crazy for me to
23 remember.

24 Q. So Ms. Crawford is asking
25 here or is telling -- is advising Mr. Moore and

1 copying you that the Tradewind report will likely
2 need to be produced as part of the City's
3 affidavit of documents. So she copies you in on
4 this.

5 Based on your practices and
6 working with Ms. Crawford, do you know why she
7 would have copied you in at this stage having not
8 copied you in before?

9 A. No, I'm not sure why she
10 copied me. Perhaps because it had been an issue
11 that had been raised prior back in -- was it 2017?
12 Was I --

13 Q. Yes.

14 A. I was in on that. So
15 maybe she's copying me on it again because it's
16 the same issue.

17 Q. Well, here it seems like
18 a reference specifically to the affidavit of
19 documents and the -- and confirmation about
20 whether the issue has been presented to council,
21 and Mr. Moore does confirm it has not been
22 presented to council. He copies you on that
23 e-mail as well.

24 In the usual course would Ms.
25 Crawford update you on a document that may or may

1 not go into an affidavit of documents if they had
2 some concern about sensitivity with that document?

3 A. No, not necessarily.

4 There was no hard and fast rule either way.

5 Q. Based on your practices,
6 what would you have done with these e-mails and
7 the attachment, the Tradewind report, upon
8 receipt, in terms of your file management, paper
9 management and practices?

10 A. They would be printed and
11 put in the hard copy of the file.

12 Q. What about
13 electronically? Is this a document that you would
14 have kept electronically?

15 A. The only time I typically
16 kept matters electronically were when they were
17 really difficult to print off, too large, and they
18 were actually better to be just reviewed in their
19 electronic form, in which case I would have
20 attached it to RiskMaster. Not very often.

21 Q. Just going back to an
22 answer that you just gave just so that I can get
23 some clarity on it.

24 When I asked with Ms. Crawford
25 why would she have copied you in on this e-mail,

1 you said, well, I was looped back in in 2017, and
2 so maybe she's copying me again. You were not
3 looped in in 2017 and now she's copying you in,
4 and that's why I'm asking if you have any sense of
5 why she would now be copying you in.

6 A. No, and that's why I
7 think I asked before, I said was I copied back in
8 2017, and I thought you said yes.

9 Q. I misheard you. I
10 thought you said I was not copied in, and I said
11 yes, so that's why I wanted to bring it up again,
12 just to make that we weren't miscommunicating, you
13 and I.

14 A. No, I don't know why she
15 copied me on it. I would be speculating. I'm
16 thinking maybe she was having some difficulty
17 getting the document from him and maybe that's why
18 I'm being copied on something. Because as I said
19 before, I typically wasn't copied on things unless
20 they were having some difficulty getting some of
21 the documents that they needed.

22 Q. Well, the document is
23 attached, so that's not the problem.

24 A. I don't know why.

25 Q. Okay. This is

1 approximately three months after you received
2 Shillington's reporting letter, the one that we
3 were just looking at from late January. Do you
4 recall if you had had any discussions about the
5 Tradewind report with anyone from Shillingtons
6 after receiving the reporting letter and before
7 this e-mail from Ms. Crawford?

8 A. I don't recall. I don't
9 remember.

10 Q. Turning again to that
11 point, plaintiff's counsel has specifically asked
12 us about friction testing. Were you aware of any
13 other requests in other pieces of litigation
14 involving the Red Hill or requests for friction
15 testing from plaintiff's counsel?

16 A. From plaintiff's counsel,
17 no, no.

18 Q. You told us earlier when
19 you were looking at the reporting letter from
20 January that the fact that the Tradewind report
21 had not been reported to council, City council,
22 was not significant to you. I'm paraphrasing your
23 earlier evidence. You didn't note that, or that
24 it wasn't of interest to you. What about at this
25 point when Shillingtons is preparing the affidavit

1 of documents and Ms. Crawford is saying, we're
2 likely going to have to include this report in the
3 affidavit of documents, and you get confirmation
4 from Mr. Moore that the report was not provided to
5 council. Does that have any significance to you?

6 A. Historically it's
7 never -- whether or not a decision that was made
8 on an operational level, whether or not it was
9 reported to council or not has not been a material
10 fact in any of my claims experience. So it really
11 didn't jump out to me as being a concern.

12 Q. Beyond filing this
13 correspondence, did you review the Tradewind
14 report that was attached to Ms. Crawford's e-mail
15 when you received this e-mail in May of 2018?

16 A. I may have had a really
17 quick look at it and I've reviewed it a few times.
18 I can't say that I've read it verbatim even now.
19 It's highly technical and I get lost in it. It's
20 got such a level of technical expertise.

21 Q. But you can't recall
22 either way whether you reviewed at the time, or
23 you think you did review it but just to the extent
24 that you could understand it?

25 A. Yeah, maybe just a

1 cursory review to understand what it was about.

2 Q. Would that have been
3 consistent with your personal practices to review
4 at least scanned documents that are received from
5 defence counsel?

6 A. Yes.

7 Q. Did you discuss the
8 Tradewind report and its likely production in the
9 City's affidavit of documents with anyone at
10 Shillingtons in and around this time?

11 A. I may have had a
12 conversation with someone about them. It's
13 probably because it's something I had never saw
14 before. Pavement -- the material, what pavement
15 is made of for roadways, I cannot recall it ever
16 coming up in any other litigation I ever had.

17 Q. Do you remember either
18 way whether you had any discussions with
19 Shillingtons? I can see there is no e-mails or
20 traffic to suggest a call, there's no e-mails in
21 which you're discussing it.

22 A. No, I don't remember.

23 Q. Did you discuss the
24 Tradewind report with Mr. Moore?

25 A. No, I didn't speak to

1 Mr. Moore at all.

2 Q. What about with Mr.
3 McLennan?

4 A. Who? McLennan?

5 Q. Yes. Mr. McLennan?

6 A. John McLennan. At some
7 point I know later on John McLennan became
8 involved, or he reached out to me I think it was
9 later in 2018 there was some discussions about it.

10 Q. Yes. So before those
11 discussions that involved Mr. Sabo and others just
12 after receiving in May of 2018 and let's say
13 through the summer and into the early fall, did
14 you have any discussions with him about the
15 Tradewind report during that period of time?

16 A. No, I don't recall any
17 discussions along those lines.

18 Q. Did you discuss it with
19 Ms. Lezau?

20 A. Did I discuss it with Ms.
21 Lezau?

22 Q. Yes, "it" being the
23 Tradewind report.

24 A. I don't recall.

25 Q. You had said earlier that

1 you're trying to facilitate to ensure that --
2 again I'm paraphrasing what you said -- that the
3 in-house counsel doesn't need to reinvent the
4 wheel or redo work that external counsel is doing.
5 Did you provide Ms. Lezau with a copy of the
6 Tradewind report?

7 A. I think later she got one
8 or she got it on her own or she got it through
9 Marco Oddi. I can't remember. That's why I put
10 defence counsel in direct contact with the client
11 group, because it is very, very difficult when you
12 have the number of claims that you have under your
13 carriage to make sure in every instance that
14 everything is captured across all of the files.
15 That's a huge undertaking. That's why I make it
16 very important that the client group and the
17 deponent is responsible for making sure these
18 documents are produced to defence counsel.

19 Q. My question was about Ms.
20 Lezau, who was external counsel.

21 (Speaker overlap)

22 Q. -- don't think you put
23 her in touch with external counsel. You've been
24 -- you've suggested you're going to be the liaison
25 to ensure she can look at past documents. So did

1 you provide her with a copy of the Tradewind
2 report at this time, again from May until November
3 of 2018.

4 A. Till November. I'm not
5 sure when she got it, to be honest, or when -- I
6 would have to look again. I'm really not good
7 with these dates, jumping all over.

8 Q. We'll get to the e-mails
9 that I see where she becomes involved again, Ms.
10 Lezau. But I'm asking you if you recall -- maybe
11 let's do this. Did you personally ever give her a
12 copy of the Tradewind report?

13 A. I don't recall. I have
14 to look. I would have to look at that. I don't
15 recall.

16 Q. Did you provide a copy of
17 the Tradewind report to anyone at the City in and
18 around this time, so from May of 2018 when you
19 received it from Ms. Crawford until November
20 of 2018?

21 A. Until November of 2018.
22 I seem to have some distant recollection that I
23 provided somebody something in November of 2018,
24 but I would have to go look.

25 Q. Well, we'll get there,

1 certainly. There was some back and forth with you
2 and Mr. Sabo. Ms. Auty is involved. I'm asking
3 sort of before that period where people are asking
4 you for information and it sort of comes back to
5 the surface, the issue of these pieces of
6 litigation, before that period of time, did you
7 provide the Tradewind report to anybody at the
8 City?

9 A. No, but I do have a
10 recollection about talking about it with Donna and
11 I knew -- and I think she was doing some
12 preliminary -- she was doing some investigating on
13 her own. But to answer the question, the answer
14 is no, I don't recall giving it to her.

15 MS. LAWRENCE: Commissioner,
16 I'm noting the time, which is 20 after 12. We did
17 take an earlier break, and I'm certainly content
18 to continue to push forward until our usual 1
19 o'clock break, but -- and of course Ms. Swaby can
20 confirm. I get the sense that she might need a
21 little bit of a break.

22 I wonder if we might -- just
23 because it's been an hour and a half, it's a long
24 time to answer questions, and I wonder if this
25 might be an appropriate time to take a slightly

1 earlier lunch break than we normally do. Ms.
2 Swaby, would that be useful for you, or am I --

3 THE WITNESS: That's okay.

4 It's just I get frustrated because I can't
5 remember everything and I wish I could. That's
6 all.

7 MS. LAWRENCE: I understand.

8 And sometimes having a break from the screen is a
9 useful thing to get back on track, so I propose we
10 take an early lunch.

11 JUSTICE WILTON-SIEGEL: Sure.

12 If it's 20 past 12, that means we're going to be
13 coming back, what, at 25 to 2? I guess that would
14 be right?

15 MS. LAWRENCE: That sounds
16 right to me. Thank you.

17 JUSTICE WILTON-SIEGEL: Then
18 let's stand adjourned until 25 to 2.

19 --- Recess taken at 12:19 p.m.

20 --- Upon resuming at 1:35 p.m.

21 MS. LAWRENCE: Commissioner,
22 may I proceed?

23 JUSTICE WILTON-SIEGEL: Yes,
24 please proceed.

25 BY MS. LAWRENCE:

1 Q. Thank you. Ms. Swaby,
2 we're now going to talk about the events in the
3 fall of 2018.

4 Registrar, can you bring up
5 OD9A, page 118, please. Can you call out 295 and
6 296.

7 On October 11th Mr. Sabo
8 e-mailed Ms. Edwards, who is in the legal
9 department, and Mr. McLennan to ask -- well, as an
10 FYI and a recent discussion. You're not copied on
11 this e-mail, but Mr. Sabo says:

12 "Also, John, is your
13 recollection the same as mine,
14 that plaintiff's counsel in
15 recent years have been aware
16 of or requesting information
17 on the RHV studies as a result
18 of some discussions at city
19 committees or the press."

20 And then there's a reference
21 to a blog post from a local authority service, a
22 non-for-profit organization created by the
23 Association of Municipalities of Ontario.

24 As I said, you're not copied
25 on this e-mail. Do you recall if anyone spoke to

1 you about the questions raised by Mr. Sabo in his
2 e-mail chain below?

3 A. No, I don't recall anyone
4 talking to me about this e-mail exchange.

5 Q. Registrar, you can close
6 this down, and if you could go to page 130,
7 please. Call out 314 and 315, please. On
8 November 8 the City received an FOI request, the
9 first that is just a reference to the receipt of a
10 request, and then you'll see at 3:15 is the actual
11 request, which is access to reports, memos,
12 drafts, correspondence about friction testing on
13 the Red Hill in last five years, and reports,
14 memos, including drafts, or correspondence about
15 asphalt or pavement testing, assessments, plans on
16 the Red Hill for the last two years?

17 I know that you've become
18 involved at some level in respect of this FOI. Do
19 you recall, did you ever receive a copy of the
20 actual request itself?

21 A. No, I did not.

22 Q. Were you aware of the
23 nature of the request, that it was related to
24 friction testing on the Red Hill in the last five
25 years and asphalt and pavement testing

1 assessments, et cetera, for the last two years?

2 A. It would have been
3 brought to my attention on a general sense I think
4 in late November when I was approached.

5 Q. Registrar, you can close
6 this down. If you can go to page 147, please. If
7 you could call out 344.

8 Ms. Edwards prepared
9 handwritten notes of a conversation that she had
10 with Mr. McGuire on November 12, four days after
11 the FOI request was received by the City. I don't
12 think we have any documents that suggest that you
13 either attended this meeting with Ms. Edwards or
14 that you knew about the FOI request at this time
15 just a few days after it came in.

16 Ms. Edwards transcribed her
17 notes, which is this is what we're looking at now,
18 and there's also an e-mail below which transcribes
19 them in a more narrative form. Just looking at
20 this again, this is a call between Ms. Edwards and
21 Mr. McGuire. And so I'm asking -- I'm going to
22 ask you about this, recognizing these are not your
23 notes. So Ms. Edwards says Gary sent over info to
24 Diana about two years ago. The context of this
25 discussion is about the Tradewind report.

1 So we know that you received a
2 copy in May of 2018 when Ms. Crawford forwarded
3 you Mr. Moore's e-mail, but for confirmation, did
4 you receive a copy of the Tradewind report at any
5 time prior to receiving Ms. Crawford's e-mail in
6 May of 2018.

7 A. No. It could very well
8 be that legal and risk get lumped in together all
9 the time and someone might have thought sending it
10 to Colleen meant it was sending it to me because
11 we're all on the same team. So that may be where
12 that came from, but no, I did not receive it
13 myself.

14 Q. Registrar, could you
15 close this down just for a moment and go to 345,
16 please. Pardon me, paragraph 345. Thank you.

17 So here this is a different --
18 a later transcription of Ms. Edwards' notes which
19 she made in April of 2019. I'm not going to go to
20 the underlying actual handwritten notes, but
21 you'll see here she says to Ms. Auty that the
22 report had been sent to Diana and risk about two
23 years previously, and then it goes on.

24 There's no other Diana in
25 risk, right?

1 A. No.

2 Q. Registrar, could you
3 close that down and go back to calling out 344.
4 It goes on to say there's no -- pardon me, report
5 looked at UK STD. There is no STD in Ontario.
6 Report is a bit misleading since not binding.
7 Gary doesn't recall receiving any response. John
8 McLennan is aware.

9 Do you know how Mr. McLennan
10 would have been aware? Were you the source of his
11 knowledge? It's not clear what he's aware of. I
12 recognize it's hard to answer these questions.

13 A. No, I'm not -- I don't
14 know where he received that information.

15 Q. Did you have any
16 discussions with Mr. McGuire about the Tradewind
17 report in the fall of 2018?

18 A. No.

19 Q. Did you ever have
20 discussions with Mr. McGuire about the Tradewind
21 report?

22 A. No.

23 Q. Did you have any
24 discussions with Ms. Edwards about the Tradewind
25 report in the fall of 2018?

1 A. No.

2 Q. Registrar, you can close
3 this down, and if you go to page 155 and 156.
4 Could you pull out 168, which starts at the bottom
5 of the first page and goes on to the second.

6 We're now at November 20th,
7 and you receive a copy of the Tradewind report
8 from Mr. McLennan, says:

9 "FYI - the preliminary thought
10 is that this report will have
11 to be released to the
12 requestor. Obviously not a
13 good turn of events for any of
14 our RHVP files. You will see
15 an e-mail where I advised
16 Nicole/Ron of four files I
17 could find. I said you could
18 provide more information on
19 those files upon your return
20 and advise on any that I might
21 have missed."

22 So he mentions you could
23 provide more information upon your return. This
24 is November 20. There are other documents that
25 suggest that you were out of the office during

1 this time. Were you on vacation when this e-mail
2 was sent to you?

3 A. I believe so. I think I
4 was away on vacation.

5 Q. Registrar, could you
6 close this down, and could you call up 370.
7 You'll see in the excerpted text in the e-mail,
8 the last paragraph says:

9 "As stated, this is just my
10 quick search in advance of
11 Diana returning. She is back
12 Thursday."

13 So this is November 20.
14 Thursday would have been November 22. Is that
15 consistent with your recollection of when you
16 returned from vacation?

17 A. I don't have a
18 recollection. I would accept it as being true.

19 Q. Were you checking e-mails
20 while you were on vacation?

21 A. No.

22 Q. Registrar, you can close
23 this down. Had you ever spoken to Mr. McLennan
24 prior to receiving his e-mail on November 20, that
25 first one that we looked at, that's at 368?

1 A. Have I ever spoken to
2 John about?

3 Q. Had you ever spoken to
4 him about the Tradewind report? Pardon me. Not
5 generally.

6 A. I have a vague
7 recollection of talking about friction testing,
8 testing being done, the existence of friction
9 testing generally speaking, I think. I'm trying
10 to -- certainly dating back to -- I think dating
11 back to 2013 there were some suggestion of -- or
12 some inquiries that he might have been receiving,
13 and he asked me at one point if I had -- if there
14 was anything I was concerned about with the
15 litigation, and of course this is -- again it's
16 difficult. I couldn't give you a specific yes, I
17 spoke to him about the Tradewind report in advance
18 of this meeting.

19 But I know that there were
20 some discussions over the years about these
21 articles, the friction testing, and his -- he
22 asked me my input on how the claims were running,
23 and my response would be that they are ongoing and
24 there was nothing that -- you know, it was too
25 soon in order to be able to tell whether friction

1 testing was going to be a material fact or -- in
2 relation to the assessment of the legal exposures.
3 In each and every one of those particular files.

4 Q. When did you have that --
5 in relation to November 20th?

6 A. November 20th, I don't
7 believe I -- I don't believe I spoke to him
8 specifically about the Tradewind report until
9 after November 20th.

10 Q. So the evidence that you
11 just gave about the specifics of how the Tradewind
12 report -- how the claims were running and what the
13 Tradewind report would impact those, which I'm
14 paraphrasing your evidence just now but I think
15 that that's what you were saying, did that happen
16 before November 20th?

17 A. Like I said, there wasn't
18 a specific discussion, but just thinking back of
19 my testimony earlier as well, there were -- Ron
20 Sabo had an e-mail to Donna Lezau talking about
21 the article, the friction testing. There are
22 previous -- so it came up there. And I may have
23 had a conversation with him very, very general
24 about it, that it was out there, he was doing
25 his -- but nothing specific. I'm sorry, Emily. I

1 can't think of anything specific before this date
2 about the Tradewind report.

3 Q. Do you think that you
4 ever actually used the words Tradewind report or
5 friction testing report, something that indicated
6 that you actually had some document that you were
7 speaking about with Mr. McLennan?

8 A. No.

9 Q. When you returned from
10 vacation, would these e-mails that you -- first
11 you received and then you were copied on, would
12 those have been the first e-mails in which you
13 learned about the FOI request?

14 A. Yes.

15 Q. Did you connect the
16 report where it says the preliminary thought is
17 that this report attaching the Tradewind report,
18 did you connect that to the report that Ms.
19 Crawford had sent you in May of 2018?

20 A. I might have gone looking
21 for it to see when I had it.

22 Q. When you opened up the
23 attachment to the November 20th e-mail, did you
24 open it and go, oh, I've seen this before? You
25 said that earlier, when you looked at it you found

1 it to be very technical; you weren't sure when you
2 looked at it. But had you looked at it by
3 November 20th?

4 A. Had I looked at it by
5 November 20th. I can't recall. I don't remember.

6 Q. So you can't recall
7 whether it was familiar to you when you -- in that
8 you'd already seen when you opened it on November
9 20th?

10 A. It may have been familiar
11 to me.

12 Q. But you're not sure
13 either way?

14 A. Yeah, I know that we
15 talked about friction testing. Was this the
16 report that talked about it? Perhaps. I really
17 didn't spend a lot of time -- I guess I'm not sure
18 quite of the question.

19 MS. HALE: Ms. Lawrence, it
20 might be helpful to take Ms. Swaby to her
21 November 23rd e-mail. That might help refresh her
22 recollection.

23 MS. LAWRENCE: It might. I'm
24 going to ask some questions first to try to do
25 that, though.

1 BY MS. LAWRENCE:

2 Q. You received the
3 Tradewind report from Ms. Crawford. You'll recall
4 we looked at those before the lunch break, and
5 then you received a copy of the Tradewind report
6 on November 20th.

7 And my question was, when you
8 opened the copy that you that received on
9 November 20th, was it a document familiar to you
10 in that you had already opened it because you had
11 received it before, or was it the first time you
12 were looking at it, on November 20th.

13 A. I don't remember now. I
14 can't remember what was going through my mind when
15 I opened up the e-mail of November 20th and what I
16 looked at when I reviewed it. I can't remember
17 that now.

18 Q. Did you have any
19 discussions with Mr. McLennan about what he meant
20 when he said the preliminary thought is that this
21 report will have to be released, and then when he
22 said in particular, obviously not a good turn of
23 events for any of our RHVE files?

24 A. I probably wouldn't share
25 the same sentiments as he did insofar as if it's a

1 producible document, it is what it is, and it
2 should be produced in any event if it's relevant
3 to the litigation. So from my perspective that's
4 how claims go.

5 You need to conduct -- you
6 need to do -- produce all of your relevant
7 documents and assess it after you've looked at
8 that and compared it to the facts to the
9 individual claim and whether it's the proximate
10 cause and then you determine whether or not it's
11 an exposure or not.

12 Q. Did you have any
13 discussions with him about what he meant by that?

14 A. By saying it's not good,
15 no.

16 Q. Obviously not a good
17 turn of events?

18 A. No, I didn't have any
19 discussion with him on that.

20 Q. So you returned -- it
21 seems from the e-mails, you returned on
22 November 22, which was the Thursday. Did you tell
23 Mr. McLennan that you had a copy of the Tradewind
24 report on that day?

25 A. Well, he sent it to me on

1 November 20th. It was attached to it. So you're
2 saying did I say I already had it?

3 Q. Yes.

4 A. I don't think I did.

5 Q. Registrar, can you pull
6 out 370. So this is an e-mail. You're still away
7 at this point, and this is the one in which
8 Mr. McLennan says, we have four significant
9 claims, but that's just my quick search until
10 Diana is back. She will comment on these files
11 and any others I may have missed.

12 And we will come to an e-mail
13 in which you talk about the Tradewind report, but
14 my question here is, did you provide any of the
15 individuals who are copied in this, Mr. Oddi, Mr.
16 Sabo or Mr. McLennan, with an update on whether
17 those four files were all of the RHVP files?

18 A. No, I did not -- I did
19 not conduct an exhaustive search of all of the Red
20 Hill files.

21 Q. So Mr. McLennan has gone
22 looking and has found four claims, and he said,
23 this is just my quick search in advance of Diana
24 returning. She's back and will be able to comment
25 on these files and any others I may have missed.

1 So you did not go through and
2 determine whether he had missed any?

3 A. No.

4 Q. Did somebody else to your
5 knowledge?

6 A. It's my understanding
7 that a more exhaustive search was done by Gavin
8 after, capturing more files, and that was -- it
9 came within the next few months, because I
10 understand there was also a meeting with the
11 insurers that came in February so it was important
12 that they had all of that information by then.

13 Q. So -- but it looks like
14 it's important that they have the information now
15 for those people who are on this list. Did you
16 comment on these files, these being the four files
17 that he had identified?

18 A. No.

19 Q. Did anybody ask you for
20 an update about those files?

21 A. Not -- no. Well, there
22 was a meeting that came afterwards when I came
23 back from my holidays that we had a discussion
24 about what they were looking for in terms of
25 dealing with the FOI request, and that was the

1 purpose of my involvement, recognizing that I had
2 claims.

3 Q. Did you have more than
4 four claims at this point?

5 A. In 2018, I would think
6 yes. I don't even know which four ones he's
7 referring to in this list. He doesn't identify
8 them.

9 Q. Registrar, can you go to
10 page 158, please. And can you call out 375. This
11 is an e-mail exchange with Mr. Sabo and
12 Mr. McLennan, and it's -- Mr. Sabo says, "I'll
13 check with Dan," who I believe here to be Dan
14 Bartley, and Mr. McLennan says, "we should let the
15 insurer chime in," and then Ron says, "I spoke to
16 Dan briefly on his two claims and let him know
17 that you'll be speaking to him."

18 And then this is still
19 Mr. McLennan speaking, or writing, "Diana, can you
20 please put a call in to Terry Shillington as soon
21 as possible tomorrow. Thanks."

22 Do you remember having any
23 conversations with Mr. McLennan about putting in a
24 call to Mr. Shillington either on the day before
25 you returned from vacation or on the day that you

1 got back from vacation?

2 A. I don't remember having a
3 call specific -- discussing with John specifically
4 before I called Terry.

5 Q. I think there will be an
6 e-mail that will make that clear, which we'll get
7 to in just a moment. On the issue of letting the
8 insurer chime in, who in risk management had the
9 responsibility to update the insurer on issues
10 that arose?

11 A. On the individual claims,
12 if it was an individual claim, it was myself, but
13 they would be -- we were both working -- there
14 will always be an examiner on the insurer side
15 that would work with defence counsel at the same
16 time as myself. So they would be apprised and
17 kept up-to-date as litigation moved forward on
18 the insurance.

19 With respect to apprising the
20 insurer, I believe that would be the issue that
21 John was I think dealing with on the -- on whether
22 or not this Tradewind report had any implications
23 for other files, these files, more files, and
24 hence why the meeting with the insurer in
25 February.

1 Q. Okay. Even though these
2 were -- at least four of them were your files. I
3 think that that is the inference from
4 Mr. McLennan's e-mails. You would normally on an
5 individual file update the insurer, but in this
6 case Mr. McLennan took over the responsibility of
7 assessing when and how to update the insurer; is
8 that right?

9 A. I think he was thinking
10 more of a much broader approach on the issue of
11 the Tradewind report and it not being released and
12 the implications that would be reviewed with the
13 insurer, not just in the context of these claims,
14 but potentially other claims.

15 Q. Thank you for that extra
16 context. So in speaking in that sort of broad
17 letting the insurers chime in on the issue of
18 potential claims that could arise, was it you or
19 was it Mr. McLennan who decided when and how to
20 update the insurers in these particular claims
21 that were -- over which you had carriage?

22 A. In these particular
23 claims it would be defence counsel that was there
24 that would be aware of the -- assuming -- I'm not
25 sure which claims he is referring to. I can only

1 talk about the claims I was dealing with with
2 Shillingtons, and I know that there were other
3 claims, and I see that there was one that was
4 in-house with Dan. I don't know that I had much
5 contact with him on that -- some of the in-house
6 files. They weren't all in my carriage. I know
7 that there were some others that may have not have
8 had very much activity, I'm not sure.

9 Q. My question was, was it
10 you or was it Mr. McLennan who decided when and
11 how to update the insurers on the claims that you
12 did have carriage over?

13 A. I would be responding. I
14 would update the insurers. Mr. -- I think -- it
15 would depend on the examiner. I update the
16 insurer on the claims that I'm dealing with.

17 Q. Okay. And was it you who
18 was deciding when and how to update them?

19 A. The updates at that
20 point, they are with outside counsel, with defence
21 counsel, who are taking the lead, so they do the
22 updates to the insurer as they uncover the
23 productions, as they determine the implications of
24 them, as they review it from a legal perspective,
25 that they would be doing the updates.

1 Q. Okay.

2 A. And hence why there was
3 also a request that I reach out to Mr. Shillington
4 about this.

5 Q. Registrar, you can close
6 this down, and if you could bring up 376, please,
7 which goes on to the next page.

8 Ms. Swaby, this is an e-mail
9 that you sent in reply to the e-mail asking about
10 the four claims, asking you to -- pardon me, it's
11 in respect of Mr. McLennan's e-mail sending you
12 the Tradewind report, and this is the first
13 response I think that we have from you on that
14 day, so it would be November 23, which is the
15 Friday after the Thursday that you get back.

16 And before you sent this
17 response, did you have any discussion with anyone
18 internally at the City or externally about the FOI
19 or the Tradewind report?

20 A. No. When I came back did
21 I have any conversations in advance of writing
22 this letter before (skipped audio) it, or this
23 e-mail?

24 Q. Yes.

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

1 Q. Okay. Did you review any
2 documents or e-mails or notes to refresh your
3 memory before you sent this e-mail?

4 A. No. I might have done a
5 cursory search of my in-box in my e-mails to see
6 if there was something in there that I could jog
7 my memory about the last contact talking about the
8 friction testing.

9 Q. So you say, "This report
10 concerns the RHVE and the LINC." So just stopping
11 there. By November 23rd had you reviewed a copy
12 of the Tradewind report?

13 A. I probably looked at it
14 quickly, skimming it, as we talked before. When
15 we talked about Colleen Crawford giving it to me.
16 I may have skimmed it.

17 Q. And then Mr. McLennan
18 sends it to you again on the 20th?

19 A. Yes.

20 Q. But you have a copy from
21 May 2018 and you have a copy from November
22 the 20th. Before November 23rd you read the
23 report?

24 A. I would have skimmed it.
25 What's important to me from my perspective is

1 productions and that we had them, and to go
2 through it and digest it and make comments and
3 talk about the sufficiency and the implications
4 and what it means, that's not something I would
5 have spent a great deal of time on doing it,
6 recognizing that my primary function is to make
7 sure that they are available, they have been
8 produced, and the lawyers and the engineers deal
9 with it.

10 Q. What did you mean by the
11 Tradewind report being a red herring?

12 A. Well, from my -- it's
13 completely from a claims perspective. It's a
14 claims lens, not a road safety lens. So when I'm
15 dealing with claims, I'm assessing liability in
16 the sense of is it material, is it the
17 proximate -- is it a contributing factor to the
18 overall facts and that gave rise to the accident
19 in question.

20 So each individual claim would
21 have to be assessed based on the unique facts of
22 that case and whether or not the pavement
23 integrity or what it was made of being a
24 contributing factor. If anything, I was probably
25 very skeptical because in my -- now I guess it

1 would have been about 25 years in experience, we
2 had -- it's never been a topic or an allegation in
3 the claims that we've had to deal with. No one
4 has ever asked us about it before, and we've never
5 had to deal or address that before.

6 So I would have seen it as a
7 bit of a red herring, and depending on -- in some
8 of the cases, and, you know, that's really my
9 candor, what are the causes of various accidents.
10 If an accident happens because a tire blew or if
11 because someone was driving dangerously or doing
12 an excessive speed, that's my approach, being a
13 claims person, saying whose really at fault for
14 this accident here. So that would have been my
15 very honest, you know, reflection on it from a
16 common sense perspective at the time.

17 Q. So you say, and this may
18 refresh your memory:

19 "All of our serious files on
20 the RHVE and the LINC are for
21 the most part being defended
22 by Shillingtons, save and
23 except Sherk/O'Hare," which is
24 Dana Lezau, "and one being
25 handled right now by Dan

1 Bartley (Kanagaratnarajan)."

2 I may have said that

3 completely wrong. Does that refresh your memory

4 about the matter that Mr. Bartley had?

5 A. Yeah, that would be --

6 those would be the ones that, you know, they stood

7 to me. I think later on we identified a few more,

8 but yeah, that does refresh my memory, yes.

9 Q. The Sherk/O'Hare, is that
10 the Hansen and Bernat?

11 A. Sherk/O'Hare, Hansen and
12 Bernat. Sherk and O'Hare is a different claim.
13 That's on the LINC.

14 Q. So there's no reference
15 here to the Hansen and Bernat matter?

16 A. No. I didn't necessarily
17 capture them -- I would never have expected this
18 response to capture all of the files.

19 Q. You do say are serious
20 files. And I think you said earlier in your
21 evidence that you did not undertake a search in
22 RiskMaster to get a better sense of the scope of
23 the RHVP or LINC files; is that right?

24 A. Yes.

25 Q. So you're just going from

1 what you have in your memory?

2 A. Yes.

3 Q. You go on to say that:

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

15 What you don't say there is
16 that you actually received a copy of this report
17 from Shillingtons. Why don't you say that?

18 A. It's important -- I
19 didn't -- why didn't I say it? It's important
20 that Shillingtons has it, more than it is
21 important that I have it. I don't receive all the
22 documentary productions, especially once counsel
23 takes it over. And I don't -- I don't typically
24 spend a lot of time looking at the documents
25 themselves. That's counsel's job.

1 Q. You also don't say that
2 Shillingtons has a copy of the report or that they
3 provided it to you. You say they asked about the
4 report. Why don't you say that?

5 A. Well, I think it's kind
6 of presumed because they'd say it would have to be
7 listed in the affidavit of documents and at least
8 one of the claims. I would assume that they have
9 to review it to know what it's about and to make
10 the determination where it falls in an affidavit
11 of documents. You would have to look at it to do
12 that.

13 Q. Did it cross your mind to
14 provide a copy of the May 4th, 2018 exchange with
15 Mr. Moore and Shillingtons to legal services or
16 Mr. McLennan?

17 A. I didn't -- from my
18 perspective, through my claims lens again, I keep
19 saying this, but what matters is we had it for the
20 claims. When we received it would not have been a
21 material fact that I thought I needed to share.
22 If someone wanted to ask me, I would have told
23 them when it looked like when we got it. I would
24 have certainly reached out Terry and asked when we
25 received it if someone asked me, but if you didn't

1 ask me, I wouldn't turn my mind to it because it's
2 not something that I considered important from a
3 claims perspective. Claims perspective is make
4 sure we have it. If it's out there, make sure we
5 have it, as opposed to when did we get it, because
6 litigation runs over several years and we'll see
7 what the implications are of the report. But
8 whether or not it -- it will increase exposure
9 depending on when we received it or not, I hadn't
10 turned my mind to that.

11 Q. You hadn't turned your
12 mind to the fact that there was an FOI and that
13 the City was going to have to respond to that?
14 Was that part of you're thinking?

15 A. Well, FOI requests for
16 documents, I wasn't part of the FOI review or the
17 context or the implications. FOI requests can
18 happen before litigation starts. They can happen
19 during the course of the litigation. And what the
20 implications are for that, that would be the
21 people that are reviewing the FOI request, and I
22 wasn't really involved in that until
23 November 23rd.

24 Q. Yeah, now we're at
25 November 23rd. So if you could turn your mind to

1 the fact that the City was going to have to
2 respond to an FOI request. And I'll put to you,
3 providing more information would be useful for
4 legal services to be able to respond?

5 A. It very well could be,
6 and if they had asked me, I certainly would have
7 told them about that. From my recollection, the
8 question was whether or not it should be produced
9 or not because of claims privilege, more so than
10 timing.

11 Q. You say at the bottom of
12 this e-mail, "If there's a specific question I
13 need to ask Shillingtons, please advise." Did
14 anyone give you any direction about what to ask
15 Shillingtons?

16 A. No, I don't believe so.

17 Q. You also say, "Perhaps
18 Dana Lezau can also assist." Why did you think
19 that Ms. Lezau specifically might be able to
20 assist?

21 A. Because Dana Lezau also
22 had a legal file.

23 Q. Registrar, you can close
24 this down. If you can call out 377 and 378 on
25 page 159. You e-mailed, on November 26th,

1 Mr. Shillington, marking the e-mail as "high
2 importance," and you forwarded the e-mail that you
3 and Ms. Crawford had received from Mr. Moore on
4 May 4, 2018 -- in fact, let's just pull that up.
5 HAM64140, please.

6 So you'll see on the
7 right-hand side is the e-mails from May 2018. Ms.
8 Crawford copying you in on the e-mail that we
9 looked at earlier today that had the Tradewind
10 report and her reference to this is -- now we're
11 likely to produce a copy of this report in the
12 City's AOD, and then Mr. Moore responds, this
13 report was never reported to council. So you take
14 that e-mail and you flip it to Mr. Shillington
15 with the high importance.

16 Where did you find this e-mail
17 chain in order to flip it to Mr. Shillington?

18 A. I likely had it in my
19 in-box, probably searching for friction testing,
20 having a vague recollection about it, and bringing
21 that to the forefront because now we're meeting in
22 the afternoon. I would have marked it high
23 priority only because we were meeting very, very
24 soon, and so I would have used that as my backdrop
25 to reach out to Terry Shillington.

1 Q. You said earlier in your
2 evidence that -- we'll blow it up for you, Ms.
3 Swaby, so you don't have to look so closely. Can
4 you, Registrar, pull out the bottom half of the
5 left-hand side. I think, Ms. Swaby, this is what
6 you were looking at. Before we get there, I do
7 have one more question.

8 You said earlier that you
9 delete things from your e-mail once you printed
10 them out, and that's why I'm asking where did
11 you -- how did you locate this in your in-box?

12 A. Sometimes it's months or
13 a very, very long time before it gets out of my
14 e-mail and into the file. So it could very well
15 be that was the reason why it was still there.

16 Q. So you say to
17 Mr. Shillington:

18 "I am meeting with the GM of
19 Public Works as well as the
20 Director of Legal Services and
21 John McLennan of our office
22 concerning an FOI request to
23 release this report."

24 So just stopping there, the GM
25 of public works -- pardon me, the meeting with the

1 GM of public works and the director of legal
2 services and John McLennan, how did that come
3 together? How did that get scheduled.

4 A. I don't know. I assume
5 that was through John McLennan and Nicole Auty.

6 Q. You have it in your mind
7 that you're meeting with those three people that
8 afternoon on November 26th?

9 A. That's what I gather from
10 this e-mail, yes.

11 Q. We'll get to it in a
12 moment, but do you remember actually meeting with
13 Mr. McKinnon, someone from legal, and
14 Mr. McLennan?

15 A. I know it's terrible, but
16 I don't remember.

17 Q. Okay. So you say -- you
18 go on to say. "I take it that they do not want to
19 release this report." What was the basis for you
20 saying that?

21 A. Well, normally I'm not --
22 I'm consulted to see whether or not there's claims
23 privilege for the release of it. I don't
24 typically get consulted on FOI requests unless
25 there are claims, and when there are claims, they

1 like to know whether it is subject to privilege
2 because that would be one of the exceptions for
3 not releasing it.

4 Q. So that answers why you
5 were involved, but it doesn't answer why you say
6 "I take it that they do not want to release this
7 report." Why did you say that in that way?

8 A. Because they were being
9 brought in to look at it to see whether to release
10 it or not. Why would you ask for a legal
11 consultation if that wasn't what's one thing to be
12 considered. It might be a presumption. I don't
13 have any -- I don't have any information from them
14 directly to suggest that.

15 Q. So you don't remember
16 receiving any information from anyone saying, we
17 don't want to release this, and we're going to
18 meet with legal, for example, to have that
19 discussion?

20 A. No.

21 Q. Was this the first time
22 that you had spoken with anyone at Shillingtons
23 about the Tradewind report?

24 A. Is this the first time I
25 ever spoke to anyone about the Tradewind report?

1 Q. At Shillingtons.

2 A. Other than the e-mails
3 before that where it was provided to me.

4 Q. Other than e-mails but
5 actually oral discussions. Is this first time you
6 spoke to anyone at Shillingtons about the
7 Tradewind report?

8 A. Specifically -- I don't
9 remember any discussions over the phone about it.
10 I'm not saying it didn't happen. I just don't
11 have an independent recollection about it.

12 Q. Registrar, you can close
13 this e-mail -- this callout down. If you can call
14 out the three e-mails on the left-hand side, the
15 three top e-mails.

16 Registrar, apologies, but
17 could you close that callout and just the first
18 three, so from the very top of left-hand side down
19 to -- yeah, right there. Just so we can call it
20 out a little bit bigger. Thank you. A little bit
21 more to the middle of the page. Thank you.

22 So from your request to
23 Mr. Shillington to have a conversation, which he
24 says, yes, I'll talk to you soon, Ms. Crawford,
25 Mr. Thompson and Ms. Shillington (sic) then have

1 some back and forth. Ms. Crawford said this
2 report is listed in our Schedule A productions.
3 We've not served our AOD. And Mr. Thompson says:

4 "I can't think of any concern
5 for our litigation, except
6 that it that is not relevant.
7 The last I heard the report
8 had not been produced to
9 counsel. If they decide not
10 to provide it in the FOI, they
11 should let us know so we don't
12 include it in our
13 productions."

14 And then Mr. Shillington says
15 a little bit later:

16 "Thanks. She is good with our
17 review and will let the others
18 know. Any questions she will
19 call you or myself. Thanks
20 for the quick update."

21 That's the back and forth that
22 happens, all of which you're not copied on, but I
23 have some questions.

24 Do you recall having a
25 discussion with Mr. Shillington on November 26?

1 A. I assume I did have a
2 conversation with him, yes, based on this, that we
3 did have a conversation that morning about the
4 Tradewind report, the fact that they have it,
5 where they would consider it to fall in respect to
6 the affidavit of documents.

7 Q. Do you recall that
8 discussion?

9 A. Not independently. I
10 don't have -- I know that it would have happened
11 that morning, but what the actual conversation
12 was, I can't remember.

13 Q. Do you recall what you
14 told Mr. Shillington about the FOI and the
15 possible release of the Tradewind report?

16 A. No, I don't. I just know
17 that it was subject to a freedom of information
18 request and that it was going to be requested
19 or -- and it was being considered to be requested
20 or be released.

21 Q. Did Mr. Shillington tell
22 you that the Tradewind report was not relevant to
23 the Melo/Lee/Barlow claims?

24 A. No, I don't recall that
25 specifically. If anything, it would be more of a

1 discussion about its relevance, depending on each
2 of the cases at the time and what we knew about
3 them, the circumstances of each accidents, how it
4 arose, and they would be looking at each one of
5 them individually to determine where it goes. I
6 really don't -- when I say where it goes, I mean
7 Schedule A or Schedule B from a claims privilege
8 perspective.

9 But ultimately the
10 determination of whether it goes in Schedule A or
11 B isn't even noted. I know that there are some
12 defence counsel there that are of the opinion that
13 if it's not relevant, they don't need to refer to
14 it at all. But I don't leave those kinds of -- I
15 don't make those decisions; the lawyers defending
16 the claim do.

17 Q. My question was specific
18 about whether Mr. Shillington told you that the
19 Tradewind wasn't relevant, that he conveyed that
20 view that Mr. Thompson had conveyed to him?

21 A. I don't recall that.

22 Q. Is that to say you don't
23 recall either way, or are you confident that he
24 did not?

25 A. I don't recall it either

1 way.

2 Q. So then -- do you recall
3 what discussions you did have with Mr. Shillington
4 about the implications of the release of the
5 Tradewind report on the litigation that he was
6 retained on?

7 A. No.

8 Q. Is that that you don't
9 remember either way?

10 A. I don't remember either
11 way.

12 Q. Okay. Mr. Shillington
13 advised his colleagues that you were good with our
14 review and will let the others know. What
15 information is Mr. Shillington talking about here
16 that you were good with?

17 MS. HALE: To be fair to Ms.
18 Swaby, she has stated clearly that she has no
19 independent recollection of this call, so I don't
20 know if any of this continual questioning about
21 this would be of assistance to the commissioner.

22 MS. LAWRENCE: It's always
23 amazing how people can sometimes remember things,
24 so I would like to answer the -- have these
25 questions asked just in case something comes to

1 Ms. Swaby's mind. I am about done with this line
2 of questioning.

3 Mr. Commissioner, you're
4 muted.

5 JUSTICE WILTON-SIEGEL: Thank
6 you. I was going to say, I think perhaps
7 rephrased not as what does that refer to, but does
8 it recollect or cause her to recollect anything
9 further. The question can be put and then let's
10 move on.

11 THE WITNESS: I think Terry,
12 when he says is she good with our review and will
13 let the others know. Any questions she will call
14 you or myself. Does that refresh my memory?
15 Little bit, but not to the point of getting
16 specifics. I would imagine that he would have
17 told me how this report impacts the litigation on
18 the various claims they were handling based on the
19 information in hand at that time, and I would have
20 accepted that and that would have been the end of
21 it, and reported back to John McLennan and the
22 others about the information about it being at
23 least Schedule A on at least one of the claims.

24 BY MS. LAWRENCE:

25 Q. Do you recall when you

1 made that report back to Mr. McLennan and the
2 others?

3 A. No, I don't recall when.
4 I take it if we had a meeting that afternoon, that
5 information would have been communicated then.

6 Q. So there's a back and
7 forth, a part that you're not copied on, is about
8 if they decide not to provide it under the FOI
9 request, they should let us know so that we don't
10 include it in our productions.

11 Did you give instructions to
12 Shillingtons at any point to remove the Tradewind
13 report from the City's production because of the
14 FOI request?

15 A. No. You know, really
16 just to provide some context, I think there was
17 the issue of the FOI request being dealt with by
18 John and Deb and the legal team, and I am dealing
19 with the claims, and as I would deal with them in
20 their normal course and they're reaching out to me
21 for certain bits of information that may or may in
22 fact -- may impact, may not impact the release,
23 whether they release the report, and if --
24 certainly if Shillingtons had said that the
25 Tradewind report is going to be in Schedule A and

1 at least one of the documents or one of the
2 claims, then that information would be
3 communicated over to them. I don't see the --
4 unless it's privileged, it shouldn't affect how
5 the freedom of information request is dealt with.

6 Q. So you view the FOI and
7 the disclosure obligations, production obligations
8 in court as just two separate things?

9 A. Yes, unless it's subject
10 to litigation or claims privilege, that would be
11 the only time that that might be a factor that
12 needs to be considered from my perspective.

13 Q. Thank you. So you said
14 earlier that you don't remember a meeting with Mr.
15 McKinnon, the director of legal services, and
16 Mr. McLennan?

17 A. No.

18 Q. We've gone through a few
19 more documents now, including some information you
20 have from Shillingtons which at some point, you've
21 given evidence, you would have conveyed. Does
22 what we've gone through, has that assisted to
23 refresh your memory in any way about attending a
24 meeting with those individuals?

25 A. Unfortunately it does

1 not.

2 Q. Registrar, can you close
3 this down and go into 9A. Page 407 and 408.
4 Could you call up at page 407 the paragraph
5 starting at 933.

6 Ms. Swaby, these are undated
7 handwritten notes that have been transcribed that
8 were handwritten by Mr. Sabo, and he believes that
9 this may have been sometime in -- that he would
10 have made these notes sometime in November or
11 December of 2018. And the reason I'm taking you
12 to them is he identified that John, and then, what
13 are we telling him outside operation, I think.
14 Speed. Litigation. And then it says risk, DS, 1
15 or 2. Dana 2, Dan 2. Dana has CIMA reports. May
16 not be friction testing.

17 Just stopping there. The DS
18 there, Mr. Sabo advised, would have been in
19 reference to you. Risk, Diana Swaby, 1 or 2. It
20 seems from what we've gone through that the
21 numbers there may reference the claims that you
22 had carriage over, recognizing that's six because
23 you and Dana might have counted the same ones
24 twice or you and Dan might have counted the same
25 ones twice.

1 I know this is not
2 particularly instructive to you, but do you recall
3 attending a meeting with Mr. Sabo in particular in
4 or around November 26?

5 A. No. Well, I don't think
6 I met with Ron Sabo.

7 Q. No?

8 A. I don't think I did, no.

9 Q. Okay. That's helpful.

10 A. No.

11 Q. Do you remember meeting
12 with Ms. Auty around the Tradewind report or the
13 FOI request?

14 A. No, unless it was that
15 same meeting in that afternoon with the GM, that
16 November 26 one, and again I don't remember it.
17 But if there was a separate meeting with Ron and
18 Nicole and myself, just us, I don't think that --
19 that wouldn't have happened. I don't think it
20 happened.

21 Q. Well, I'm trying to
22 narrow it down, so I presume, and this is just a
23 presumption, that you didn't meet with Dan
24 McKinnon, the general manager of the public works,
25 all that often; is that right?

1 A. Right.

2 Q. So meeting with him maybe
3 would stick in your mind even these many years
4 later?

5 A. Yeah, that's why it kind
6 of boggles me that I don't remember.

7 Q. So I'm wondering whether
8 there may have been a meeting that was with
9 Mr. Sabo and/or Ms. Auty and/or Mr. McLennan, all
10 people who I assume you met with somewhat more
11 regularly than Mr. McKinnon; is that fair?

12 A. Yeah, I don't think I
13 ever met with Nicole Auty.

14 Q. Okay. And you don't
15 think you met with Mr. Sabo about this issue?

16 A. I don't recall having a
17 specific meeting with Ron Sabo on this issue.

18 Q. Are you confident that
19 you didn't meet with him on this issue?

20 A. Well, he was already
21 meeting with John, and would he need -- would
22 there be another meeting with me? I doubt it.

23 Q. Or a meeting with you and
24 John together?

25 A. Yeah, I don't remember

1 anything like that.

2 Q. Is that to say you're
3 confident that that did not happen, or you just
4 can't remember either way?

5 A. I don't remember either
6 way, but my gut tells me it didn't happen.

7 Q. Registrar, you can close
8 this down. Ms. Swaby, we have -- in fact, you can
9 leave OD9A up. We looked at a number of e-mails
10 that sent or received in relation to the FOI and
11 the possible release of the Tradewind report just
12 now, just since after lunch. By late November,
13 sort of after this period, the number of e-mails
14 on which you are either an author or recipient
15 seems to decrease fairly significantly as it
16 relates to this issue. They're a bit more
17 sporadic. Is the drop that we see on the inquiry
18 on relevant documents from late November, is that
19 consistent with your recollection, that you had
20 less involvement after this somewhat busy period
21 of e-mails in late November?

22 A. Yes. I don't -- like I
23 said, I rely heavy on e-mail exchanges and
24 communications for the purpose of refreshing my
25 memory, and I would have to answer yes, that it

1 did drop off. They came -- I was included for the
2 specific purpose about the claims and the issue of
3 claims privilege. I gave them -- there would have
4 been a meeting, as we see, provided that
5 information, and then it wouldn't be surprising to
6 me that that would drop off because they are
7 separately dealing with the Freedom of Information
8 request outside the claims realm.

9 Q. So just closing up that
10 issue. Mr. McLennan had asked you about claims,
11 he had asked you about speaking to
12 Mr. Shillington. We don't see any e-mail
13 communication from you reporting on those matters,
14 and I think I hear your evidence to be that you
15 believe that there must have been a meeting.

16 Is it fair to say that you
17 would have not let those items that Mr. McLennan
18 asked you to do go unreported to him?

19 A. Well, the issue with
20 respect to the number of claims out there, we
21 likely didn't have that information in hand for
22 November 26, but I believe a more exhaustive
23 search did come after that. And I'm not sure
24 about the urgency of the number of claims. Again,
25 the number of claims and how many are out there

1 may or may not impact the FOI request and whether
2 or not it should be reduced -- should be produced
3 or not. I'm not sure that that's -- you know,
4 it's good to know how many claims you have out
5 there, but I don't know that that's a deciding
6 factor whether or not you release the information
7 or not.

8 Q. My question was really,
9 given what we see coming from your boss to you and
10 that there is no e-mail response back to you,
11 knowing your practices and your -- you as you do,
12 would you have let those responses go unanswered?

13 A. If he asked for them and
14 he doesn't have them yet, you know, if they went
15 unanswered, it was probably because it was a
16 really busy time and I didn't have -- I couldn't
17 do that. I would have to go to Gavin as well as
18 he would have to go to Gavin in order to get an
19 exhaustive search done. It hadn't got done yet
20 neither by himself or by myself by November 26,
21 but it did eventually get done.

22 Q. The part about
23 Mr. Shillington and talking to them, that's a
24 different issue. I'm going to suggest that if you
25 didn't respond by e-mail, you either didn't answer

1 them or you updated Mr. McLennan orally rather
2 than by e-mail. Which do you think is more
3 likely?

4 A. The response from
5 Mr. Shillington about whether it would be on
6 Schedule A or -- providing that information?

7 Q. Yeah. Mr. McLennan asked
8 you to contact Mr. Shillington, and you did, and
9 there's no e-mail that you updated Mr. McLennan
10 about that, and so I can only see two options:
11 you either never updated Mr. McLennan, or you did
12 it orally. Which one do you think is more likely?

13 A. I would have done it for
14 the purposes of a meeting in the afternoon orally,
15 yes. With respect to the number of claims and
16 whether I had all the information for that
17 afternoon about the number of claims we have, that
18 likely wasn't done or communicated by that time
19 that meeting took place.

20 Q. Thank you. Registrar,
21 can you go to 208, please. Sorry, page 208. If
22 you can call up 489. This is just a reference in
23 the overview document.

24 It doesn't have a lot of
25 information here, but on December 7 Mr. Oddi,

1 Marco Oddi, was examined for discovery in relation
2 to the Hansen and Bernat litigation which arose
3 from the motor vehicle accident -- a motor vehicle
4 accident on the Red Hill. That that accident
5 occurred in 2015. And this is the one of the
6 cases that Ms. Lezau had carriage over, you'll
7 recall? Yes.

8 A. Yes.

9 Q. This is internal legal
10 counsel. Would you have expected to be advised in
11 advance of the examination for discovery that it
12 was about to occur?

13 A. No.

14 Q. You would expect an
15 examination report after it occurred?

16 A. At some point, yes.

17 Q. Would you have left it to
18 Ms. Lezau and Mr. Oddi to confirm the contents of
19 the affidavit of documents?

20 A. Yes.

21 Q. And to prepare for the
22 examination for discovery?

23 A. Yes.

24 Q. Prior to receiving Ms.
25 Lezau's examination report, which we'll get to in

1 a moment, were you aware that the Tradewind
2 report -- you were aware, pardon me, that the
3 Tradewind report was listed in the AOD that
4 Shillingtons had carriage over given those e-mails
5 with Ms. Crawford?

6 A. Normally I wouldn't know
7 those finer details, but because we specifically
8 asked, I knew that in that case, yes.

9 Q. And here did you
10 specifically tell Ms. Lezau about the Tradewind
11 report so she could assess whether to include it
12 in the Hansen and Bernat AOD?

13 A. No, I didn't. The
14 expectation is that she's reviewing this with
15 Mr. Oddi.

16 Q. And the expectation is
17 that Mr. Oddi has a copy of it?

18 A. Has a copy of?

19 Q. The Tradewind report.

20 A. The Tradewind report.

21 Yes.

22 Q. That's the presumption
23 that's built on Ms. Lezau talking to Mr. Oddi
24 about it, right?

25 A. And he is our

1 representative, so he -- it's his responsibility
2 to make sure that everything that's relevant is
3 produced.

4 Q. And you don't have any
5 role in ensuring that a City representative meets
6 that obligation?

7 A. No.

8 Q. Assist him with that?

9 A. No.

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

12 A. I should say, only if
13 counsel knew there was something and they weren't
14 getting something and they asked me for my help to
15 get it.

16 Q. I'm not going to take you
17 into the examination report. I believe you've
18 seen it to prepare for today's examination. I'm
19 just interested in after you reviewed the
20 examination report, did you provide a copy of the
21 Tradewind report to Ms. Lezau for inclusion or for
22 her information?

23 A. I don't recall. Probably
24 did. I don't recall.

25 Q. We looked at an earlier

1 e-mail where Mr. McLennan was speaking about how
2 both Ms. Lezau had a case and also Mr. Bartley had
3 a case. The case name that I completely mangled
4 earlier. Did you take any steps to advise
5 Mr. Bartley of the Tradewind report after you
6 received it in November?

7 A. No. I do believe legal
8 services did have the report, though, because that
9 was part of the review that came later. I think
10 there was a large documentary review. I -- when
11 David Boghosian was reviewing it and providing an
12 opinion later, but did I give Dan Bartley the
13 Tradewind report, no.

14 Q. Turning to Mr. Boghosian.
15 Registrar, can you go to 214 and 215 of OD9A.
16 Registrar, OD9A, 214 and 215. Thank you.
17 Registrar, could you call out the top of page 215.

18 So this is taken as an excerpt
19 from Mr. Boghosian's retainer letter that he was
20 preparing in December, in fact on the same day
21 that Mr. Oddi was examined, December 7th. Did you
22 have any involvement in setting the scope of
23 Mr. Boghosian's retainer?

24 A. No.

25 Q. Did you know anything

1 about Mr. Boghosian's retainer in December?

2 A. No. I didn't know that
3 David Boghosian was being retained.

4 Q. When did you learn that
5 he was retained?

6 A. After.

7 Q. In January?

8 A. Yes, until -- I think I
9 learned of him after, when I received his report.

10 Q. Is that the report --
11 we'll get there in a moment -- a report that
12 Mr. McLennan sent to you for review?

13 A. Yes.

14 Q. Registrar, you can close
15 this down.

16 We anticipate that
17 Mr. Boghosian may give evidence that at some point
18 after he was retained on December 7th, you and he
19 spoke about -- you and he were speaking about
20 other files that Mr. Boghosian had with the City,
21 and in the course of that discussion the Red Hill
22 came up and you had a brief discussion about Red
23 Hill collisions, sort of a thumbnail sketch of the
24 other -- of the matters that you had under your
25 carriage. But that the Tradewind report didn't

1 come up during this discussion; it was sort of a
2 high level discussion about Red Hill collisions
3 and litigation.

4 Do you recall providing that
5 information to Mr. Boghosian?

6 A. No, I don't. I don't
7 recall doing it. It doesn't mean it didn't
8 happen, but it could very well be.

9 David Boghosian was on other files as well, and so
10 I did have conversations with him from time to
11 time about some of our litigation.

12 Q. Registrar, could you go
13 to page 289 and 288 of OD9A. Registrar, could you
14 call out 669 to 671, please.

15 So I think you said before you
16 got a copy of the Boghosian report forwarded you
17 to. So this is on January 8. So after the
18 holidays. This is really the next e-mail from
19 that series of e-mails we saw in November. Is
20 that consistent with your recollection, that you
21 didn't have much to do with this case for that
22 period of time, late November, mid-January.

23 A. That makes sense.

24 Q. Mr. McLennan asks you to
25 read it today if you can and give me your

1 thoughts. So was this the first indication to you
2 that Mr. Boghosian had been retained for some
3 purposes relating to the Red Hill?

4 A. I don't -- I don't
5 remember -- sorry, what was the question again?

6 Q. Was this your first
7 indication that Mr. Boghosian had been retained
8 for some purposes relating to the Red Hill?

9 A. I believe so. I didn't
10 retain him. I don't know exactly -- like, I know
11 now that he was returning back in December. No
12 one spoke to me about retaining him or whether
13 they should retain him. I don't recall any
14 conversations about that. Whether I knew he was
15 retained before I read this somewhere in that
16 intervening period, it could be, but I don't
17 remember.

18 So this is really the first
19 time for me that I can recall David's involvement.
20 But like I said, David may have talked to me in
21 between, but I don't remember.

22 Q. This e-mail from
23 Mr. McLennan suggests to me that there might have
24 been a conversation in advance. He said here's
25 the Boghosian opinion, which implies that you know

1 about what the Boghosian opinion is. Do you
2 recall having any discussions with Mr. McLennan
3 about this -- about the Boghosian opinion before
4 he sent this e-mail?

5 A. I don't. I suspect I
6 might have said, why did we retain Mr. Boghosian;
7 we have Shillingtons. But -- because that's still
8 something I would have thought we could deal with
9 it through the claims litigation, but I understand
10 it's an FOI request. It's separate. So that
11 would have been the extent of any conversation I
12 had with him in advance.

13 Q. Registrar, can you go
14 into HAM26043. I think I've given you the wrong
15 doc ID. Let's try that again. HAM62043. Thank
16 you.

17 Ms. Swaby, you're familiar
18 with this document by this point, right?

19 A. Yes.

20 Q. Registrar, could you call
21 up the next image as well. Thank you. So you'll
22 see even just from the overview there's a number
23 of documents that Mr. Boghosian says that he
24 looked at, including a six-year performance review
25 by Golder. Had you seen what we call the Golder

1 report by January 8, 2019?

2 A. Had I seen the Golder
3 report by January 2019?

4 Q. January 8, the day that
5 you're reviewing Mr. Boghosian's draft opinion.

6 A. I can't -- I don't
7 remember. I believe there was a document brief
8 that was given to David Boghosian, and I'm not
9 sure if these documents were attached to his
10 opinion letter or whether -- I know at some point
11 I saw a binder or a Cerlox-bound brief that was
12 provided to David Boghosian. Whether I read that
13 in context with this opinion, I can't say for
14 sure. I think it's more likely that I just honed
15 in on David's comments in relation to liability
16 exposure.

17 Q. I know that there was a
18 document prepared in the context of the FOI that
19 you that later provided to the insurer. Is that
20 what you're thinking about, or this Cerlox-bound
21 brief that was sent to Mr. Boghosian? Can you
22 give me --

23 A. Yeah, that's a good
24 question. I might be mixing them up, to be
25 honest.

1 Q. I think your answer was
2 that you don't remember whether you saw the Golder
3 report with this draft opinion or before?

4 A. Yeah, I don't remember.

5 Q. There's also a reference
6 to the RHVP detailed safety analysis by CIMA in
7 2015, an e-mail about testing results from Golder
8 in November of 2018, and some references to some
9 appendices that are collision countermeasures, and
10 then a draft roadside safety assessment by CIMA in
11 2018.

12 For those things, had you
13 actually seen those CIMA reports?

14 A. I may have. I'm not
15 sure. When I read this report, I doubt I looked
16 at all of the supporting documentation or went to
17 look at them before I reviewed David's opinion.
18 I'm fairly certain I would have read David's --
19 just David's opinion.

20 Q. Registrar, you can close
21 this down. Can you go back into OD9A. Page 288,
22 please. Can you pull out 670 to 671. You say:
23 David's opinion is consistent with mine as to
24 friction testing completed, as there is no
25 industry standard in Ontario."

1 Stopping right there. There's
2 no industry standard in Ontario. What information
3 was the basis for -- what was the basis for you
4 saying that? Was it Mr. Boghosian's opinion or
5 some other source?

6 A. It would be -- I think
7 it's in David's opinion. I'm not sure now at the
8 time whether it -- I don't know that I would have
9 gone back to the Melo report at that point. If
10 there is no industry standard in Ontario, that
11 means it's a -- you know, that's a big criteria
12 that we take into consideration from a legal
13 exposure, whether or not your meeting a standard
14 from a legal exposure. Not from a safety concern,
15 but from a legal exposure.

16 Q. I understand. My
17 question was quite specific on what -- the source
18 of that information was for you, if it was Dr.
19 Boghosian -- pardon me -- Mr. Boghosian's opinion
20 or if you had some independent source of knowledge
21 about industry standards in Ontario relating to
22 friction.

23 A. I may have had some
24 background information in my head concerning
25 pavement testing. Whether it be through reading,

1 I'm not quite sure.

2 Q. You think you did some
3 reading on friction standards in Ontario?

4 A. No, I mean I think there
5 was some newspaper articles as well about
6 provincial standards or industry -- I can't
7 remember, to be honest, I can't remember where I
8 got that information.

9 Q. Okay. It is in
10 Mr. Boghosian's opinion, to be clear. I wanted to
11 ask if you had an independent place that you knew
12 that?

13 A. No. You know, if I sat
14 and read David's opinion right now I would say
15 okay, then it came from David's opinion. Whether
16 I knew it somewhere else I guess the answer is no,
17 I don't -- I don't have a recollection of that.

18 Q. Mr. McLennan forwarded
19 your response to Mr. Sabo and he says:

20 "Dana's thoughts are
21 consistent with mine. I think
22 it's incumbent on us to bring
23 in JLT."

24 So just stopping there. JLT
25 is an insurer; is that right?

1 A. Yeah, they are a broker
2 for the insurers.

3 Q. And they get brought in
4 later in the piece in February 2019. Do you
5 recall being involved in discussions with the
6 broker and insurers after the public release of
7 the Tradewind report?

8 A. I do have a recollection
9 of a telephone conference call.

10 Q. Do you have any
11 recollection of being involved in any discussions
12 with the broker or the insurer before the
13 Tradewind report was publically released?

14 A. No.

15 Q. Are you confident that
16 you were not involved in any those conversations
17 before public release?

18 A. No. Yes, I am confident.

19 Q. Registrar, could you
20 close this and go to HAM62040.

21 So this is an e-mail. You get
22 a flip of the Boghosian opinion and the next day
23 you send it to Dana Lezau. It just says "FYI."
24 You had spoken to Ms. Lezau about the Tradewind
25 report prior to sending this draft opinion to her?

1 A. Had I spoke to her about
2 it? I may have. I may have.

3 Q. "FYI" seems to be a
4 little general if she doesn't know anything about
5 the Tradewind report. You would agree?

6 A. "FYI" is general if she
7 doesn't know about the Tradewind report?

8 Q. Just saying "FYI" seems
9 like a pretty general e-mail and may be confusing
10 one if she doesn't know about the Tradewind report
11 in advance of this. Would you agree?

12 A. It would be confusing if
13 she didn't know about it. I would think she did
14 know about it.

15 Q. Do you remember speaking
16 to her about it?

17 A. I don't recall. I recall
18 probably speaking to her about the ongoing
19 litigation, the fact that she has a claim and
20 Shillingtons has one and we have discussions,
21 informal discussions from time to time. And I
22 would have just been sharing this information with
23 her so that she was aware of David Boghosian's
24 opinion on liability.

25 Q. So I understand the

1 general discussions and I understand I think your
2 evidence on why you sent her this opinion so she
3 would be aware. So the record is really clear,
4 before this had you sent her a copy of the
5 Tradewind report? Had you given her a copy of the
6 Tradewind report?

7 A. I don't know. I can't
8 remember.

9 Q. Did you know that she was
10 aware and had a copy of the Tradewind report from
11 someone, if not you?

12 A. I don't know. I don't
13 know offhand.

14 Q. Why did you send this to
15 her and not to Mr. Bartley?

16 A. Probably because this
17 litigation was very active and I didn't -- the
18 other litigation with Bartley, Dan Bartley, I
19 don't think we had any recent conversations about
20 it.

21 Q. Do you recall having any
22 discussions with Ms. Lezau after you sent the
23 Boghosian report to her?

24 A. I'm sure we did have some
25 discussions but I don't recall them.

1 Q. Registrar, you can close
2 this down. The version of Mr. Boghosian's opinion
3 letter that you received was a draft. It was
4 dated December 13. The inquiry also received a
5 final version of his report with some revisions
6 dated February 4, 2019.

7 Did you receive a copy of the
8 February 4, 2019 of opinion letter?

9 A. I don't remember.

10 Q. On January 23rd, 2019
11 there's a closed session of council which council
12 received an in camera presentation from city
13 solicitor Nicole Auty in which they are basically
14 a heads up about the existence of the Tradewind
15 report and the FOI. And then two weeks later on
16 February 6 staff represented with a series of
17 reports relating to the Red Hill in a closed
18 session. And then following that closed session
19 there was the public release of the Tradewind
20 report, including a press release.

21 Were you involved in any of
22 the preparation for materials for the council
23 meeting on January 23rd?

24 A. No.

25 Q. What about the

1 preparation for the meeting on February 6?

2 A. No, I wasn't involved.

3 Q. Did you review any of the
4 materials that were presented to council? There
5 was a number reports, including the legal services
6 report.

7 A. No.

8 Q. And you didn't attend
9 either of those meetings?

10 A. No.

11 Q. Did you attend the open
12 portion of the meeting on February 6?

13 A. The meeting on February 6
14 with?

15 Q. It was a GIC meeting.

16 A. Oh, no. I was not
17 involved in any presentations to committee or
18 council or assembling the documents or the
19 presentation in any form.

20 Q. So on February 6 there is
21 a press release that goes out saying that the
22 Tradewind report exists and that it will be
23 released -- I'm paraphrasing -- prior to -- and
24 that press release is circulated to all staff and
25 it goes quite quickly.

1 Prior to this release were you
2 aware that the Tradewind report was going to be
3 publicly released?

4 A. No.

5 Q. Registrar, can you go to
6 OD 10A, please, page 46 and 47. You can call out
7 paragraph 96, please.

8 I'm raising this because I
9 think I might have spoken earlier and said that
10 there was two bound briefs of FOI records that you
11 may have involvement in given meetings with
12 insurers. I actually think it was in respect of
13 this discussion with Shillingtons. I think I
14 misspoke.

15 So on February 7, this is
16 after the public disclosure, you forwarded the
17 press release to Mr. Shillington and Mr. Thompson
18 and you said please don't speak to the media, and
19 Mr. McLennan had said:

20 "Please don't speak to the
21 media in his e-mail. I have
22 two bound brief of FOI records
23 that were released. I will
24 have them sent to you this
25 week via courier."

1 Is that when you were talking
2 before that the Cerlox-bound documents in relation
3 to Mr. Boghosian? Is this what you were thinking
4 of.

5 A. This could very well be
6 it.

7 Q. Do you recall when you
8 received the two bound briefs of FOI records?

9 A. It would have been
10 somewhere between that December and February. I
11 couldn't tell you when.

12 Q. Do you remember reviewing
13 them when you received the two bound briefs of FOI
14 records?

15 A. Not in detail. It was
16 just -- I just knew they were compiled for this
17 purpose and it would be good to share it. So I
18 don't think I would have reviewed it tab by tab.

19 Q. Why were they sent to
20 you, the bound copies?

21 A. I don't know. I might
22 have asked for it just to make sure that
23 Mr. Shillington had everything that was in the FOI
24 review but I don't have an independent
25 recollection.

1 Q. Registrar, could you
2 bring up HAM6227.

3 MS. HALE: I think it might be
4 62271.

5 BY MS. LAWRENCE:

6 Q. I think it's 62270, which
7 is what I meant to say. Apologies. Thank you,
8 Ms. Hale.

9 This is February 13th.
10 Registrar, could you put up Mr. McLennan's e-mail
11 and just make it a little bit bigger, the second
12 e-mail. Thank you.

13 So this is copied to you.
14 You're in the "to" line, but it goes to
15 MCallaghan@JLTCanada and
16 LPapadopoulos@pearsondunn. Pearson Dunn is the
17 broker; is that right?

18 A. The City's broker, yes.

19 Q. And JLT, is that a broker
20 or is that an insurer?

21 A. They have a broker too
22 on behalf of the insurers and Linda Papadopoulos
23 is the City-specific broker to help with the
24 securing of insurance and with ongoing day-to-day
25 insurance inquiries, needs; whereas JLT is really

1 the broker that we deal with on behalf of the
2 insurers. So there's QBE and Lloyd's and JLT
3 manages that program.

4 Q. Mr. McLennan refers to a
5 conference call with a general agenda, he says.
6 Do you recall did you attend that conference call
7 that would have been on the 14th of February?

8 A. I di have a vague
9 recollection of being in on that call.

10 Q. Did that call generally
11 follow the agenda that was set out here?

12 A. As far as I can remember,
13 yes.

14 Q. To the best of your
15 recollection did JLT or Pearson Dunn know about
16 the existence of a Tradewind report before this
17 conference call that you attended on the 14th?

18 A. Did they know about the
19 Tradewind report before this call? I'm not sure.
20 I assume so.

21 Q. I should have been more
22 specific, because of course they planned the call
23 the day before. It does a conference call Red
24 Hill Valley Parkway. It's now public information
25 as of February 6. Let me try to rephrase my

1 question to be more precise.

2 To your knowledge, did the
3 folks from JLT and Pearson Dunn know about the
4 existence of the Tradewind report before the
5 Tradewind report was publically released.

6 A. Before it was publically
7 released. I don't know the answer to that.

8 Q. Registrar, you can close
9 this down and if you can call out Ms. Swaby's
10 e-mail at the top. On the 14th, this is 7:50 in
11 the morning, you say, "I'm working from home
12 today. Anything in advance of a telephone
13 conference give me a call. I didn't have a chance
14 to review on my TC with Terry and David."

15 Do you recall having a call
16 with -- I think this is Terry Shillington and
17 David Thompson -- before the 14th.

18 A. Do I recall?

19 Q. Do you recall having a
20 conversation with them?

21 A. I'm sure I did have a
22 conversation with them to probably gather some
23 information for the purposes of the meeting with
24 JLT.

25 Q. What do you remember

1 about that call?

2 A. I don't recall the call
3 now but I'm trying to think what I would have
4 asked for. Whether or not their continued
5 assistance would be required to navigate for -
6 with claims or potential claims moving forward, I
7 would imagine.

8 Q. You don't remember the
9 content?

10 A. No, I don't.

11 Q. Registrar, could you
12 close this down and go back into 10A, page 55 and
13 56.

14 I'm sorry, before I move on
15 that last document that we had up, it's HAM62270,
16 needs to be marked as the next exhibit which would
17 be Exhibit 184.

18 THE REGISTRAR: Noted,
19 Counsel, thank you.

20 EXHIBIT NO. 184: Letter dated
21 2/14/2019 from Diana Swaby;
22 HAM62270

23 BY MS. LAWRENCE:

24 Q. Can you bring up callout
25 150 to 152, those two pages, please. Just bring

1 these up at the same time?

2 On February 14 you forwarded
3 Mr. McLennan a copy -- an e-mail chain between you
4 and Mr. Moore and Ms. Crawford in which Mr. Moore
5 circulated a copy of the Tradewind report to Ms.
6 Crawford in 2017, and then Ms. Crawford flips it
7 to you in May 2018. So we've gone through those a
8 couple of times today, and you say:

9 "Just an FYI. As show below
10 the public could have accessed
11 this report long before the
12 recent attention it's
13 received. That said, I'm not
14 sure we should be seeing an
15 influx of claims coming out of
16 this. Arguably this claim
17 should be dismissed --"

18 I'm sorry, I think I misspoke
19 here:

20 "That said, I'm not sure we
21 should be seeing an influx of
22 claims coming in after the
23 applicable prescription dates.
24 Arguably those claims should
25 be dismissed," you say.

1 Just stopping there. The
2 prescription date. That's the limitation period;
3 is that right?

4 A. Yes.

5 Q. And was this the first
6 time that you had provided -- had told
7 Mr. McLennan that you had received a copy of the
8 Tradewind report in May of 2018?

9 A. Is this first time I
10 would have told him that? I don't know. It
11 obviously came in to my head with this being all
12 of the issues around it, and I was always of the
13 view that if -- historically I was always of the
14 view if you want something you do an FOI, you
15 submit it and if you ask for it you should receive
16 it.

17 So in my mind it was look,
18 here, dating back -- this issue is raised now but
19 look at how far back this goes and if you ask for
20 it you got it and here it is. That was the
21 context of that e-mail that I sent. Had I told
22 him about it before? Likely not, because I'm
23 really looking at things through the claims lens.

24 Q. So your evidence was that
25 on May 14 was the first time you told Mr. McLennan

1 that you had received a copy of the Tradewind
2 report on May 4, 2018?

3 A. May 4, 2018. Sorry, what
4 was that? You said something about May?

5 Q. May 4th, 2018.

6 A. Yes.

7 Q. May.

8 A. May 4, 2018 I had it here
9 and I said here, look, I had it back then and I'm
10 forwarding it to you now. I missed the first part
11 of the question, sorry.

12 Q. That's okay. I can
13 restate my entire question.

14 February 14, 2019 is the first
15 time that you told Mr. McLennan that you had had a
16 copy of the Tradewind report that you received on
17 May 4th, 2018.

18 A. It was the first time I
19 told him I had it?

20 Q. Yeah.

21 A. Probably, yes.

22 Q. Thank you.

23 MS. LAWRENCE: Commissioner
24 I'm looking at the time, it's 3:15. I would like
25 a moment to look up my notes to make sure I have

1 nothing else. I'm quite close to the end of my
2 examination, and I would suggest -- I would be
3 content to even take a ten minute break, confer
4 with counsel about the remainder of our day and
5 then finish up my exam.

6 JUSTICE WILTON-SIEGEL: That's
7 fine. Let's take a ten minute break and we'll
8 return at 25 past.

9 --- Recess taken at 3:16 p.m.

10 --- Upon resuming at 3:25 p.m.

11 MS. LAWRENCE: Commissioner,
12 may I proceed?

13 JUSTICE WILTON-SIEGEL: Yes,
14 please proceed, Ms. Lawrence.

15 MS. LAWRENCE: I've reviewed
16 my notes and I realize there was one document that
17 I raised with Ms. Swaby and have not -- did not
18 mark it as an exhibit. It is HAM64296. I would
19 ask that that be marked the next exhibit, which is
20 185.

21 THE REGISTRAR: Thank you,
22 Counsel, noted.

23 EXHIBIT NO. 185: Letter dated
24 December 22, 2017 from Diana
25 Swaby; HAM64296

1 MS. LAWRENCE: Thank you. I
2 have no further questions for Ms. Swaby. I
3 understand the MTO and Golder also have no
4 questions for Ms. Swaby and that the City of
5 Hamilton may have some brief questions.

6 MS. HALE: The City has no
7 questions for Ms. Swaby, thanks.

8 JUSTICE WILTON-SIEGEL: Then,
9 Ms. Swaby, thank you very much for attending
10 today. You're excused and, Counsel, we'll stand
11 adjourned then until 9:30 tomorrow morning. Have
12 a good evening.

13 --- Whereupon at 3:27 p.m. the proceedings were
14 adjourned until Wednesday, October 19, 2022 at
15 9:30 a.m.

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