

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONOURABLE FRANK MARROCCO
held via Arbitration Place Virtual
on Tuesday, August 9, 2022, at 9:33 a.m.

CONFIDENTIAL TRANSCRIPT

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1 Arbitration Place Virtual

2 --- Upon commencing on Tuesday, August 9, 2022,
3 at 9:33 a.m.

4 MR. MARROCCO: Well, hello,
5 everybody. I know some of you from other things
6 and don't know others of you, but good morning.

7 I can tell you that Yadesha
8 Satheaswaran is on the call. She's an associate
9 at Stockwoods and helping me with this, and so my
10 idea is that she'll just simply stay on the call
11 throughout, listening in, probably not on the
12 screen, but I just didn't want you to forget about
13 the fact that she was there.

14 I've read everything that you
15 have sent me once, so on the one hand you can
16 assume I've read it, but on the other hand, if
17 there's something you feel you need to emphasize
18 or state again, by all means go ahead, but I'm
19 not, and neither is Yadesha, a completely blank
20 page as far as this is concerned. And so, I think
21 that having been said, we should just get started.

22 So, have you discussed among
23 yourselves who is going first and that sort of
24 thing?

25 MR. LEDERMAN: Yes, we have.

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1 I'm getting an echo. Hang on. Can you hear me
2 okay?

3 MR. MARROCCO: I can hear you
4 fine. I'm not getting an echo.

5 MR. LEDERMAN: Okay, great.
6 We have talked about it. So, the plan, I think,
7 is that we will, as counsel for the City of
8 Hamilton, Ms. Contractor and I have agreed that we
9 will divide our submissions between us. I would
10 go first and do about two and a half hours max in
11 terms of our timing. Ms. Lie will then, I think,
12 want two and a half hours as commission counsel
13 response. And we may have a brief reply after
14 that, sort of the traditional form of submissions
15 during the course of a motion. That's sort of
16 what we had anticipated.

17 MR. MARROCCO: I'll leave the
18 timing to you, but that seems like a long time.
19 So, I'm assuming everybody has been a bit -- well,
20 depending on your political perspective,
21 conservative or liberal in their estimate of the
22 time, but it strikes me as a lot of time, but I'm
23 not trying to rush anybody.

24 MR. LEDERMAN: We will do our
25 best to keep this -- to condense it as much as

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1 possible. What we've also done is we've got a bit
2 of a PowerPoint which basically is a collection of
3 some of the material that's been put before you
4 that will assist as an aid in our oral argument
5 which we'll put up on the screen that will
6 hopefully assist in keeping this moving on a quick
7 pace, and that may, you know, assist in trying to
8 get through this relatively efficiently.

9 MR. MARROCCO: Okay. And will
10 we end up with a copy of one?

11 MR. LEDERMAN: Sure. I'm
12 happy to provide a copy of that to you afterwards.

13 MR. MARROCCO: Sure. Okay, so
14 we're ready when you are.

15 SUBMISSIONS BY MR. LEDERMAN:

16 Okay. Let me just get the
17 PowerPoint up. Can you see that okay?

18 MR. MARROCCO: I can. I can.
19 You're all on the side of my screen now and --

20 MR. LEDERMAN: Right, so
21 that's the one downside of sharing screen like
22 this, is we're now going to be in small boxes, but
23 you'll have the benefit of the slide on the screen
24 in front of you. And if it gets distracting and
25 you want me to take it down, we can so we can have

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1 us on the larger screen if that's of use.

2 But for the moment, let me
3 just walk you through, if I could, just a quick
4 road map of our submissions to you, Mr. Marrocco,
5 which would be that -- I'll do a brief
6 introduction and then my colleague Ms. Contractor,
7 she will quickly go through a summary of the key
8 facts that are really at issue on this motion and
9 address the terms of reference. I will deal with
10 the documents that we've identified as the
11 category 1 and category 2 documents and
12 Ms. Contractor will then come back and finish it
13 off by dealing with the specific issues around
14 categories 3 to 6.

15 And when we get to the
16 different categories, we'll explain and I'll
17 remind you how we have defined or characterized
18 the different groups of documents as they relate
19 to different issues in this proceeding.

20 So, with that, let me just
21 begin with a quick introduction just relating to
22 some of the key themes that we intend to deal with
23 and that are going to be a feature of this
24 argument, and that is of course the impact of
25 section 33(13) of the Public Inquiries Act which

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1 grants the summons power in a judicial inquiry.
2 And what's most important about this is that
3 pursuant to the terms of the legislation in
4 section 13, nothing is admissible in evidence at
5 an inquiry that would be inadmissible in a court
6 by reason of any privilege under the law of
7 evidence.

8 So, I bring that up as one of
9 the key themes in this proceeding because we are
10 in a judicial inquiry and this enshrines as part
11 of the legislation that the summons power of the
12 Commission to compel documents and to compel
13 evidence is limited by legislation, that it is not
14 to compel privileged information.

15 So, that's what leads to the
16 key issue that I think you're going to need to
17 consider, is not only whether this information is
18 privileged and is inadmissible, but really whether
19 this violates that the summons power here should
20 be considered in this context and what is the test
21 for quashing a summons that, in effect, is seeking
22 to compel privileged information. So, that's a
23 key theme and I just want to move to the next
24 slide.

25 Of course, we're going to be

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1 talking a lot about solicitor-client privilege as
2 well as litigation privilege. Obviously it is a
3 fundamental principle of our justice system. It's
4 not just a rule of evidence. And I make that
5 point obviously, Mr. Marrocco, because when we are
6 talking about a judicial inquiry, often what we
7 encounter are distinctions and contrasts that are
8 drawn in inquiries from other court proceedings
9 where one says, well, the laws of evidence don't
10 apply to the same degree of -- with the same
11 degree of force in a public inquiry than it will
12 in a regular trial or a civil trial or criminal
13 trial. Obviously that's not the case when we're
14 dealing with privilege. Privilege is more than
15 just a rule of evidence, but is a fundamental
16 principle in our system. And that is, I think,
17 why it is reflected in the legislation under the
18 Public Inquiries Act, which is that privileged
19 information is not to be compellable even when a
20 public inquiry has been called, and that is going
21 to become an important feature of our argument
22 when we address the arguments that commission
23 counsel have made to say, well, there has been an
24 implied waiver of privilege by virtue of the terms
25 of reference that have been made by the city

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1 council in this inquiry.

2 If we could just go back to
3 the previous slide for a second. So, we're going
4 to deal with that implied waiver issue in this
5 argument. In my respectful submission, where one
6 is looking to say there has been an implied waiver
7 of privilege by virtue of passing terms of
8 reference, that really must be found in the
9 clearest of cases, and this is not one of those
10 cases in my respectful submission.

11 That also involves a bit of a
12 review of the terms of reference themselves to
13 make sure that they have been interpreted
14 correctly to determine whether or not, when you
15 look at a term of reference, was it implied that
16 privilege was to be waived or that privilege would
17 not be maintained, and that is one of the
18 considerations that we'll need to and we will
19 address during the course of these submissions.

20 And then I do want to make a
21 point about the test for litigation privilege,
22 which we will address as well. Looking at the
23 commission counsel's factum, you will have seen
24 that they rely heavily on the McComb case from the
25 BC court largely to say that when a party seeks a

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1 liability assessment or a general liability
2 assessment, that doesn't meet the test for
3 establishing a document as having the dominant
4 purpose of litigation. And we'll address that in
5 our submissions as well to say why we don't agree
6 with that submission or that interpretation or the
7 application or the reliance of that case on that
8 proposition, but rather the litigation privilege
9 that's been asserted here is based on, at the time
10 that Mr. Boghosian was retained, for example,
11 there was existing cases ongoing and it's clear
12 that that was one of the reasons for the City's
13 engagement of external counsel, and we'll get into
14 that in some detail when we go through the
15 categories of documents in particular.

16 Just a quick point about the
17 test to be applied. This is about quashing a
18 summons. If we could just go to the next slide.
19 Sorry, back one. So, this is when we are talking
20 about quashing a summons, the test to do so is
21 that if you're going to compel privileged
22 information, there must be a basis to do so, it
23 must be material, it must be necessary and it must
24 be admissible. And in this case, we submit that
25 it is inadmissible, the documents that are sought

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1 to be compelled are inadmissible by virtue of the
2 existence of a legal privilege and that, in any
3 event, the information that is sought here is not
4 truly material or necessary in order for the terms
5 of reference to be answered.

6 Okay. With that very brief
7 introduction, I will pass it over to
8 Ms. Contractor, who will review with you, sort of,
9 the key facts that are relevant, I think, for your
10 analysis and your consideration of this privilege
11 issue.

12 MR. MARROCCO: Okay.
13 Ms. Contractor, before you start, I should have
14 said I'll break after about an hour or so for a
15 few minutes and I'll just keep doing that. I sort
16 of take as my cue the fact that most lectures are
17 50 minutes and then they were over, so I'll do
18 that. So, Ms. Contractor, just keep that in mind.

19 MS. CONTRACTOR: Certainly.
20 Thank you, Mr. Marrocco, and if I go over the
21 allotted time, of course feel free to interrupt me
22 and I'll pause my submissions where they are. If
23 you give me a moment, I'm going to share my own
24 screen so that I can control the PowerPoint, so
25 just bear with me. Are you able to see that?

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1 MR. MARROCCO: I can and I
2 see, you know, Submissions of the City of Hamilton
3 on my screen, which is what I think I'm seeing,
4 and then on the left side, presentation views and
5 so on. Now I'm not seeing it.

6 MS. CONTRACTOR: Apologies.
7 Let me try that again.

8 MR. MARROCCO: Yes, I can see
9 it now.

10 MS. CONTRACTOR: Great. No?
11 Strange.

12 MR. MARROCCO: I can see it.
13 It's that first page. Now I'm on the second page,
14 background to privilege issue.

15 MS. CONTRACTOR: Strange.

16 MR. MARROCCO: Now it's gone.
17 Why don't we do this? Do you want to stand down
18 for a minute or two until you're sorted out?
19 There's no need to --

20 MS. CONTRACTOR: Sorry, it
21 will be just a brief minute. Let me sort out why
22 it's not working. We did test it out, but
23 technology.

24 MR. MARROCCO: Yes. I'm
25 always terrified when I start one of these that

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1 people won't be able to hear me and I won't be
2 able to solve the problem. Okay, so we'll just
3 take five.

4 --- Recess taken at 9:49 a.m.

5 --- Upon resuming at 9:53 a.m.

6 SUBMISSIONS BY MS. CONTRACTOR:

7 As Mr. Lederman stated, I
8 would like to start with a brief overview of the
9 facts. And, of course, we've provided a summary
10 of that in our factum and our friends provided a
11 helpful summary as well, but I do want to spend
12 some time taking you through these because they of
13 course provide important context to the disputed
14 documents and particularly to my friends' argument
15 that the City waived privilege in calling this
16 inquiry, which requires an analysis of the facts
17 and how they relate to the terms of reference.
18 So, I'm going to take you through some of these
19 issues.

20 I would like to start with a
21 genesis, with a quick background on the genesis,
22 of this motion itself. And so, the inquiry was
23 commenced in April of 2019, following which the
24 City produced initially about 62,000 documents and
25 claimed privilege over about a thousand documents.

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1 And, about a year later, commission counsel
2 advised of its position that that City waived
3 privilege in calling the inquiry and asked for
4 copies of the privileged documents on a without
5 prejudice basis, which were provided.

6 As a result of this, there
7 were extensive negotiations between the City and
8 commission counsel and ultimately the City agreed
9 to produce the majority of the documents requested
10 by commission counsel that in its view were truly
11 necessary to answer the questions posed in the
12 terms of reference, and the documents that the
13 City produced and waived privilege over are
14 referred to as the produced documents or the
15 redacted produced documents. And the documents
16 that the City maintained privilege over are the
17 disputed documents, which of course are the
18 subject of this motion.

19 And the key point here that I
20 want to bring to your attention, Mr. Marrocco, is
21 that the City waived privilege over the produced
22 documents or the produced redacted documents under
23 the condition that commission counsel would not
24 take the position that the City waived privilege
25 over any of the disputed documents solely on the

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1 basis that the City waived privilege over these
2 documents. And the purpose of this was of course
3 to ensure against any arguments regarding partial
4 waiver. So, right off the bat, I wanted you to be
5 aware of the condition on which the City did waive
6 privilege over the produced documents and the
7 produced redacted documents.

8 MR. MARROCCO: Just to be
9 clear, the City produced to the inquiry the
10 unredacted disputed documents on the understanding
11 that the production of those documents did not
12 constitute waiver of privilege?

13 MS. CONTRACTOR: Not quite.
14 Let me try that again. There were a set of
15 privileged documents that commission counsel
16 sought. Most of those, the City agreed to produce
17 and waive privilege over, and those have been
18 incorporated into the overview document and
19 released to the public. So, those documents that
20 we produced are referred to as the produced
21 documents or the produced redacted documents.

22 There are a set of documents
23 that the City maintained privilege over, the
24 disputed documents, which are the subject of this
25 motion, and what you see before you is an excerpt

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1 of what we call the privileged process letter, and
2 you have the cite there on the screen, which is
3 essentially correspondence from commission counsel
4 to the City confirming the agreement between the
5 parties regarding the condition on which the City
6 waived privilege over the produced documents and
7 the produced redacted documents.

8 MR. MARROCCO: Okay. So,
9 waiving privilege over the produced documents or
10 the produced redacted documents did not amount to
11 any kind of a waiver of privilege over the
12 disputed documents?

13 MS. CONTRACTOR: That's
14 correct.

15 MR. MARROCCO: But as a matter
16 of fact, I just want to understand this for
17 myself, everyone -- and it should be clear I think
18 in the transcript that everyone today who is
19 dealing with these documents have the unredacted
20 documents for their preparation?

21 MS. CONTRACTOR: Absolutely.
22 So, commission counsel was provided on a without
23 prejudice basis copies of the disputed documents.

24 MR. MARROCCO: Okay.

25 MS. CONTRACTOR: So, on to the

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1 The second group or party
2 that's involved is Golder Associates. Golder was
3 the pavement consultant for the Red Hill, so it
4 was involved way back during the design and
5 construction of the roadway and continued to be
6 engaged by the City to do work on the Red Hill,
7 including the friction testing that is the key
8 subject of this inquiry.

9 The third group is CIMA, which
10 is another consultant engaged primarily by the
11 traffic group in public works. CIMA are safety
12 consultants that were engaged by the City to
13 conduct safety reviews on the Red Hill, which they
14 did in 2013, 2015 and in 2018. And you'll hear
15 the name Brian Malone, who is a principal of CIMA
16 and who was the primary contact between the City
17 and CIMA for these reviews.

18 And the last group that
19 continues to make an appearance is members of the
20 City's legal group and specifically Ms. Nicole
21 Auty, Ron Sabo and Ms. Byrdena MacNeil, now
22 Justice MacNeil, who are all lawyers within the
23 City's legal group, who become involved in the
24 events in the fall of 2018 once the Tradewind
25 report is located. And the legal department, as

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1 I'll take you to, engages external counsel by the
2 name of David Boghosian, and we'll be referring to
3 him quite a bit as well.

4 By way of background on the
5 friction testing itself, the friction testing came
6 about from a request from Mr. Gary Moore, who, in
7 September of 2013, was the director of engineering
8 services in the City's public works group. He
9 makes a request to Golder for skid testing on the
10 Red Hill. Golder, in turn, subcontracts Tradewind
11 Scientific to conduct that friction testing, which
12 is completed in November of 2013, and the report
13 is provided to Golder and to the City in 2014.

14 And the Tradewind report is
15 obviously the central focus of this inquiry and
16 specifically the disclosure of the Tradewind
17 report and the impact of that report on the safety
18 of the roadway. And I have here the key
19 conclusion that the Tradewind report includes with
20 respect to the Red Hill. And the report states
21 essentially that the Red Hill was below
22 investigatory levels that are found in the United
23 Kingdom and that the City should consider doing a
24 more detailed investigation and consider possible
25 remedial action.

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1 All right. We're going to
2 fast-forward now to the fall of 2018, as the
3 majority of the disputed documents arise in this
4 time period. However, it is important to note
5 that there are a number of things that take place
6 between Mr. Moore obtaining the report in 2014 and
7 Mr. McGuire locating the report in 2018. And, for
8 example, in 2017, Mr. Moore e-mails a copy of the
9 Tradewind report to Shillingtons, which is an
10 external law firm that the City engaged in
11 litigation arising from motor vehicle accidents on
12 the Red Hill, and in that case, the City waived
13 privilege and produced all the e-mails between the
14 City and Shillingtons because, in that case, they
15 were directly relevant to the issues in the terms
16 of reference.

17 Back to 2018. Mr. Gord
18 McGuire becomes the director of engineering
19 services and replaces Mr. Moore, and in September
20 of 2018, he locates a copy of the Tradewind report
21 in the City's document management system. He
22 shares the report with others in the public works
23 group, including the general manager of that group
24 and the director of traffic operations. He also
25 shares the report with Mike Zegarac, who, at the

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1 time, was the City's interim manager, city
2 manager.

3 MR. MARROCCO: Ms. Contractor,
4 do we know why Mr. Moore ordered the report?

5 MS. CONTRACTOR: We do have
6 that in the City's factum. And I can take you to
7 it, but essentially there were e-mails exchanged
8 between the City's after-hours roads crew, so the
9 folks that show up after an MVA on the Red Hill to
10 do cleanup as may be necessary, and one of them
11 expressed concerns that when there is heavy
12 rainfall on the Red Hill, that the pavement tends
13 to be slippery and expressed his view that the
14 police have also expressed concerns about that.

15 So, the after-hours road staff
16 member, Sam Capostagno, that's his name, forwards
17 that e-mail, it goes up the chain and is sent to
18 Mr. Moore, who is the director of engineering
19 services at the time, and John Mater, who is the
20 director of corporate asset management under which
21 falls traffic operations, the manager of risk,
22 John McLennan, is also included in that e-mail
23 chain. And there is a back and forth at that time
24 about whether anyone else at the City had heard of
25 this issue of the roadway being slippery during

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1 clear that he had no concerns about the safety of
2 the roadway and that that was confirmed by the
3 exchange between the manager of traffic
4 operations, who confirmed that there were no
5 claims of wet weather collisions, no history of
6 those types of collisions, and by the manager of
7 risk, who also confirmed that there were no claims
8 at that time of wet weather collisions.

9 MR. MARROCCO: Okay.

10 MS. CONTRACTOR: Excuse me, I
11 jumped ahead a little. In the fall of 2018, once
12 Mr. McGuire locates the Tradewind report and is
13 busy sharing that report, as I mentioned, with
14 others in public works as well as the city
15 manager, there are a number of other things that
16 are occupying the time of city staff members that
17 are relevant to our discussion, so I'm going to
18 take you through some of those as well.

19 And the first is the FOI
20 request, FOI request 18-189, which the City
21 receives on November 9, 2018. That FOI requested
22 access to any reports, memos or drafts about
23 friction testing on the Red Hill in the last five
24 years or any reports or memos regarding asphalt or
25 pavement testing on the Red Hill in the last two

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1 years. So, that comes in on November 9 and, as a
2 result of that, city staff and particularly Gord
3 McGuire and Ms. MacNeil, start considering whether
4 or not to produce the Tradewind report in response
5 to that FOI request. And all of those
6 communications between Mr. McGuire and Ms. MacNeil
7 where they discuss whether or not the Tradewind
8 report should be produced in response to the FOI
9 request have been produced and the City has waived
10 privilege over those documents.

11 One of the other things that
12 was going on in the fall of 2018 was the roads
13 value for money audit. And this was an audit
14 conducted by the City's audit group that was
15 looking into a roads value for money, so whether
16 the public works group was getting good value for
17 the asphalt that it obtained. And, through their
18 investigation, they made a number of copies for
19 the Tradewind report as well around that time
20 period and all of those documents have been
21 produced as well.

22 In the fall of 2018, there
23 were also discussions around the resurfacing of
24 the Red Hill, which at the time was planned for
25 the spring/summer of 2019, and those discussions

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1 had been ongoing since about the spring of 2016,
2 and so plans were being developed and at the time
3 the plan was to have the resurfacing completed by
4 the spring/summer of 2019.

5 A few other things going on in
6 this time period. There's a municipal election
7 that takes place on October 22, as a result of
8 which there are a number of new city councilors
9 that are elected and their first council meeting
10 after being elected is not until December 6, 2018.
11 And so, between their election in October and
12 actually a few weeks prior to that during which
13 the campaigning is proceeding, the council
14 meetings are essentially suspended and there's
15 delegated authority to different city staff
16 members for issues that may ordinarily be brought
17 to city council, so that's also in the mix that
18 there really isn't, after October 22, any city
19 council meetings until December 6.

20 As well, in the fall of 2018,
21 CIMA, who is the engineering firm that conducted
22 previous safety reviews of the Red Hill, at that
23 time was conducting three studies of the Red Hill
24 and the LINC, including a roadside safety
25 assessment, a speed study review, so a review of

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1 the speed limit on the Red Hill, and a review of
2 illumination on the Red Hill.

3 And last but certainly not
4 least, at the time there are a number of civil
5 claims and actions arising from accidents on the
6 Red Hill where the City was either a defendant or
7 a third party that were ongoing at the time, and a
8 list of those is provided in Ms. Nicole Auty's
9 affidavit.

10 In late November, members of
11 the City's legal department start considering
12 engaging external counsel in light of Mr. McGuire
13 locating the Tradewind report. And you'll see in
14 the e-mail before you, which is one of the
15 disputed documents, Ms. Auty asked Mr. Sabo, both
16 who are, again, members of the City's legal team,
17 for an update on the plans to speak with David
18 Boghosian, who is external counsel, and who the
19 City ultimately retains, as I mentioned. She also
20 asks for an update on the assessment of risk and
21 the impact on litigation.

22 I'll just pause here,
23 Mr. Marrocco, to note that the screenshots that
24 are included in this PowerPoint are lifted from
25 the unique brief of documents, and those briefs

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1 have been annotated to make it clear for you as to
2 whether the document is fully disputed, in which
3 case the top right-hand side will say fully
4 duplicated, or whether it's a redacted document
5 and it's a redaction that's in question. And
6 where it's a redaction in question, there's a red
7 box around the section that is in dispute, just to
8 make it easier. So, for example, the City has
9 produced this e-mail but redacted this sentence
10 here that's outlined in the red box.

11 MR. MARROCCO: Okay. I
12 understand.

13 MS. CONTRACTOR: And on
14 December 7, Ms. Auty and Ms. MacNeil arrange a
15 phone call with Mr. Boghosian to discuss his
16 retainer, and the notes from that December 7 call
17 between Ms. Auty and external counsel are part of
18 the disputed documents. Subsequent correspondence
19 between Ms. Auty and Mr. Boghosian regarding the
20 details of his retainer are also part of the
21 disputed documents.

22 And in her affidavit and in
23 her cross-examination, Ms. Auty was clear that she
24 retained Mr. Boghosian to provide advice with
25 respect to the City's exposure to civil liability

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1 MR. MARROCCO: What advice was
2 she seeking on how to approach the consultant?
3 Wouldn't you just hire the consultant?

4 MS. CONTRACTOR: So, if I can
5 take you to the following screen.

6 MR. MARROCCO: Sure.

7 MS. CONTRACTOR: Mr. Boghosian
8 provides a response to Ms. Auty's -- item number 3
9 in Ms. Auty's e-mail, stating:

10 "I thought over the
11 weekend about the issue
12 of how to obtain an
13 opinion from CIMA
14 regarding interim safety
15 measures regarding the
16 condition of the Red Hill
17 pending resurface in
18 June 2019. I think the
19 only way we would prevent
20 access to any
21 correspondence they send
22 conferring their opinion
23 is if I contact them and
24 obtain their advice and
25 then communicate it to

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1 from city council, it's at that point where CIMA
2 is provided a copy of the Tradewind report and
3 asked to comment on whether or not, in light of
4 the findings of the Tradewind report, CIMA would
5 take any other -- would suggest that the City take
6 any other steps, including whether the roadway
7 should be closed, and they ultimately decide that
8 they did not have any other safety measurements or
9 would not advise that the roadway be shut down.

10 But what's important here is
11 that at this point, Mr. Malone or anyone at CIMA
12 has not been provided a copy of the Tradewind
13 report, and so any suggestion that the real nature
14 of the discussion between Mr. Boghosian and
15 Mr. Malone at this point, in December 2018, was so
16 Mr. Boghosian could obtain information from
17 Mr. Malone on what safety measures needed to be
18 put in place in light of the findings of the
19 Tradewind report are not supported because CIMA
20 didn't have a copy of the Tradewind report at this
21 point and they don't receive a copy until
22 January 30.

23 MR. MARROCCO: Was there
24 evidence about where it says, I think -- it says
25 in this e-mail:

1 "I think the only way we
2 could prevent access to
3 any correspondence they
4 sent conferring their
5 opinion -- "

6 Was that Freedom of
7 Information access?

8 MS. CONTRACTOR: I don't
9 believe that there's any evidence from
10 Mr. Boghosian in his affidavit and I don't believe
11 he was asked about that on cross-examination.

12 MR. MARROCCO: Okay.

13 MS. CONTRACTOR: Following the
14 call with Ms. MacNeil and Ms. Auty and
15 Mr. Boghosian on December 7 and the subsequent
16 e-mails that I took you to about his retainer and
17 the advice regarding contacting CIMA,
18 Mr. Boghosian calls Mr. Malone on December 11, and
19 his evidence on why he called Mr. Malone was quite
20 clear. It was, A, because he had used Mr. Malone
21 as an expert on many other legislation matters and
22 here he was facing the task of interpreting
23 technical reports in order to prepare his
24 liability analysis for the City as to whether any
25 litigation may arise as a result of the finding of

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1 the Tradewind report, and that he relied on
2 Mr. Malone to gain an understanding of what the
3 issues were and the significance of the various
4 reports and findings of those reports from the
5 standpoint of risk and liability.

6 MR. MARROCCO: But when you
7 say the reports, it's not the Tradewind report
8 because he hasn't got it? These must be other
9 reports?

10 MS. CONTRACTOR: That's right.
11 So, Mr. Boghosian is provided a copy of the
12 Tradewind report, the safety reviews conducted by
13 CIMA in 2015 and in 2013, as well as a six-year
14 review of the Red Hill that's conducted by Golder.
15 And he speaks with Mr. Malone about these reports
16 and gets an understanding of what the reports mean
17 and Mr. Malone's insight into the Red Hill based
18 on the work that he's done for the City in the
19 past.

20 And a few days later,
21 Mr. Boghosian provides a draft legal opinion in
22 which he summarizes the call with Mr. Malone on
23 December 11 and a final opinion follows on
24 February 4, which is virtually identical to the
25 draft opinion, the only difference between there

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1 is a summary of a subsequent telephone call with
2 Mr. Malone, which takes place on January 30.

3 MR. MARROCCO: Is there any
4 other evidence about the substance of those two
5 phone calls, other than Mr. Boghosian's letter?

6 MS. CONTRACTOR: Certainly.
7 There are notes from Mr. Boghosian of the
8 December 11 call, there are notes from Mr. Malone
9 of the December 11 call, and there is a subsequent
10 call between Mr. Boghosian, Ms. Auty and
11 Ms. MacNeil -- or it might be Mr. Sabo -- where
12 Mr. Boghosian is providing an update on his call
13 with Mr. Malone and there are notes from that
14 follow-up call as well, and all of those notes
15 form part of the disputed documents and
16 Mr. Lederman will get into those specific
17 documents in discussing categories 1 and 2.

18 The Boghosian legal opinion
19 itself, as I mentioned, includes a background --
20 an analysis of the background material that's
21 provided to him, which includes the draft Golder
22 six-year review, the 2015 CIMA report and the
23 Tradewind report as well, and notably it includes
24 his opinion on potential liability concerns,
25 including claims for contribution and indemnity by

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1 the City based upon the City's response to
2 consultant reports.

3 And specifically,
4 Mr. Boghosian includes that plaintiffs may bring
5 civil action against the City even for accidents
6 that occurred on the Red Hill more than two years
7 prior relying on the principle of discoverability
8 in light of the discovery of the Tradewind report.
9 And Mr. Boghosian further includes that the City
10 could seek contribution and indemnity from any
11 consultants that recommended that the City use the
12 specific asphalt that was used on the Red Hill,
13 which is called stone mastic asphalt or SMA, for
14 the Red Hill in any such actions.

15 And this is, of course,
16 important, Mr. Marrocco, because it evidences that
17 the purpose of retaining Mr. Boghosian and the
18 subsequent memo was with respect to ongoing and
19 anticipated litigation that would arise as a
20 result of the Tradewind report, and indeed his
21 opinion speaks to exactly that issue.

22 MR. MARROCCO: So, that makes
23 it arguably privileged, and then the question
24 becomes whether the privilege had been waived. Is
25 that right?

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1 MS. CONTRACTOR: That is
2 right. And Mr. Lederman will get into privilege
3 and waiver of privilege when we get into those
4 specific documents.

5 There's other legal advice
6 that's sought from Mr. Boghosian as well on draft
7 reports to city council and communications [REDACTED]
8 [REDACTED] and the excerpt here is
9 from the draft Boghosian opinion, which notes that
10 Mr. Boghosian has not been provided any
11 communications with the council or media, but that
12 they would be able to provide any comments once
13 they receive it. And this is important as well
14 because many of the disputed documents in
15 commission counsel's category 3 involve
16 communication between Mr. Boghosian and members of
17 the City's legal team in which he's providing
18 exactly what's sought in this opinion letter,
19 which is comments on the draft reports to council
20 [REDACTED]

21 The next key event takes place
22 on January 23, 2019 during which Ms. Auty presents
23 an in camera report to city council in which she
24 advises council that an FOI request is made for a
25 report that was not previously disclosed, that the

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1 report may have negative impact on liability for
2 the City and that further analysis of the
3 situation would be provided to council in the
4 coming weeks.

5 At that council meeting,
6 council directs Ms. Auty to obtain information
7 regarding whether CIMA's previous recommendations
8 regarding the Red Hill would have changed if they
9 knew of the Tradewind report and whether CIMA had
10 any additional recommendations. And so, it's at
11 this point that Ms. Auty and Mr. Boghosian speak
12 with Brian Malone at CIMA, advise him of the
13 Tradewind report, provide him with copies of the
14 report and ask him to provide his views regarding
15 whether any interim measures need to be
16 implemented in advance of the resurfacing, given
17 the findings of the Tradewind report. So, there's
18 an initial call with Mr. Boghosian, Ms. Auty and
19 Mr. Sabo on January 30 and there are notes from
20 Mr. Boghosian on that call, and there are also
21 notes from a follow-up call on January 30 as well
22 with Mr. Malone, Mr. Boghosian, Ms. Auty, Mr. Sabo
23 and other members of the public works leadership
24 team.

25 And so, as I mentioned,

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1 following that January 30 call, Mr. Malone
2 receives a copy of the Tradewind report as well as
3 an additional report completed by Golder on the
4 assessment of pavement surface and aggregates,
5 which was obtained in preparation of the
6 resurfacing of the Red Hill. On February 4, CIMA
7 sends a memo to Mr. Boghosian in response to the
8 City's request and essentially states that CIMA
9 would not substantially change their previous
10 recommendations regarding the safety measures on
11 the Red Hill, they would not add any additional
12 safety measures to the Red Hill, nor would they
13 recommend that the City close the Red Hill pending
14 resurfacing of the Red Hill. That report is
15 initially addressed to Mr. Boghosian, but a final
16 version of that report, which is addressed to city
17 council, is ultimately released to the public on
18 February 6 along with the Tradewind report.

19 MR. MARROCCO: So, if I have
20 it right, there's a concern that releasing the
21 report, according to what you're saying, there's a
22 concern that releasing the report will increase
23 the exposure or risk or like to of the City, and
24 ultimately the report back from this CIMA is that
25 they would not have changed their recommendations

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1 if they had known about the report?

2 MS. CONTRACTOR: That's right.

3 At the time, as I mentioned, CIMA was working on a
4 safety review of the Red Hill and I think by the
5 time that they received the Tradewind report on
6 January 30 had presented a final copy of that
7 report to council. Or not to council, but to the
8 City. And so, in their memo, they confirmed that
9 there are no other safety measures that they would
10 recommend in addition to what has already been
11 provided to the City, and they confirmed that, of
12 course, the roadway does not need to be shut down
13 in advance of the resurfacing and no interim
14 measures need to take place in advance of the
15 resurfacing.

16 MR. MARROCCO: So, do I have
17 the right, then, that the City's position would be
18 that there was a certain amount of time taken in
19 the fall of 2018 trying to figure out what to do
20 with this Tradewind report, trying to figure out
21 the liability exposure, but that ultimately when
22 the report is given to CIMA, CIMA doesn't change
23 its recommendations. Is that right?

24 MS. CONTRACTOR: That's
25 correct. And while the timing or the fact that

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1 MR. MARROCCO: Does
2 Mr. Boghosian, in that presentation, disclose the
3 fact that he's been talking to Mr. Malone over the
4 fall?

5 MS. CONTRACTOR: The evidence
6 is that Mr. Boghosian and Ms. Auty goes through
7 the Boghosian opinion, which includes summaries of
8 the December 11 and January 30 calls with
9 Mr. Boghosian. Sorry, with Mr. Malone.

10 MR. MARROCCO: And that was
11 done in public?

12 MS. CONTRACTOR: No. That's
13 done in camera. So, the entire presentation --

14 MR. MARROCCO: Okay.
15 Understood.

16 MS. CONTRACTOR: So, the
17 presentation was in camera, but the City has
18 produced the public works portion of the
19 presentation but has maintained privilege over the
20 legal considerations section of the PowerPoint,
21 which is what Ms. Auty and Mr. Boghosian spoke to.

22 MR. MARROCCO: Okay.

23 MS. CONTRACTOR: Following the
24 February 6, 2019 meeting, council votes to release
25 the Tradewind report and the CIMA memo and votes

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1 to maintain privilege over the Boghosian legal
2 opinion and the advice that it received on the
3 February 6 meeting.

4 I'm going to now take you very
5 briefly through the general categories of the
6 terms of reference. I'm certainly not going to
7 take you to each one, however, I may be past the
8 hour mark, so I'm happy to take a break now.

9 MR. MARROCCO: Okay. If it's
10 convenient now, we'll break for five.

11 --- Recess taken at 10:37 a.m.

12 --- Upon resuming at 10:41 a.m.

13 MS. CONTRACTOR: May I
14 proceed?

15 MR. MARROCCO: Sure.

16 MS. CONTRACTOR: We can group
17 the terms of reference into five categories
18 generally. The first and the largest category is
19 with respect to the disclosure of the terms of
20 reference. Let me take a step back. The
21 resolution passed by council in April of 2019 to
22 call the inquiry contains 24 questions. Those are
23 the terms of reference and, as I mentioned, they
24 can be grouped into five broad categories.

25 MR. MARROCCO: I can tell you

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1 I have read the terms of reference.

2 MS. CONTRACTOR: Perfect. I'm
3 not going to take you through each one. The only
4 comment I'll make is that the terms of reference
5 were drafted by city council after they received
6 updates from Ms. Auty and Mr. Boghosian at the
7 February 6 meeting. As we'll speak to throughout
8 our submissions, that's important to keep in mind
9 because it reflects the language that city council
10 has used or has not used in this case when
11 drafting the terms of reference.

12 With that, I'll turn it over
13 to Mr. Lederman, who will speak to you regarding
14 the category 1 and 2 documents.

15 MR. LEDERMAN: Can you hear me
16 okay?

17 MR. MARROCCO: I can now.

18 SUBMISSIONS BY MR. LEDERMAN:

19 Okay, great. So, we're going
20 to deal with the documents by virtue of these
21 groupings into different categories. There's
22 really, in effect, six categories.

23 The first one is the documents
24 and the communications relating to the engagement
25 and the retainer of David Boghosian and his firm,

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1 Mr. Boghosian's draft retainer and the e-mail
2 correspondence discussing the scope of
3 Mr. Boghosian's retainer, some of which we looked
4 at a little earlier.

5 So, here we looked at this one
6 where the redacted portion in the red box is what
7 is being disputed. We've produced this e-mail
8 from Nicole Auty to Mr. Sabo in the legal
9 department and John McLennan of risk to the
10 inquiry, but what we have maintained privilege
11 over is the sentence:

12 "Where are we with
13 regards to speaking to
14 David Boghosian and our
15 assessment of risk/impact
16 on litigation matters and
17 the need for an interim?"

18 That is portion that we have
19 redacted and is the disputed component of this
20 e-mail as to whether or not that is privileged.

21 And let's just go to the next.
22 You'll see on the left-hand side of this screen,
23 that's the draft engagement letter that sets out
24 the scope of the mandate or the engagement of
25 Mr. Boghosian. And then on the right-hand side

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1 there is the e-mail correspondence between
2 Ms. Auty, the City solicitor, to David Boghosian
3 about the retainer letter asking him to fill in
4 his hourly rate info for him. So, those are some
5 examples of the documents in category 1 relating
6 to his engagement and his retainer.

7 And so, this is the e-mail we
8 have already looked at about the question about
9 speaking to CIMA and how privilege and whether
10 privilege could be maintained over that, and that
11 is Mr. Boghosian's response.

12 MR. MARROCCO: Can I just stop
13 you for a minute? In terms of the impact of the
14 Tradewind report on liability for the City, it
15 would be important to know, would it not, whether
16 CIMA would have done anything different if it had
17 the report, whether it would have reported
18 additionally and given advice suggesting further
19 things that the City should do, and if the City
20 sends the report, the Tradewind report, to
21 Mr. Malone and he writes back, that is all Freedom
22 of Information producible, you can get at that
23 through the Freedom of Information procedure.

24 And so, does what
25 Mr. Boghosian mean here is we can prevent that

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1 from happening if I hire him?

2 MR. LEDERMAN: Well, certainly
3 at this point it seems to be that at least the
4 communications about this before CIMA prepares a
5 final report, that seems to be what he is
6 suggesting. But what's important here is that at
7 this time, CIMA is not asked for a view about
8 whether interim safety measures should be carried
9 out. That happens later, when they receive the
10 Tradewind report after at the time of the
11 January 30, 2019 discussion, not at this stage, in
12 December of 2018. And ultimately, the report that
13 CIMA prepares in determining whether or not their
14 opinion has changed as a result of having seen the
15 Tradewind report, that report is produced. It's
16 produced to counsel and it's produced to the
17 inquiry and it's produced to the public and would
18 be accessible through an FOI request for sure.

19 What we're talking about here
20 are the communications between Ms. Auty and
21 Mr. Boghosian discussing his engagement and the
22 scope and trying to understand the nature of that
23 retainer for the purposes of him carrying out a
24 general liability assessment arising from this
25 Tradewind report. This is the City solicitor's

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1 office asking Mr. Boghosian for legal advice as to
2 what is the impact to the City's liability, what
3 is the exposure in connection with this Tradewind
4 report that has just been brought to people's
5 attention in 2018? That's the nature of this
6 mandate and the communications surrounding the
7 engagement of Mr. Boghosian are, in the truest
8 sense, protected by solicitor-client privilege.
9 This is City solicitor to external legal counsel
10 for the purposes of engaging legal counsel to
11 obtain legal advice. And so, solicitor-client
12 privilege is the principle here that would operate
13 to say it doesn't matter that this is a judicial
14 inquiry, but unless there has been a term of
15 reference that says we need to investigate and
16 understand the terms of the engagement of
17 Mr. Boghosian, unless that was the term of the
18 inquiry, this doesn't -- there's no implied
19 waiver, express waiver, that, by calling an
20 inquiry, we are now at a point where the
21 communications between the City solicitor and the
22 engagement of Mr. Boghosian are somehow no longer
23 protected by privilege or that there has been a
24 waiver of that privilege.

25 We gave you the principles on

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1 the previous slide, if we just go back one, just
2 dealing with the nature of a solicitor-client
3 communication. Obviously, Mr. Marrocco, you'll
4 see that the principles are where there is -- just
5 go back one slide.

6 MR. MARROCCO: I'm familiar
7 with that.

8 MR. LEDERMAN: You know,
9 you're familiar with that and the principles that
10 we've provided here and we've also said this in
11 our factum is that, you know, where there is --
12 where this test has been clearly met in
13 demonstrating that the engagement and the
14 communications around Mr. Boghosian's engagement
15 are solicitor-client communications.

16 So, that is, sort of, the --

17 MR. MARROCCO: Can I just stop
18 you for a minute?

19 MR. LEDERMAN: Sure.

20 MR. MARROCCO: If one of the
21 questions that was put to Mr. Boghosian was how
22 can we find out what Mr. Malone thinks in a way
23 that does not make this report FOI-able, this is
24 in the fall of 2018, would that, in your view, be
25 soliciting legal advice from Mr. Boghosian?

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1 MR. LEDERMAN: Yes, it would
2 be.

3 MR. MARROCCO: All right.
4 Okay.

5 MR. LEDERMAN: The reality is
6 we don't need to look into the type of advice and
7 what is being sought in order to know and
8 determine whether or not this is a
9 solicitor-client communication. The exceptions
10 upon which one would say, well, you can't seek
11 legal advice on such an issue are extremely
12 narrow. So, this is in the immediate initiation
13 of the engagement of Mr. Boghosian to describe and
14 articulate what it is that they are looking to get
15 from him, and, as part of that, asking a question
16 as to whether information obtained through him is
17 disclosable is also part of the legal advice that
18 was being sought and would be protected by
19 privilege and is not waived, if we come back to
20 the waiver point, is not waived by virtue of
21 calling a judicial inquiry.

22 You'll see that commission
23 counsel has said, well, the terms of reference are
24 what governs the requirement to produce this
25 information and that, as a result, there has been

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1 a waiver and they rely on the Davies case out of
2 British Columbia in support of the proposition
3 that when you call for a judicial inquiry, in that
4 case, the criminal justice branch of the Attorney
5 General's office couldn't maintain privilege and
6 the same principle should apply here to the legal
7 department of the City of Hamilton.

8 And you'll have seen from our
9 factum that what's important to do when you look
10 at that case is to actually look at the express
11 terms of those terms of reference, which clearly
12 set out an investigation about what response the
13 criminal justice branch of the Ministry of
14 attorney general had in respect of on the death of
15 Mr. Paul. So, yes, in that case, where the terms
16 of reference specifically are asking to
17 investigate what did the criminal justice branch
18 do, there, it was impossible to say that there had
19 been no waiver of privilege in connection with the
20 documents and information within the criminal
21 justice branch.

22 And so, applying that here,
23 one would have thought that if the intent here was
24 to waive privilege by seeking -- by passing these
25 terms of reference, one would have needed to say

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1 in the terms of reference, we are -- city council
2 would have needed to have said, we are looking
3 into the legal advice which the legal department
4 obtained in connection with the liability
5 assessment of the Tradewind report, and that is
6 not what is called for in the terms of reference
7 in this inquiry. And that's why it's important to
8 go back to the terms to say, what is it that city
9 council intended to be answered as part of this
10 inquiry?

11 MR. MARROCCO: Okay.

12 MR. LEDERMAN: So, I raise
13 that BC case as an important point to consider,
14 because you can't just, sort of, lift from that or
15 extrapolate from that that when terms of reference
16 are passed to investigate broadly various issues,
17 that it means that somehow there's been a waiver
18 of privilege over privileged communications within
19 the legal department of a government or the City
20 in this case.

21 And of course we've given you
22 the Cornwall inquiry ruling about how what is
23 prescribed here is looking at the precise terms of
24 reference and that one can also and ought to look
25 at the preamble to assist in interpreting what was

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1 intended when terms of reference are passed as
2 part of a judicial inquiry. And we've given you
3 the preamble from this City's terms of reference
4 that were passed on this slide where they are
5 talking about the fact that the Tradewind report
6 had not been disclosed and whereas the City of
7 Hamilton's department of engineering services had
8 received that report in 2014 that the MTO had done
9 friction testing but did not disclose the results
10 of that testing to council or the public and
11 whereas concerns have been raised why the report
12 or the information and recommendations report were
13 not disclosed to council.

14 That preamble is important
15 when one looks at, all right, well, was it
16 intended, impliably or expressly, to say that this
17 inquiry, counsel intended to waive privilege by
18 calling for this inquiry. If one would have
19 thought that that was intended, one would have
20 thought that in the preamble we would have
21 expected to see some reference into we need to
22 inquire into what advice the legal department
23 obtained in connection with this in the 2018
24 timeframe, early 2019, and that's not present here
25 and one would have thought that that needed to be

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1 present in order to vitiate the assertion of
2 privilege or to amount to a waiver.

3 MR. MARROCCO: When it says in
4 the preamble why the report or the information and
5 recommendations were not disclosed, is that a way
6 of really asking what happened to the report?
7 What was done with the report?

8 MR. LEDERMAN: Yes.

9 MR. MARROCCO: And if that's
10 the case, does the fact that what was done with it
11 in part was consulting with Mr. Boghosian about
12 the potential liability caused by the
13 non-disclosure of the report, does that amount to
14 something that was done with the report before it
15 was disclosed?

16 MR. LEDERMAN: So, I think
17 that addresses the question that you had asked
18 earlier about the timing, should the City be
19 entitled to have an opportunity to understand the
20 legal implications of that report? And I think
21 the answer is yes, but that is different than
22 saying this is an entitlement by passing this term
23 of reference or in this case by including this in
24 the preamble, that is different than saying we
25 intend to waive privilege over the substance of

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1 the legal advice, the nature of the communications
2 that the City engaged in with external lawyers
3 about its civil liability associated with the
4 Tradewind report. That's a very different thing
5 than understanding the timeline here, that there
6 is a period of time of a matter of two or
7 three months where once it made its way to the
8 City solicitor's office, that external advice was
9 obtained as to what was the legal impact of that.

10 That's a very different
11 question when we're talking about getting at the
12 substance of those communications and the details
13 of that advice rather than the fact that advice
14 was obtained. And, in large measure, that's sort
15 of what has governed this process, which is that
16 the City has been -- I would almost go as far to
17 say has bent over backwards to ensure the greatest
18 degree of transparency where a whole swath of
19 documents that otherwise would have been
20 privileged were produced to the inquiry so that
21 all of the questions in the terms of reference
22 could have been answered, that the only ones that
23 have been held back are the ones that really now
24 deal with some of substantive points and the
25 communications with legal counsel about legal

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1 Mr. Sabo's notes from the call that they had with
2 Mr. Boghosian regarding his call with Mr. Malone
3 in December, the internal CIMA correspondence
4 regarding the City's request, which makes it clear
5 that CIMA understood that it was being asked to do
6 this on a privileged and confidential basis, and
7 then a draft CIMA memo that was addressed to
8 Mr. Boghosian. And, as Ms. Contractor indicated
9 earlier, that draft memo was finalized and the
10 final version of the memo was sent to city council
11 and was produced to the public. What we're
12 talking about here are, again, the internal back
13 and forth with the legal department and
14 Mr. Boghosian and with CIMA in the timeframe
15 between December 2018 and February 4, 2019.

16 Okay. Just to give you an
17 example of these documents, this is the draft
18 Boghosian opinion where he is describing in the
19 draft his telephone conversation with Brian
20 Malone -- this is in the middle section -- on
21 December 11, 2018. And then flipping the page,
22 here is the issues that he is commenting on in his
23 draft report. You've asked us to comment on the
24 following issues: Risk management, liability
25 issues arising out of the findings concerning the

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1 RHVP, a response to the FOI request, assistance
2 with dealing with the media and council.

3 So, in this draft report, he
4 has narrowed or he has confined his opinion to
5 addressing those three issues, all of which are,
6 in my respectful submission, in furtherance of
7 providing legal advice, this is his legal opinion
8 he's providing to the City, and importantly risk
9 management liability issues would also attract
10 matters of litigation privilege.

11 MR. MARROCCO: But just so I
12 understand it, once Mr. Malone says, and I take
13 this from you, that the Tradewind report would not
14 have resulted -- that the Tradewind report, had
15 Mr. Malone known about it, would not have resulted
16 in different recommendations or additional
17 recommendations concerning safety, then the issue
18 would become whether they implemented the
19 recommendations that he did make. Right? That
20 would be the only source of potential liability,
21 is that they were advised to do certain things by
22 Mr. Malone and didn't, prior to anybody knowing
23 about the Tradewind report, and never did.

24 MR. LEDERMAN: Yes. That
25 would be something that was important for

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1 Mr. Boghosian to know in order for him to properly
2 advise the City with respect to its exposure to
3 liability.

4 MR. MARROCCO: And I suppose
5 had it been the case that Mr. Malone said, if I
6 had known about this report, I would have made
7 these additional recommendations, then that would
8 reflect on the delay in giving the report to him,
9 but he says, according to what you're telling me,
10 this report would not have resulted in additional
11 recommendations, so that contingency never arises?

12 MR. LEDERMAN: Correct.

13 MR. MARROCCO: Okay.

14 MR. LEDERMAN: Yeah, that's
15 absolutely correct.

16 This is an example of the
17 notes of Ms. Auty and Mr. Sabo, so they each have
18 their own transcription of the notes from the same
19 meeting that they had had with Mr. Boghosian on
20 December 11. Again, these are the solicitor's
21 notes of a discussion that they have had with
22 their external counsel, Mr. Boghosian, and we have
23 maintained privilege over these notes and, you
24 know, form part of the disputed documents on the
25 basis that they are also subject to

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1 this is the CIMA memo addressed to Mr. Boghosian.
2 As we indicated, the final version of this was
3 provided to counsel, but we have maintained
4 privilege over this draft that is provided to
5 Mr. Boghosian pursuant to the request that he had
6 made of CIMA to provide this following the city
7 council meeting at the end of January of 2019.

8 So, broadly speaking, this
9 slide is really just to set out why, in my
10 respectful submission, solicitor-client privilege
11 attaches to the category 2 documents. The bottom
12 line that I'm trying to suggest is that what
13 Mr. Boghosian was doing was he's obtaining
14 information from Mr. Malone, and that was an
15 essential component to the liability analysis that
16 he was providing and giving his legal opinion to
17 the City. And so, that protects and is intended
18 to capture communications with a third party for
19 the purposes of providing that legal advice.

20 And we've given you the
21 reference to Chrusz that privilege applies to
22 communications in circumstances where the third
23 party employs an expertise in assembling
24 information provided by the client and explaining
25 that information to the solicitor. That statement

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1 is apt here, which is Mr. Boghosian is engaged to
2 provide an assessment of liability to the City.
3 In so doing, he needs to be informed by Mr. Malone
4 to understand the issues so that he can give that
5 advice to the City, and that's what's happened
6 here. And he does that to understand the reports,
7 to understand the liability issues and to
8 understand the technical issues, and that's what
9 Mr. Boghosian said in his cross-examination.

10 So, that deals with the
11 solicitor-client privilege that is attached to
12 those documents. Let me speak for a moment about
13 litigation privilege. As, you know, it applies to
14 documents created for the dominant purpose of
15 litigation and, given that the engagement here is
16 to assess risk and liability, when the City was
17 engaged in a number of active pieces of litigation
18 involving motor vehicle accidents, these documents
19 in category 2 would also be protected by
20 litigation privilege.

21 It would be very different --
22 you'll see in that point, in the last point of the
23 slide, it would be very different if public works
24 had gone and engaged CIMA for this purpose. If
25 public works wanted to obtain that information,

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1 they would have obtained that information from
2 CIMA and that would have been produced and indeed
3 all of the work that CIMA had prepared at the
4 request of the public works group has been
5 produced as part of this inquiry.

6 But here, the fact that it is
7 being requested for the purposes of assisting
8 Mr. Boghosian in advising the City as to its
9 exposure to liability is what gives this the
10 litigation privilege character that would preclude
11 disclosure or would make it privileged subject to
12 any waiver.

13 I did say at the outset
14 that -- if we could just go to the next slide,
15 these are some general propositions about
16 litigation privilege, which you are obviously well
17 familiar with, but I did want to just speak a
18 moment about the McComb case as I indicated at the
19 outset of these submissions, because commission
20 counsel relies heavily on that to say that a
21 general assessment of liability does not give rise
22 to a claim of litigation privilege. And I think
23 it's important to understand the context of that
24 McComb case.

25 There, the court ruled that

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1 reports and notes of a claims adjuster were not
2 subject to litigation privilege because at the
3 that the adjuster prepared them, the insurance
4 company was investigating which of two parties to
5 a motor vehicle accident was liable for the
6 purposing of assessing the strength of an
7 insurance claim. So, it's very different when
8 you're talking about where an insurance company is
9 looking to assess the entitlement of an insured
10 under a policy, and there where an insurance
11 adjuster prepares notes and details the facts of
12 the claim and considers those points, it's in
13 those circumstances that the courts, similar to
14 what's happened in Chrusz, in those circumstances
15 the court would look at it and say, yeah, that's
16 not really prepared for the dominant purpose of
17 litigation. That really is to assist the insurer
18 in determining whether or not the insured is
19 entitled to cover under its policy.

20 That's very different than a
21 situation where there are active pieces of
22 litigation against the City for various motor
23 vehicle accidents, there is this information that
24 comes to light about the Tradewind report, and now
25 the question is: What is the impact on the City

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1 of that report in connection with its exposure to
2 the existing claims that are in place or the
3 anticipated claims that the City may get in
4 connection with the information related to the
5 Tradewind report? In my respectful submission,
6 that is very litigation privilege would apply.

7 MR. MARROCCO: Is the dominant
8 purpose litigation or to shield the report from an
9 FOI request?

10 MR. LEDERMAN: No. The
11 dominant purpose is to -- so, there's two things.
12 One is to give advice to the City about its
13 exposure. That, I would say, contemplates both
14 solicitor-client privilege as well as litigation
15 privilege. And the reason why the litigation
16 privilege when we're talking about dominant
17 purpose applies here is we're talking about the
18 exposure associated with the claims or anticipated
19 claims that the City is aware of at this time.
20 And there are, I think Ms. Auty's affidavit
21 identifies, I think, 15 pieces of litigation that
22 were active at the time that Mr. Boghosian was
23 engaged. And then there's the other point that I
24 don't want you to lose sight of, which is --
25 because this is raised in my friends' factum

1 MR. MARROCCO: Thank you.

2 MR. LEDERMAN: Okay. Okay. I
3 want to spend a moment, if I could, on the waiver
4 argument, if I could, and this really is the
5 point, if I could, these are the terms of
6 reference that commission counsel cites in their
7 factum as being the terms of reference that would
8 suggest there has been a waiver of privilege by
9 virtue of passing these terms of reference in
10 connection with the category 2 documents, and they
11 say that because of these terms of reference, the
12 City impliably waived privilege and cannot
13 continue to assert privilege over the substance of
14 the category 2 documents.

15 I think it's important to look
16 at these terms to fully understand whether or not
17 there had been a waiver -- so, I'm looking at the
18 first one:

19 "Were appropriate steps
20 taken to disclose the
21 report or the information
22 and recommendations
23 contained therein once it
24 was discovered in 2018?"

25 And, again, I bring you back

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1 to that Davies decision in BC where the court
2 found that the terms of reference there
3 constituted an implied waiver based on a plain
4 reading of a particular term, noting that there
5 was no other interpretation of what the impugned
6 term could have meant. Because remember, in that
7 term of reference, it was specifically asking to
8 look at what did the criminal justice branch do.

9 Here, there's no term
10 contained in category -- in term of reference
11 number 8 that this is about trying to get to the
12 bottom of or the substance of any legal advice
13 that the City's legal department obtained in
14 connection with the Tradewind report or regarding
15 the concern about the City's legal exposure
16 associated with the Tradewind report.

17 Similarly, if I could ask you
18 to look at -- the same principle applies with (9)
19 and with (11):

20 "Did the report contain
21 findings or information
22 that would have triggered
23 council to make safety
24 changes to the roads or
25 other further studies?"

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1 prior to the release of the report, negligence,
2 malfeasance or misconduct? It seems to me -- and
3 I'm asking you -- in order for the Commissioner to
4 say no, there was nothing negligent, improper or
5 there was no misconduct, in doing that requires
6 the Commissioner to say what the legal department
7 asked Mr. Boghosian and what Mr. Boghosian told
8 the legal department. That, I guess, is what I
9 would like you to --

10 MR. LEDERMAN: I understand.
11 Yeah, I understand the question, but I guess the
12 way I see it, when you look at these terms of
13 reference, what the focus here is on is on the
14 disclosure of the Tradewind report. It's not
15 about what advice did the City receive from its
16 lawyers about what to do once it discovered or
17 once this report came to light. It's about the
18 disclosure issue. It's about the fact that there
19 was this report that was given to the City in 2014
20 and then it took four years before it made its way
21 to city council before they learned about it. And
22 so, the question is about the disclosure. It's
23 not about the substance of the advice or questions
24 about legal liability that may flow to the City in
25 connection with the disclosure of that report.

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1 And that's where I would draw the distinction,
2 Mr. Marrocco, if that's assists you.

3 MR. MARROCCO: It does.

4 MR. LEDERMAN: Okay. And
5 we've just put up again this is, again, the
6 reference to the preamble. Again, the preamble
7 assists in understanding what it was that was the
8 scope of the terms of reference and circumscribing
9 the scope of the terms of reference because it
10 helps inform what is it that is of importance to
11 the City when they passed these terms of reference
12 and what is important for the Commissioner to
13 answer. And it's that last point in the preamble
14 that we've talked about before, which is again
15 it's about the disclosure about the report, not
16 about what steps the City took in terms of getting
17 legal advice in connection with that or what its
18 exposure may be in relation to that.

19 Okay. I think, looking at the
20 time, I better pass it over to Ms. Contractor, who
21 can address the other categories of documents, if
22 I may.

23 MR. MARROCCO: Sure. That's
24 fine. We've got -- yes, I see what you mean by
25 the time, so by all means.

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1 MR. LEDERMAN: Okay. Thank
2 you.

3 MS. CONTRACTOR: Mr. Marrocco,
4 bear with me one moment and I'm going to --

5 MR. MARROCCO: I was going to
6 take a -- I'll take five now and we will add that
7 on to your time.

8 MS. CONTRACTOR: Thanks very
9 much.

10 --- Recess taken at 11:30 a.m.

11 --- Upon resuming at 11:34 a.m.

12 MS. CONTRACTOR: May I
13 proceed?

14 MR. MARROCCO: Yes.

15 SUBMISSIONS BY MS. CONTRACTOR:

16 So, I'm going to speak to
17 categories 3 to 6 of the disputed documents. The
18 biggest category is category 3, so I'm going to
19 spend some time on that and, you know, we're
20 mindful of the time. If we need to rely on our
21 submissions for 4 to 6, we can certainly do that,
22 but I did want to spend some time on category 3
23 because they are the largest group.

24 There's 33 documents and
25 largely they can be characterized as

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1 correspondence and notes with external and
2 internal counsel. We've further broken down the
3 category 3 documents into the following three
4 subgroups and we've provided in the PowerPoint for
5 your benefit the specific tabs referenced in the
6 disputed documents for each of these subgroups.
7 And, as I mentioned, I'm happy to provide you with
8 this PowerPoint so you can have those references.

9 The first one is marked up
10 copies of Mr. Boghosian's draft and final legal
11 opinion. And, as I understand it -- let me
12 just -- here we are. As I understand it, my
13 friend conceives that the legal opinions are
14 protected by solicitor-client privilege, except
15 for the portions that summarize the December 11
16 and January 30 calls with Mr. Malone; however,
17 they also assert that the City has waived
18 privilege over these documents in calling the
19 inquiry.

20 And you've heard from
21 Mr. Lederman that the discussions between
22 Mr. Malone and Mr. Boghosian are properly
23 protected by solicitor-client privilege and,
24 therefore, the summaries in the draft and final
25 opinion of those discussions are also similarly

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1 protected and not admissible.

2 With respect to -- I'm not
3 going to repeat the arguments on whether or not
4 these are prima facie privileged. They're
5 litigation privilege in terms of the summaries and
6 here we have in-house counsel making notes on
7 draft copies of a legal opinion received from
8 external counsel. And, certainly, it's lawyer's
9 work product and it's subject to privilege.

10 I want to spend some time on
11 the waiver argument here. And commission
12 counsel's position here is that the two terms of
13 reference that are relevant and on the basis of
14 which they claim the City waived privilege are
15 whether appropriate steps were taken to disclose
16 the report and the information and recommendations
17 and term 9 that you were just discussing with
18 Mr. Lederman with respect to whether there was any
19 negligence, malfeasance or misconduct, again, in
20 failing to disclose the report or any information
21 and recommendations.

22 In our submission, commission
23 counsel has to demonstrate that these handwritten
24 comments that I just had up, which are transcribed
25 in 90 and 91(a), that they reach the threshold of

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1 extraordinarily relevant such that there is no
2 other interpretation of the terms of reference
3 other than to mean that city council intended for
4 the Commissioner to include these documents in
5 their review. And that threshold of
6 extraordinarily relevant comes from the Roynat
7 Capital and Repeatseat Ltd. decision. It's a 2015
8 case out of the Ontario Superior Court. It's at
9 tab 14 of my friends' book of authorities. And,
10 in that case, the Plaintiffs allege that they
11 relied on leads to make a transaction and then
12 objected to the production of that legal advice on
13 the basis of privilege. The court found that the
14 Plaintiffs, of course, placed their state of mind
15 in issue and implicitly waived privilege by
16 claiming they relied on legal advice.

17 And my friend relies on this
18 case for that proposition that privilege is waived
19 where there's an implied intent to waive it.

20 It's important to note that in
21 this case the court held that is test of implied
22 waivers is not to be applied lightly. And at
23 paragraph 87, the court states that:

24 "The Defendant's
25 submission that the

1 relevance of legal advice
2 received by the
3 Plaintiffs on the
4 question of reliance
5 breaches the threshold of
6 extraordinarily relevant
7 and may be dispositive of
8 the action."

9 And so, I think that phrase is
10 critical here and it's also consistent with what
11 the court did in the Davies case. It looked at
12 the terms, the plain reading of the terms of
13 reference, it looked at whether there was any
14 other interpretation of the terms of reference,
15 having found that there was no other
16 interpretation of that term and, as such, that the
17 information was extraordinarily relevant.
18 Although they didn't use the phrase, that phrase,
19 in the Davies decision, it's essentially what
20 they're saying, is that this is highly material
21 and highly necessary and there's no other
22 interpretation of what city council could have
23 meant in this term of reference.

24 MR. MARROCCO: Can I just
25 interrupt for a minute?

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1 MS. CONTRACTOR: Certainly.

2 MR. MARROCCO: Where you're
3 asked, if you're the Commissioner, were
4 appropriate steps taken, does that not raise the
5 question of whether resorting to Mr. Boghosian was
6 an appropriate step and does that not entail
7 saying, well, this is why I went to external
8 counsel and this is what they told me? And, so in
9 soliciting that opinion and getting that advice, I
10 was acting or the City solicitor was acting
11 appropriately?

12 MS. CONTRACTOR: Mr. Marrocco,
13 I would agree with you if the nature of the legal
14 advice sought was whether or not the Tradewind
15 report should be produced. Whether there was any
16 evidence to suggest that the nature of the legal
17 advice, the actual substance of it, had any impact
18 on whether staff were going to disclose the report
19 or not, there is no evidence to suggest that.
20 Ms. Auty, in her affidavit, states that by the
21 time that she decided to retain Mr. Boghosian,
22 they had largely reached the decision they were
23 going to disclose the report to council and the
24 remaining steps were to figure out how to do that
25 and, in the course of that, they sought legal

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1 advice on some of the communications to council
2 and the media releases that they were preparing.

3 The nature of the legal advice
4 from Mr. Boghosian in terms of liability had no
5 connection to the disclosure of the Tradewind
6 report. And it's really important to look at all
7 of the circumstances here, to consider the fact
8 that the preamble of the terms of reference were
9 specifically drafted to focus on disclosure.

10 And recall what I told you
11 during the facts summary. By the time that they
12 were drafting that preamble, city council were
13 aware that a legal opinion had been sought. City
14 council was aware that there was an opinion on
15 liability. If they intended for the Commissioner
16 to look at all of the steps that were taken or not
17 taken once the Tradewind report was discovered,
18 then that's what they would have requested.

19 That's not what the terms of reference, reading it
20 from a plain language perspective, that's not, in
21 our respectful submission, what counsel could be
22 reasonably interpreted.

23 And if there's any ambiguity
24 about that, it has to be interpreted to favour
25 maintaining solicitor-client privilege because we

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1 know implied waiver will only be found in the most
2 clear cases.

3 MR. MARROCCO: Was it not
4 clear that Ms. Auty was not going to release the
5 report, disclose the report, to council until
6 after she heard back from Mr. Boghosian?

7 MS. CONTRACTOR: There's no
8 evidence to suggest that. I don't believe
9 Ms. Auty was asked about that in her report. But,
10 again, even if the timing, the time it took to
11 report, to disclose the report, was affected by
12 the fact that legal advice was sought, it does not
13 mean that the substance of the legal advice, which
14 again is not should we disclose the Tradewind
15 report. If that's what the opinion was, there
16 would be no question, but that's not what was
17 sought. That's not the legal advice that was
18 sought. It was very much focused on what does
19 this mean from a liability perspective given that
20 we have ongoing litigation and given that we
21 anticipate additional litigation once this report
22 is released.

23 And city council -- I'm sorry.

24 MR. MARROCCO: How does the
25 Commissioner comment on that, just as you phrased

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1 it, if the Commissioner can't see the
2 communication and the correspondence?

3 MS. CONTRACTOR: Commission
4 counsel, we've worked very closely and
5 cooperatively with commission counsel throughout
6 this negotiation process in determining what
7 privileged documents can be released and what
8 can't in finding ways, such as an Agreed Statement
9 of Facts, that would allow the Commissioner to
10 have the information that he needs. And a lot of
11 the -- there is some information already produced
12 with respect to Mr. Boghosian's, the timing of
13 Mr. Boghosian's retainer, but certainly the City
14 would agree to provide an Agreed Statement of
15 Facts if commission counsel feels that the
16 Commissioner requires information about when the
17 advice was sought, when the advice was received.
18 That can be done without revealing the substance
19 of the legal advice, which, again, privilege can
20 only be waived over that in the clearest of cases.
21 And, in our submission, this just is not one of
22 them because of the use of disclosure. There is a
23 reason that that word was used by city council
24 repeatedly throughout the terms of reference.

25 The term 9, we would be in a

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1 different situation if term 9 read, was there any
2 negligence, malfeasance or misconduct once the
3 report was discovered in 2018? That's not what it
4 says. It narrows the circumstances to disclosure
5 because council was aware that there was
6 litigation and liability analysis completed
7 because they had received briefings on that.

8 And so, there's a few other
9 categories in category 3 or subcategories in
10 category 3. The same waiver argument is raised by
11 commission counsel and I think you have our
12 submissions on that, so I won't repeat them. But
13 I will take you back to subcategory 2 and 3 to go
14 through them, unless, Mr. Marrocco, you have any
15 questions on this particular issue.

16 MR. MARROCCO: No. I think I
17 followed that.

18 MS. CONTRACTOR: The second
19 subcategory are e-mails between Mr. Boghosian,
20 Mr. Sabo and Ms. Auty. And in these e-mails, we
21 see Mr. Boghosian, external counsel, providing his
22 comments on draft reports to council, consistent
23 with the scope of his retainer, which I showed you
24 earlier. And [REDACTED] also
25 consistent with the scope of the retainer. And

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1 Mr. Boghosian is also asked to provide legal
2 advice with respect to the City's meeting with
3 Gary Moore, who at that time had retired from the
4 City but was being interviewed by city staff about
5 the steps he took with respect to the Tradewind
6 report.

7 For most of these e-mails,
8 commission counsel takes the position that they're
9 not protected by solicitor-client privilege
10 because the communication does not strictly relate
11 to legal advice, and I presume it's because he's
12 not citing case law referring to statutes. But,
13 of course, we know that solicitor-client privilege
14 is much broader than that and will apply to advice
15 and all communications passing between a client
16 and solicitor relating to the provision of legal
17 advice. And, in the interest of time, I'll just
18 refer you to paragraph 42 of the City's reply
19 factum where we've cited case law in support of
20 these authorities.

21 And the last category of the
22 category 3 documents are notes. There's four sets
23 of notes. Three of them are notes taken by
24 Mr. Boghosian, Ms. Auty or Mr. Sabo which contain
25 legal advice. The fourth set of notes is from a

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1 Ms. Jasmine Graham, who is a city staff member
2 that was employed in the public works group and
3 responsible for communications and media requests.
4 So, I'll start there.

5 The notes have been produced
6 but a section of the notes that you have before
7 you has been redacted by the City, and that's the
8 portion of the document that the City is claiming
9 privilege over. And you'll see that this states:

10 "Litigation point of view
11 - we need to have him on
12 board."

13 And Ms. Auty's evidence on
14 this was that this was one of the documents that
15 included or recorded communications with respect
16 to legal advice on the City's liability following
17 release of the Tradewind report, including
18 regarding ongoing Red Hill litigation and
19 potential litigation.

20 Moreover, it's our submission
21 that it's quite clear from the face of this note
22 that Ms. Graham was recording legal advice
23 specifically with respect to litigation strategy
24 in any proceeding that would have resulted from
25 the discovery of the report.

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1 MR. MARROCCO: And who is the
2 him? Mr. Malone?

3 MS. CONTRACTOR: You know,
4 there's no evidence in the record as to whether
5 it's Mr. Malone or Mr. Moore, and so I don't want
6 to mislead you about that, but I'm going to just
7 double check and I'll let us know if there's any
8 information on that in the record, on the record,
9 excuse me. But at the top of my head, I'm not
10 sure what's on the record with respect to who the
11 him is. It might be that we haven't heard from
12 Ms. Graham yet in the inquiry, so I expect she
13 will say that it's Mr. Moore, but again I'm not
14 sure if that's on the record, so let me double
15 check that for you.

16 I'll quickly try to go through
17 the remaining three categories. They're much
18 smaller than any of the other categories that we
19 dealt with.

20 MR. MARROCCO: Can I speed
21 this up a little bit by asking this question? It
22 might not speed things up, in which case, you tell
23 me.

24 The transcripts of the
25 discoveries, the implied undertaking rule doesn't

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1 make them immune from a summons, does it?

2 MS. CONTRACTOR: It doesn't
3 make them immune from a summons, but the case law
4 that my friend has relied on for that proposition
5 also states that while they're not immune from
6 being subject to a summons, it doesn't authorize
7 its use of the material in any proceeding that may
8 be initiated, and you see the excerpt there. So,
9 our submission is that the onus is on commission
10 counsel to seek leave to vary the deemed
11 undertaking rule here.

12 But more importantly, these
13 transcripts of Mr. Cooper and Mr. Oddi, the City
14 had offered to provide commission counsel with a
15 summary of the evidence provided in these
16 examinations that actually relates to the
17 Tradewind report, again, trying to strike a fair
18 balance between what's actually relevant to the
19 terms of reference and what is not relevant.

20 And we continue to offer that
21 here today. We're happy to provide a summary of
22 the evidence that's relevant because one of these
23 matters is ongoing and that has to be kept in
24 mind.

25 The fifth category is a

1 reporting letter from Shillingtons, which again is
2 the law firm that the City engaged in civil action
3 arising from motor vehicle accidents on the Red
4 Hill and the LINC. This correspondence, dated
5 January 31, 2018, is from counsel at Shillingtons
6 to Diana Swaby, who is the clerk in the risk group
7 that deals with claims and acts as the City's
8 representative in the City's dealings with its
9 external counsel. So, this is a reporting letter
10 that is being provided to Ms. Swaby on the Melo
11 action, which concerns a motor vehicle accident on
12 the LINC, but in the context of this action, a
13 year or two back, Shillingtons had requested a
14 copy of the Tradewind report, as I mentioned to
15 you earlier, and received it from Mr. Moore. And
16 this reporting letter does not reference the
17 Tradewind report, but it does speak to a report
18 that was not provided to counsel with respect
19 to -- let me find the actual reference for you.
20 Excuse me.

21 MR. MARROCCO: Well, it speaks
22 of a report. You know, where it says City of
23 Hamilton records?

24 MS. CONTRACTOR: Right.

25 MR. MARROCCO: It speaks to a

1 report that wasn't produced or --

2 MS. CONTRACTOR: That's right.

3 MR. MARROCCO: -- due to
4 erroneous calculations.

5 MS. CONTRACTOR: Right, so it
6 doesn't mention the Tradewind report, but it does
7 make reference to a report that was not produced.
8 And we do know that Shillingtons received a copy
9 of the Tradewind report in the context of this
10 matter, and so the City of course asserts
11 solicitor-client privilege over this document.
12 It's clear on the face of it that it's protected
13 by solicitor-client privilege but, again, willing
14 to provide a summary of the sections of the report
15 that are relevant to the terms of reference. And
16 we do agree here that the fact that Ms. Swaby was
17 provided with some information, however that's
18 going to be criticized with respect to the
19 Tradewind report and a copy of the report as well,
20 is relevant to the terms of reference, but this
21 entire document is certainly not relevant to the
22 terms of reference and the relevant portions
23 should be summarized and provided to limit the
24 invasion of the City's solicitor-client privilege.
25 That's our submission on this category.

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1 MR. MARROCCO: Is the
2 evidence, just so I understand it, that
3 Ms. Swaby's counsel was given the Tradewind
4 report?

5 MS. CONTRACTOR: Yes, and that
6 has been produced and the City has not waived
7 privilege over that. Sorry, the City has waived
8 privilege over that. We've produced that.

9 MR. MARROCCO: So,
10 Shillingtons get the Tradewind report from the
11 City prior to January 31, 2018, because that's the
12 date of this letter, and they give that report to
13 counsel on the other side because it's producible
14 in that litigation, I assume. But then there's
15 this reference to deficiencies with the
16 calculations. Is there any suggestion that the
17 Tradewind report is deficient because of the
18 calculations within it?

19 MS. CONTRACTOR: There are
20 notes between -- there are notes from calls
21 between Mr. Moore and Shillingtons after the
22 Tradewind report was provided to them, which
23 includes Mr. Moore's understanding of the report.
24 And I'm happy to take you to that, although it may
25 take me a moment to find that document.

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1 MR. MARROCCO: I don't know
2 that that's necessary. But if Mr. Moore told
3 Shillingtons, we have this report but it's
4 deficient, the calculations in it are deficient
5 and therefore it's not important or not persuasive
6 or not helpful, is that caught within the terms of
7 reference?

8 MS. CONTRACTOR: I think the
9 City -- yes. Yes, it is. And I think a way to
10 provide that information is possible without
11 releasing the entirety of this report. And this
12 is an example of where what we're talking about
13 here is disclosure and tracing who had the report
14 and what was done with it and why it was not
15 actually produced. So, this would be an example
16 of where it is relevant that potentially this
17 report is referencing the Tradewind report. And,
18 again, our position here is simply that the
19 parties ought to find way to provide the
20 information that's necessary without producing
21 this report in its entirety.

22 MR. MARROCCO: Did
23 Shillingtons indicate that -- did Shillingtons
24 testify and indicate they were told that or were
25 they --

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1 MS. CONTRACTOR: Shillingtons
2 has not been interviewed, nor have they been
3 summonsed to give evidence at the hearing. I
4 don't believe that this is on the record, so let
5 me just double check whether or not Mr. Moore's
6 conversation with Shillingtons speaks to this,
7 because, again, I don't want to provide you with
8 information that's not on the record.

9 MR. MARROCCO: I appreciate
10 that, Ms. Contractor, but I think what you're
11 saying is that if that's the case, there could be
12 an agreed statement that Mr. Moore provided this
13 to Shillingtons, who were counsel for the City in
14 litigation in 2018 involving Ms. Swaby, assuming
15 this was the case, and told Shillingtons that
16 there was a problem with the Tradewind report
17 because there were deficiencies in his
18 calculations.

19 MS. CONTRACTOR: That's
20 correct.

21 MR. MARROCCO: And then it
22 would become a question of whether there were in
23 fact deficiencies in the calculations, okay.

24 MS. CONTRACTOR: Certainly.
25 And so, the specific term of reference that my

1 friend relies on for the waiver argument here is
2 to identify the individuals that received the
3 report. And, again, as I said, we do agree with
4 them here that if in fact the report referenced in
5 the reporting letter is the Tradewind report, then
6 we ought to find a way to provide the Commissioner
7 with that information, preferably through an
8 Agreed Statement of Facts, but it doesn't require
9 this entire document to be produced.

10 MR. MARROCCO: And would you
11 agree that where the term of reference says, and I
12 quote:

13 "Were advised of the
14 report or the information
15 and recommendations
16 contained therein."

17 That that would include being
18 told that the report is unreliable in some
19 respects because there are deficiencies in the
20 calculations?

21 MS. CONTRACTOR: Yes. I think
22 that's a fair interpretation.

23 MR. MARROCCO: Okay. Thank
24 you.

25 MS. CONTRACTOR: Now, I see

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1 that I'm over time. I'm happy to go through this
2 quickly or rely on our submissions. One thing I
3 forgot to mention --

4 MR. MARROCCO: Well, you put
5 this up on the screen, so why don't we just deal
6 with this.

7 MS. CONTRACTOR: Okay.

8 Category 6 relates to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] And so, the correspondence
13 here is on February 7. It is following the
14 release of the Tradewind report and, in our
15 submission, has no relevance to the terms of
16 reference.

17 Commission counsel concedes
18 that these correspondence are covered by
19 litigation privilege, but assert that it's expired
20 at this point. And we include some case law for
21 the proposition that litigation cannot be said to
22 have terminated in a meaningful sense of that term

23 [REDACTED]
[REDACTED] where litigants or related parties
25 remain locked in what's essentially the same or

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1 similar legal combat.

2 And you heard from
3 Mr. Lederman that the litigation that was
4 anticipated once the Tradewind report was
5 discovered was that Plaintiffs would use the
6 discovery to bring lawsuits beyond the two-year
7 limitation period and indeed --

8 MR. MARROCCO: Yes.

9 MS. CONTRACTOR: And the
10 fact -- so, based on that, Plaintiffs could
11 potentially bring actions with respect to the
12 Tradewind report at any point after February 6,
13 2019. You also heard from Mr. Lederman that a
14 class action was commenced in May of 2019 which
15 suspended the limitation period and so, as such,
16 the risk of litigation around the disclosure of
17 the Tradewind report is still certainly -- the
18 potential remains. So, in our view, the
19 litigation has not expired in this manner based on
20 the court's statements here in blank and Canada.

21 MR. MARROCCO: Okay. All
22 right. Is that everything?

23 MS. CONTRACTOR: I believe so.
24 I could speak to the waiver argument, but we do
25 have a response to commission counsel's Schedule

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1 C, which is where they have listed their position
2 for every document and we've done the same. We've
3 provided our position to every document, so I'm
4 happy to rely on that.

5 MR. MARROCCO: Okay. That's
6 fine.

7 MS. CONTRACTOR: Mr. Marrocco,
8 subject to any questions, those are our
9 submissions.

10 MR. MARROCCO: No, I asked the
11 questions as we went along. So, then we'll stand
12 down for five and switch over to commission
13 counsel. Is that the plan? Okay.

14 MS. LIE: Yes, thank you.

15 --- Recess taken at 12:07 p.m.

16 --- Upon resuming at 12:15 p.m.

17 MR. MARROCCO: Good afternoon,
18 Ms. Lie.

19 SUBMISSIONS BY MS. LIE:

20 Good afternoon. Before I get
21 into the substance of my submissions, I do want to
22 just clarify one thing about what it is we're
23 doing here today. In Mr. Lederman's submissions,
24 he referred to this motion as a motion to quash a
25 summons and in their materials the City has relied

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1 on a Court of Appeal case in 1504413 Ontario
2 Limited as setting out the applicable test. But I
3 just want to be clear from the outset, commission
4 counsel's position is this is not a motion to
5 quash the summons and the test that is set out in
6 that Court of Appeal decision does not apply. In
7 that case, it was a motion to quash a summons that
8 was served on counsel for the appellant requesting
9 him to appear as a witness against his own client.

10 In terms of your jurisdiction,
11 Mr. Marrocco, and why we're here today, you'll
12 recall that there was a motion for directions from
13 the City and a copy of that motion, the notice of
14 motion, is actually in the City's motion record.

15 Mr. Dinner, could you pull up
16 the City's motion record? Mr. Registrar, are you
17 there?

18 THE REGISTRAR: Sorry, can you
19 just tell me which book it's in?

20 MS. LIE: If you go to tab 1
21 or page 4 of the PDF.

22 THE REGISTRAR: Sorry, which
23 PDF? Is it the brief?

24 MS. LIE: The motion record of
25 the City.

1 recommended the
2 appointment of the
3 Honourable Frank Marrocco
4 as the designate. In
5 view of Mr. Marrocco's
6 considerable experience
7 in this area as well as
8 his expansive judicial
9 experience, he is
10 appointed as the
11 Commissioner's designate
12 pursuant to the
13 provisions of rule 4 and
14 15(c) of the inquiry's
15 rules of procedure."

16 So, I'm just going to now take
17 you to the inquiry's Rules of Procedure,
18 paragraph 15(c). You'll see at paragraph 15(c)
19 that it deals with the procedure to be followed if
20 commission counsel does not agree with the
21 privilege assertions. And so, you'll see there
22 that it provides for the appointment of a
23 designate to determine the claims of privilege.

24 So, my point here is just that
25 this is not a motion to quash a summons. The

1 to this dispute.

2 And, finally, we will go
3 through the six categories of disputed documents.
4 I will be covering categories 1, 2, 3 and 5, and
5 my colleague Ms. Leclair will cover categories 4
6 and 6, so I may need a short break just to do some
7 technical switches in order to get Ms. Leclair on.

8 MR. MARROCCO: Sure.

9 MS. LIE: So, let me start
10 with the first part, which is the law. I'm going
11 to cover just four aspects of the law. The first
12 is pretty quick, the onus or the burden of proof.
13 The second is the law with respect to
14 solicitor-client privilege and, in particular, I
15 want to spend some time on the General Accident
16 and Chrusz case, when sets out the test for
17 determining if communications with a third party,
18 in this case we're talking about Brian Malone and
19 CIMA, are protected by solicitor-client privilege.

20 Third, I'll cover litigation
21 privilege and, in particular, the question that
22 Mr. Lederman raised in his submissions about
23 whether communications with a lawyer for the
24 purposes of a general liability assessment are
25 protected by litigation privilege.

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1 something, they would, in my submission, have
2 failed to have satisfied their onus.

3 Let me turn to
4 solicitor-client privilege now. So, there is,
5 again, no dispute that in order for a
6 communication to be protected by solicitor-client
7 privilege, it must be a communication between a
8 lawyer and client for the purposes of seeking or
9 giving legal advice and it must be made in
10 confidence. The law is also clear that simply
11 involving a lawyer in a communication does not
12 cloak that communication in privilege. In our
13 factum, we have cited a case, Intact Insurance
14 Company, in our authorities at tab 9. We don't
15 have to turn that up, but there the Superior Court
16 says:

17 "A party seeking
18 privilege cannot simply
19 cloak notes, documents or
20 communications with
21 privilege merely because
22 a lawyer was involved or
23 handled the documents."

24 So, commission counsel submits
25 that that's precisely what the City tried to do

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1 with its communications with the City's safety
2 consultant, CIMA, after the discovery of the
3 Tradewind report.

4 Mr. Registrar, if you could
5 turn up the disputed documents brief, tab 9. If
6 you scroll down to the next page and then one more
7 page over, one more page, if you go to the next
8 page. Okay, here. So, this is the beginning of
9 the e-mail chain and Ms. Contractor did take
10 you -- she did refer to this e-mail in her
11 submissions to you, so you won't be seeing this
12 for the first time.

13 This e-mail is the e-mail from
14 Ms. Auty to Mr. Boghosian about his retainer and
15 you'll see in the third paragraph she says:

16 "I'm looking for your
17 advice on the following."

18 And point number 2 is the one
19 that we are quite focused on. Number 2 is:

20 "How to approach
21 obtaining CIMA consultant
22 input on whether interim
23 measures are needed to
24 protect safety before the
25 resurfacing is completed

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1 in June 2019."

2 And she puts in brackets,

3 "(litigation privilege?)"

4 And, Mr. Registrar, if you go
5 up to the next e-mail in the chain. Scroll down a
6 bit.

7 So, here you'll see
8 Mr. Boghosian's response. And this is the
9 response where he says in the second paragraph
10 that he thought over the weekend about the issue
11 of how to obtain an opinion from CIMA regarding
12 interim safety measures regarding the condition of
13 the RHVE pending resurfacing in June 2019 and he
14 says:

15 "I think the only way we
16 would prevent access to
17 any correspondence they
18 send conferring their
19 opinion is if I contact
20 them and obtain their
21 advice and then
22 communicate it to you as
23 part of my opinion
24 letter."

25 And then he says:

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1 "Let me know if you want
2 to proceed in that
3 fashion. I note that I
4 used CIMA in my cases all
5 the time, so have a good
6 working relationship with
7 them and hopefully could
8 expedite the provision of
9 their opinion."

10 And if you scroll up to the
11 next e-mail in the chain, so you'll see here
12 Ms. Auty responds on December 11, 2018 in the
13 morning and she says:

14 "David, I agree with your
15 approach below."

16 And on cross-examination,
17 Mr. Boghosian testified that he interpreted that
18 to mean that Ms. Auty agreed with his approach to
19 contact CIMA to discuss potential interim safety
20 measures.

21 MR. MARROCCO: But just -- I
22 have read these e-mails, but it's his advice that
23 going through him will protect the communication
24 somehow, so that's his advice. That's distinct
25 from the communication, is it not?

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1 MS. LIE: That's right.
2 That's exactly right. So, it may be that his
3 advice about how to contact CIMA in a way that
4 will prevent access to the communication, that may
5 be privileged, but the actual doing of it, in my
6 submission, is not because we know that just
7 involving a lawyer is not enough to trigger
8 solicitor-client privilege or even litigation
9 privilege.

10 And Mr. Lederman in his
11 submissions, he had said something to the effect
12 of if public works had been the ones to engage
13 CIMA, then that would be entirely different and
14 that would have been producible. And in our
15 submission, that's exactly the point. The fact
16 that the City chose to do it this way, chose to
17 involve Mr. Boghosian in a way to try to prevent
18 access to disclosure, that's exactly the point.
19 In our submission, the City shouldn't be allowed
20 to use privilege that way and, in fact, the law
21 doesn't allow the City to use privilege that way.

22 MR. MARROCCO: Okay. I have
23 that.

24 MS. LIE: So, at the same time
25 that these communications are happening about how

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1 to contact CIMA in a way to prevent disclosure,
2 it's important for you to know that there is
3 evidence that at the same time that these
4 discussions are happening, legal, the folks in the
5 legal department, are telling public works not to
6 speak with CIMA.

7 So, for that, Mr. Dinner,
8 could you pull up the commission counsel's
9 compendium, tab 27.

10 MR. MARROCCO: So the fact
11 that they're doing that, what do I make of that?
12 That it's consistent with the idea that they're
13 going to communicate through Mr. Boghosian?

14 MS. LIE: That's right, about
15 potentially interim safety issues.

16 MR. MARROCCO: But interim
17 safety issues lead to liability. Right?

18 MS. LIE: Potentially, but if
19 the purpose of the communication is to consider
20 safety, that's different from -- I think we're
21 getting into the litigation privilege argument,
22 but that's different from saying that the dominant
23 purpose of it is to assess liability.

24 In any event, you'll hear from
25 me that when you look at the terms of reference,

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1 all of these communications are highly relevant to
2 the questions that the Commissioner is asked to
3 address.

4 So, thank you, Mr. Registrar.

5 If you would go down one more e-mail down. No,
6 you went too far. Sorry, so let me clarify.

7 So, this e-mail here, this is
8 an e-mail from Ms. MacNeil to Mr. McGuire from
9 public works and this is dated December 7, 2018.
10 At the same time or, sorry, on the same day that
11 Mr. Boghosian has that initial call with Ms. Auty
12 and Ms. MacNeil about his retainer and this e-mail
13 is public. It's not in the disputed documents.
14 And so, Ms. MacNeil says:

15 "Hi, Gord. I just tried
16 calling you but no
17 answer. Can you please
18 send me something that
19 explains the current
20 scope of work that CIMA
21 is undertaking for which
22 we are going to be
23 adding/updating them on
24 the Tradewind friction
25 testing results. I will

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1 "No, they have not
2 contacted me. Have they
3 called the office?"

4 Mr. McGuire then asks
5 Ms. MacNeil, who is in the City legal department:

6 "Did you get a hold of
7 the CIMA contact via
8 Edward? I was wondering
9 and, if so, could I talk
10 to CIMA confidentially?"

11 And here is an e-mail from
12 Ms. MacNeil to Mr. McGuire and she says:

13 "Thanks for your e-mail.
14 No, we have not contacted
15 CIMA yet because we are
16 still working on how we
17 are going to put the
18 request to them in order
19 to best move forward from
20 a legal perspective. I
21 would strongly advise
22 that you not speak with
23 CIMA about this matter
24 until you have heard back
25 from us/Nicole. We

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1 thinking about reaching out to a second safety
2 consultant, but they're told by legal not to do
3 this. And just to complete the record, we did ask
4 Ms. Auty about this note in her cross-examination
5 and she had no recollection of it.

6 The last note I want to take
7 you is now in the disputed documents brief, so
8 this is going to be one of the documents that is
9 in dispute. If you go to tab 86, these are the
10 notes of Ms. Auty. If you go to page 997, here is
11 a transcription. So, this here is a transcription
12 of a note dated December 14, 2018 and it is,
13 again, a disputed document. This is a note
14 prepared by Ms. Auty, the City's solicitor, and
15 the attendees include McGuire, Mr. Soldo, Mr.
16 McKinnon and Mike Z, who we understand to be
17 Mr. Zegarac, who is the city manager, so these are
18 non-legal folks having a meeting with Ms. Auty.
19 And the notes clearly reference the Tradewind
20 report and potentially sharing that report with
21 CIMA to assess outstanding safety. So, for
22 example, the second line or the third line down,
23 you'll see it says:

24 "Boghosian, CIMA/share
25 friction testing to

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1 assess outstanding
2 safety."

3 You'll see that in the fifth
4 line down it says:

5 "What can we do in the
6 interim?"

7 And then if you scroll down
8 the page, you'll see further down at the bottom of
9 the first page it says:

10 "Need to be confident the
11 safety issue has been
12 addressed."

13 So, here is evidence of legal
14 staff, Ms. Auty, having a discussion with public
15 works staff about interim safety, potential safety
16 issues all, again, in the context of Ms. Auty
17 having this discussion with Mr. Boghosian about
18 how to contact CIMA about interim safety measures
19 in a way that will prevent disclosure and, at the
20 same time, legal telling the public works staff
21 not to contact CIMA.

22 You can take this document
23 down. Thank you very much.

24 So, you'll hear from me on why
25 we submit these documents are highly relevant to

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1 the work of the inquiry. For now, I'll simply say
2 that despite what Mr. Boghosian said in his
3 e-mail, simply involving a lawyer in the
4 communication is not the test for privilege. The
5 Court of Appeal's decision in General Accident and
6 Chrusz sets out the test to be followed when
7 dealing with communications with a third party
8 like CIMA. And that case stands for the
9 proposition that communications with a third
10 party, like CIMA, will only be protected by
11 solicitor-client privilege in two instances.

12 First, where the third party
13 serves as a channel of communication between the
14 lawyer and the client, effectively acting as a
15 translator for that relationship, or second, where
16 the third party's retainer extends to a function
17 that's essential to the existence or operation of
18 the solicitor-client relationship, that is, where
19 the third party is seen as standing in the shoes
20 of the client for the purposes of the
21 communication.

22 When we look at the documents
23 involving CIMA, these are the category 2
24 documents, you'll recall that there were
25 communications with CIMA at a two different

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1 points. The first was the initial December 11,
2 2018 call between Mr. Boghosian and Mr. Malone,
3 and the second was January 30 through to early
4 February 2019 where there are discussions about
5 retaining CIMA to provide a report on whether or
6 not their recommendations for safety would have
7 been different had they had the Tradewind report.

8 The City has said in their
9 reply factum and Mr. Lederman has said today that
10 the communication with CIMA should be protected by
11 solicitor-client privilege because it was somehow
12 essential to Mr. Boghosian's legal liability
13 assessment, but the question, though, isn't
14 whether or not the communication is essential or
15 helpful to the lawyer. The question is whether or
16 not the third party's involvement was served as a
17 channel of communication. Was CIMA acting as a
18 translator? And, in our submission, they
19 certainly were not.

20 In the first conversation, the
21 December 11, 2018 call, the evidence is that
22 Mr. Boghosian contacted Mr. Malone to get a better
23 understanding of the issues and, on that call,
24 which is summarized in the draft and final opinion
25 letters, Mr. Malone summarized the work that CIMA

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1 had done to date, including the recommendations
2 for safety that CIMA had made in 2015 and whether
3 or not they had already been implemented. That is
4 not acting as a translator between client and
5 lawyer. That is simply summarizing the work that
6 this third party had done.

7 Similarly, when we're talking
8 about the January and February communications
9 between Mr. Malone and Mr. Boghosian, as well as
10 other city staff, those communications were
11 clearly for the purpose of getting CIMA's opinion
12 on whether or not additional safety
13 recommendations were required given the Tradewind
14 report. There is nothing in those communications
15 where it can be said that Mr. Malone was acting as
16 a translator as between the City and
17 Mr. Boghosian. They were being retained to
18 provide an opinion.

19 We've given you a couple cases
20 in our factum that speak to this issue where the
21 courts have found that a communication with a
22 third party who is effectively a consulting expert
23 is not protected by solicitor-client because the
24 third party was not retained to seek or transmit
25 legal advice on behalf of the client. And so,

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1 just for your reference, those cases are the
2 Potash Corp. of Saskatchewan case at tab 24 of our
3 book of authorities and the College of Physicians
4 of BC decision of the British Columbia Court of
5 Appeal at tab 25.

6 So, when you actually look at
7 Chrusz and you apply that Chrusz test, commission
8 counsel submits that that test is not met, and so
9 therefore the communications in which CIMA, a
10 third party, was involved are not protected by
11 solicitor-client privilege.

12 Let me now turn to litigation
13 privilege. So, again, there's really no dispute
14 about the test for litigation privilege. The City
15 has the onus of demonstrating that the document
16 was created for the dominant purpose of actual or
17 contemplated litigation, and that litigation
18 expires at the end of the litigation or related
19 litigation.

20 Where the parties depart is
21 whether the documents relating to Mr. Boghosian's
22 retainer, whether the documents involving CIMA and
23 whether some of the internal correspondence, what
24 we've been calling the category 3 documents, are
25 protected by litigation privilege.

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1 In fact, there's evidence that
2 the City reached out to the lawyers who were
3 representing the City on the specific actions to
4 get their thoughts on the potential impact of the
5 Tradewind report. So, Mr. Boghosian was never
6 retained in respect of any specific litigation
7 that the City -- in which the City was already a
8 party.

9 The evidence from Ms. Auty is
10 that Mr. Boghosian was retained to provide the
11 City with an overall picture, to provide a general
12 risk or liability assessment in light of the
13 Tradewind report, not in respect of any specific
14 claims. And just for your reference, that's in
15 her cross-examination, questions 48 to 53.

16 So, we have given you the
17 McComb versus Jones case in our factum and in our
18 book of authorities, which is at tab 23, as an
19 example of a case where the documents that were
20 created for the purposes of investigating
21 liability were found not to be protected by
22 litigation privilege. In my submission, with
23 we're talking about this idea of a general
24 liability assessment, it makes sense that
25 documents relating to that kind of an assessment

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1 may well be protected by solicitor-client
2 privilege, but they wouldn't be protected by
3 litigation privilege when you consider the
4 rationale behind litigation privilege, which is
5 really to create a zone of privacy to protect the
6 adversarial process.

7 The City, in its reply factum
8 and also in Mr. Lederman's submissions this
9 morning, referred to -- sought to distinguish the
10 McComb case that we rely on and they have in their
11 reply factum provided a couple cases they say
12 stand for the proposition that an investigation
13 into potential liability could give rise to
14 litigation privilege, and those cases are the
15 Hagedorn versus Helios case at tab 5 of their
16 supplementary authorities and the Air Canada case
17 at tab 6 of their supplementary book of
18 authorities.

19 Just with respect to those
20 cases, I would just say that they are
21 distinguishable because in each of those cases,
22 there was an investigation into liability, but
23 there was also specific litigation that was being
24 contemplated. The parties were aware of who might
25 be suing them, for example, and the investigation

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1 was in respect of that specific -- in
2 contemplation of that specific litigation. We
3 don't actually have that here. There is really no
4 specific litigation that's being contemplated when
5 we talk about Mr. Boghosian's initial retainer and
6 his liability assessment. It was really just
7 meant to be a general potential risk assessment,
8 trying to come up with some potential mitigating
9 measures that the City could take to avoid
10 liability. That's not, in my submission, for the
11 dominant purpose of any actual or contemplated
12 litigation.

13 With respect to the
14 communications with CIMA from January 30 to
15 February 4, 2019, the City appears to take the
16 position that the litigation privilege protects
17 those communications because city council specific
18 directed that legal counsel reach out to CIMA to
19 obtain that opinion, but in my submission that's
20 not the test. Again, simply involving a lawyer
21 does not actually result in cloaking a
22 communication in privilege when it otherwise would
23 not be. The test is whether or not those
24 communications were for the dominant purpose of
25 litigation.

1 Mr. Malone's opinion on
2 whether interim safety
3 measures would be
4 required?

5 ANSWER: Yes.

6 QUESTION: Okay. And is
7 it fair to say that the
8 purpose of this call a
9 was not in the purpose of
10 any ongoing or
11 anticipated litigation?

12 ANSWER: It was
13 responding to council's
14 concerns.

15 QUESTION: And council's
16 concern was with respect
17 to the safety of the
18 road?

19 ANSWER: Right.

20 QUESTION: There was no
21 litigation discussed on
22 this call?

23 ANSWER: No."

24 And then if you go to
25 page 1175, so in the third line we're now talking

1 about the February 1 call. This is the call,
2 again, with public works staff, Mr. Boghosian and
3 Mr. Malone and Ms. Auty as well. You'll see in
4 the third line it says:

5 "QUESTION: And I take it
6 that the February 1, 2019
7 call, the purpose of that
8 call with Mr. Malone was
9 providing you and the
10 rest of the folks on the
11 call with an update on
12 his thinking. Is that
13 fair?

14 ANSWER: I think he was
15 providing his comments
16 based on having seen and
17 reviewed the Tradewind
18 report and the two Golder
19 reports.

20 QUESTION: To address the
21 three points that you had
22 requested him to address?

23 ANSWER: Yes.

24 QUESTION: From this call
25 there was a question

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1 about whether additional
2 safety measures would be
3 required. Is that fair?

4 ANSWER: Yes.

5 QUESTION: And so the
6 focus was safety? You
7 didn't discuss any
8 litigation?

9 ANSWER: No."

10 And when you look at what
11 Mr. Malone was being asked to do, we actually now
12 need to go to the disputed documents brief because
13 this is one of the documents that's in dispute.

14 So, in the disputed documents
15 brief, tab 27, this is the e-mail from
16 Mr. Boghosian to Mr. Malone dated January 31, 2019
17 where Mr. Malone is being provided with the
18 Tradewind report for the very first time.

19 Actually, I should note that we realize that there
20 was a date stamp issue. So, although the face of
21 the document indicates that it was sent on
22 January 31, 2019 at 1:46 a.m., we actually realize
23 that it was actually sent January 30, 2019 at, I
24 think it was 8:46 p.m. It was just a date stamp
25 issue.

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1 to vehicular traffic in
2 whole or in part?"

3 Those are the questions that
4 he's asked about. In our submission, the e-mail
5 makes clear that this is not for the dominant
6 purpose of the litigation. This is for the
7 dominant purpose of assessing potential safety
8 issues, and that was the question that city
9 council had for the city staff at the January 23,
10 2019 city council meeting where city staff were
11 directed to go off and get this report from CIMA.

12 MR. MARROCCO: Is he asking
13 for the answers to these questions because he
14 wants to advise them on their exposure?

15 MS. LIE: So, in my
16 submission, city council wanted the answers to
17 these questions because city council was concerned
18 about public safety, and ultimately Mr. Boghosian
19 goes off and gets this opinion. In my submission,
20 the fact that was the done through Mr. Boghosian
21 was, again, an attempt to try to shield the
22 communications from exposure, not for the dominant
23 purpose of litigation. But what's perhaps telling
24 is when you look at Mr. Boghosian's final opinion
25 letter, he doesn't actually comment about this.

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1 It doesn't actually affect his liability opinion.
2 He simply refers in his final opinion letter to
3 the fact that there was a conversation on
4 February 1, 2019, but it doesn't impact his
5 liability assessment. Again, this is just an
6 example of the City trying to funnel
7 communications through their counsel in order to
8 try to protect them from disclosure.

9 Now, I do want to just pause
10 here to look at the ultimate opinion that
11 Mr. Malone provides because this morning I think
12 the submission was made that Mr. Malone didn't
13 have any additional safety recommendations, but I
14 think it's a little bit more nuanced than that, so
15 I want to make sure you have the full picture,
16 Mr. Marrocco.

17 If you go to the compendium of
18 commission counsel, tab 38 -- we just lost the
19 screen share. There it is. So, this is actually
20 the final opinion that was provided to
21 Mr. Boghosian and this is not disputed. The final
22 version of it is not disputed. And as
23 Ms. Contractor referred to this morning,
24 ultimately Mr. Malone is asked to provide a
25 version of this opinion addressed to the mayor and

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1 city council and that version is ultimately
2 disclosed publicly on, I believe it was
3 February 6, 2019, with the disclosure of the
4 Tradewind report.

5 So, if you go to page 335, so
6 the next page, you'll see here question 1 was the
7 question of whether or not any changes were needed
8 to the previous CIMA reports. You'll see in the
9 third paragraph down in the answer, CIMA does say:

10 "Had the Golder report
11 been provided to CIMA and
12 reviewed prior to
13 completing our report, we
14 would appropriately have
15 adjusted the friction
16 testing recommendation to
17 one that urged further
18 investigation of the
19 friction findings in the
20 Golder report relating to
21 road design and
22 operations. It is
23 apparent that this action
24 was in fact undertaken
25 and CIMA has been

1 informed that additional
2 evaluations of the
3 pavement were undertaken
4 by Golder for the City in
5 2017."

6 So, just for context, in
7 CIMA's 2015 report, they did recommend additional
8 friction testing and CIMA learns for the first
9 time that that friction testing was in fact done.

10 If you go to the next page,
11 under question two, the question was whether
12 additional safety measures are recommended, you'll
13 see that in the third paragraph CIMA says:

14 "One recommendation that
15 may warrant a slight
16 modification in the
17 interim relates to speed
18 enforcement. We had
19 recommended regular speed
20 enforcement, modified
21 wording to one of
22 increased or enhanced
23 speed enforcement in an
24 effort to ensure closer
25 compliance with the

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1 posted speeds could be
2 used."

3 So, there's an additional --
4 the modification of an earlier recommendation.

5 And then if you go to the next
6 page, here, I'm not going to read all of this to
7 you, but you'll see here that Mr. Malone and CIMA
8 provide their response to the Tradewind report and
9 the information contained in the Tradewind report.
10 So, here the report that CIMA ultimately provides
11 doesn't just talk about interim safety measures.
12 It also provides their views on the Tradewind
13 report. And, for that reason, you'll hear from me
14 later on, we submit that all communications that
15 relate to the obtaining of this report are highly
16 relevant to the opinion itself that's disclosed
17 and also to the questions in the terms of
18 reference that relate to the consultant reports
19 that the City ultimately did receive.

20 So, there's one other aspect
21 of the narrative that I think is helpful to
22 understanding what we say was really going on.
23 So, after the Tradewind report was released,
24 public works staff wanted to reach out to CIMA
25 again for the purposes of updating their opinion.

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1 This is because public works staff then obtained
2 some additional friction data from the Ministry of
3 Transportation.

4 MR. MARROCCO: Ms. Lie, I'm
5 going to have to interrupt you for two minutes.
6 There's somebody who keeps ringing the front door.

7 MS. LIE: Do you want to just
8 break for lunch now?

9 MR. MARROCCO: Well, why don't
10 you finish what you were going to say here and
11 then we'll break. Let's just take five for now.

12 MS. LIE: Okay.

13 --- Recess taken at 1:00 p.m.

14 --- Upon resuming at 1:03 p.m.

15 MS. LIE: So, let me just take
16 you to one more document that I think is relevant
17 to this question of what CIMA was doing and
18 whether or not it was for the dominant purpose of
19 this litigation.

20 So, after the release of the
21 Tradewind report, the City also received some
22 additional friction testing results from the
23 Ministry of Transportation and Mr. Soldo, again,
24 he's the director of roads and traffic, wanted to
25 reach out to CIMA to see if that data would affect

1 CIMA's conclusions.

2 So, Mr. Registrar, if you
3 could turn up the compendium, commission counsel's
4 compendium, tab 44 on page 364 of the PDF.

5 So, here, this is February 14,
6 2019, Mr. Soldo sends a note to Ms. Auty and he
7 says:

8 "Nicole, the last e-mail
9 from Brian through your
10 office and the external
11 lawyer, I would like to
12 contact CIMA regarding
13 the new friction data we
14 have from MTO in order
15 for them to review it in
16 the same context and to
17 extrapolate a degradation
18 curve based on the data.
19 Could we go through the
20 same process with the
21 external lawyer?

22 Thanks."

23 And then the next e-mail up
24 the chain, you'll see Mr. Soldo follows up with
25 Ms. Auty. Then if you go up to the top of the

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1 chain here, there's an e-mail from Ms. Auty to
2 Mr. Boghosian asking if Mr. Boghosian is
3 comfortable with staff dealing with CIMA directly
4 or should it be through us, and Mr. Boghosian
5 responds:

6 "I think Edward should
7 deal with CIMA directly."

8 In commission counsel's
9 submission, this demonstrates that the
10 communications with CIMA about its February 4,
11 2019 interim measures report was never for the
12 dominant purpose of litigation and, in fact, in
13 Mr. Boghosian's cross-examination, he admitted
14 that even at this time, February 14 and 15, 2019,
15 there continued to be a risk of litigation from
16 the release of the Tradewind report, but that did
17 not affect his opinion on whether or not the
18 communication had to go through him at this time.
19 And just for your reference, that's questions 416
20 to 418 of the cross-examination.

21 So, again, the point is that
22 those communications were for the purposes of
23 obtaining a report on interim safety measures,
24 just like the report that Mr. Soldo was
25 contemplating in this final e-mail that I just

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1 showed to you. It was never for the dominant
2 purpose of litigation, and so those communications
3 with CIMA about those reports are not protected by
4 litigation privilege.

5 I'm about to move on to a next
6 topic, so I wonder if this was a good time to
7 break for lunch?

8 MR. MARROCCO: I was thinking
9 of breaking for half an hour or so. How much
10 longer do you think you'll be?

11 MS. LIE: I think we had
12 originally estimated that we would take about two
13 to two and a half hours. I think I have gone for
14 about an hour, so I think we'll need about another
15 hour and a half.

16 MR. MARROCCO: Then let's come
17 back in half an hour.

18 --- Luncheon recess taken at 1:07 p.m.

19 --- Upon resuming at 1:39 p.m.

20 MR. MARROCCO: So, Ms. Lie,
21 you were saying? Let's try to stick to the time
22 estimates that everybody gave, though. Okay?

23 MS. LIE: Absolutely. Just
24 before we broke I did take you to those e-mails
25 where Mr. Boghosian and City legal staff tell

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1 public works staff that they are allowed to
2 communicate with CIMA at that point. And I just
3 wanted to really highlight for you the date of
4 that communication. That was on February 14,
5 2019, which is after the Tradewind report was
6 disclosed to city council and ultimately publicly.
7 And we say that's significant because it shows
8 that Mr. Boghosian's involvement with CIMA was
9 really only in respect of the time before
10 disclosure of the Tradewind report and it was at a
11 time leading up to disclosure.

12 Once the report is disclosed,
13 all of a sudden the City doesn't have any issue
14 with public works staff contacting CIMA. And,
15 again, we submit that's telling because it really
16 shows what Mr. Boghosian was retained to do and
17 also that the dominant purpose of all of those
18 communications with CIMA were for the purposes of
19 obtaining an opinion on interim safety measures
20 and not for the dominant purpose of litigation.

21 I now want to turn to the last
22 issue in my law overview. And you'll have seen in
23 our factum that we make the submission that
24 non-privileged facts that are contained in an
25 otherwise privileged communication are still

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1 subject to disclosure. So, our position is that
2 even if you conclude that certain documents are
3 protected by solicitor-client and/or litigation
4 privilege and that privilege was not waived, if
5 there are facts disclosed in those documents that
6 are not otherwise privileged, those facts should
7 still be disclosed. And that really comes up, for
8 example, in Mr. Boghosian's opinion letters where
9 he summarizes those conversations that he had with
10 Mr. Malone on December 11, 2018 and also on
11 February 1, 2019.

12 We've given you a couple cases
13 in our factum and in our book of authorities.
14 There's the Tiller case at tab 21 of our
15 authorities and the Pearson versus Inco case at
16 tab 22, where a court found a document to be
17 privileged but then ordered that the party produce
18 a summary of the non-privileged facts that are
19 disclosed.

20 The City in its reply factum
21 cited to the Federal Court's decision in Slansky
22 versus Canada for the proposition that facts in a
23 legal opinion could not be severed from the
24 communication that is covered by solicitor-client
25 privilege, and I just want to address the Slansky

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1 decision for a moment.

2 So, in the Slansky case, the
3 court considered whether the Canadian Judicial
4 Council had to disclose a confidential report that
5 was prepared by outside counsel, a professor of
6 law, Professor Friedland. The complainants
7 applied for judicial review --

8 MR. MARROCCO: I can tell you
9 I'm familiar with the case.

10 MS. LIE: You know the case.
11 Okay, great. So, in that case, what happened was
12 the Federal Court, the trial division, decided
13 that the entire report was protected by
14 solicitor-client and public interest privilege and
15 also then declined to sever parts of the report.
16 And so, the City relies on that decision to say,
17 well, you can't separate out the facts from the
18 actual opinion expressed. We've given you a copy
19 of the Court of Appeal's decision, the Federal
20 Court of Appeal's decision, and that's in our
21 supplementary brief at tab 1. And it's important
22 to recognize that in that case, the Federal Court
23 of Appeal ultimately upholds the trial division's
24 decision, but that's on the base of public
25 interest privilege.

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1 that is privileged, but that's actually not what
2 we're saying. We're saying that the question
3 itself of whether or not something had been
4 privileged requires a determination of whether or
5 not any privilege that did attach was waived.

6 MR. MARROCCO: I follow that.

7 MS. LIE: You get the point,
8 okay. So, let me get into the law of implied
9 waiver. So, in the Divisional Court's decision in
10 Roynat Capital, this is at tab 14 of our
11 authorities, I don't think we need to turn it up,
12 but you'll have seen in our factum that the div
13 court says that in all cases where there is an
14 implied waiver found, there are what the court
15 calls the double elements of an implied intention
16 and an element of fairness and consistency, so
17 those are the two things that we need to be able
18 to establish in order for an implied waiver to be
19 found: Implied intention and the principles of
20 fairness and consistency require their disclosure.

21 On the second point, the
22 Divisional Court did say that it does require a
23 showing that the documents in issue are highly
24 relevant to the matters in issue, and I think that
25 Ms. Contractor took you to some language where the

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1 court also used the words extraordinarily
2 relevant. The point is that the documents in
3 issue have to be material to the matters in issue.

4 MR. MARROCCO: Well, material,
5 it says highly relevant.

6 MS. LIE: Yes.

7 MR. MARROCCO: Extraordinarily
8 relevant. It's an odd thing, really, to use an
9 adverb like that with a word like relevant, but it
10 seems to imply perhaps more than materiality.

11 MS. LIE: That's fair. So,
12 highly relevant is the word -- are the words that
13 are used by the Divisional Court.

14 MR. MARROCCO: It's relevant
15 or it isn't. I guess it's more to the point maybe
16 than some other document. It's more directly
17 connected with what you're doing. Perhaps that's
18 what's it means. Anyway, we've exhausted that.

19 MS. LIE: I think we're on the
20 same page here.

21 MR. MARROCCO: Yes, I think
22 so.

23 MS. LIE: So, the City has
24 referred to the Davies case, and that's the
25 British Columbia case, the Paul Frank inquiry, and

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1 they have distinguished that case from this one
2 because they say the terms of reference in that
3 case specifically refer to the criminal justice
4 branch and our terms of reference don't do that.

5 In my submission, when you
6 actually look at the terms of reference, there
7 doesn't need to be a specific reference to
8 inquiring into what City legal staff were doing in
9 order for there to be a finding that there was an
10 implied intention to waive and that the principles
11 of fairness and consistency require a finding that
12 there was a waiver.

13 So, let me just talk about the
14 terms of reference for a moment. So, you'll have
15 seen in the terms of reference that the terms of
16 reference separate out the questions into two
17 different time frames. The 2014 timeframe when
18 the Tradewind report is first provided to
19 Mr. Moore and what happened during that timeframe,
20 and then most relevant to our motion are the terms
21 of reference that relate to what happened in 2018,
22 following the discovery of the Tradewind report.

23 The terms of reference are
24 found in our compendium at tab 1. I know that
25 we've looked at them at length, but I do want to

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1 just pull them up very quickly to give you some
2 arguments about why we say the disputed documents
3 are highly relevant to each of the terms of
4 reference that are identified.

5 So, if you go to page 7, so
6 here you'll see in subsection 7:

7 "Identify all individuals
8 who received a copy of
9 the report or were
10 advised of the report or
11 the information and
12 recommendations contained
13 therein in 2018."

14 In our submission, all
15 individuals means all individuals. It certainly
16 does not exclude lawyers. Sub 8:

17 "Were appropriate steps
18 taken to disclose the
19 report or the information
20 and recommendations
21 contained therein once it
22 was discovered in 2018?"

23 Sub 9, which is one that you
24 talked to Ms. Contractor about:

25 "Was there any

1 negligence, malfeasance
2 or misconduct in failing
3 to disclose the report or
4 the information and
5 recommendations
6 contained --"

7 MR. MARROCCO: But just
8 starting with 7, so Mr. Boghosian can be
9 identified, for example, as an individual who
10 received a copy of the report in 2018.

11 MS. LIE: Correct, yes.

12 MR. MARROCCO: But is that all
13 the Commissioner is asked to do there in that
14 particular part, just identify --

15 MS. LIE: I mean --

16 MR. MARROCCO: That's what it
17 says.

18 MS. LIE: On a plain reading
19 of that section, I think that's right. It's
20 identify all individuals. But then you have to
21 read the next subsection. And then the next
22 question is:

23 "Were appropriate steps
24 taken to disclose the
25 report or the information

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1 MS. LIE: But I think that
2 it's important to recognize the context. Right?
3 So, in December of 2018, Mr. Boghosian receives
4 the report. He has a call with Mr. Malone. He
5 does not talk to Mr. Malone about the Tradewind
6 report on that December 11, 2018 call. That's his
7 evidence. He never mentions it.

8 At the same time, and I took
9 you to the e-mails before the break, legal staff
10 are telling public works staff, don't contact
11 CIMA. And CIMA, this is the City's safety
12 consultant, they were literally in the middle of
13 doing a roadside safety assessment at that time.
14 Public works had asked CIMA to do a roadside
15 safety assessment, did not provide CIMA with the
16 Tradewind report. CIMA concludes its roadside
17 safety assessment in January of 2019, never sees
18 the Tradewind report as part of that assessment
19 and only receives it for the very first time on
20 January 30, 2019.

21 MR. MARROCCO: So you're
22 concerns about the appropriateness of that rather
23 than whether, even though it might not have
24 adversely affected public safety because CIMA says
25 it wouldn't -- because CIMA -- it wouldn't have

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1 caused a radical enough change in CIMA's behaviour
2 to make a difference or something of that nature,
3 but it's the appropriateness of that. Is that the
4 idea?

5 MS. LIE: That's right. I
6 mean, ultimately it's going to be up to the
7 Commissioner. But it's possible --

8 MR. MARROCCO: Of course.

9 MS. LIE: -- the Commissioner
10 could criticize public works staff for not giving
11 CIMA the Tradewind report as part of the roadside
12 safety assessment, as an example.

13 MR. MARROCCO: Except they're
14 told not to do that.

15 MS. LIE: Right. So, those
16 e-mails where they're told not to be public, but
17 what's disputed and what privilege is being
18 claimed over are communications that explain why
19 and what is happening.

20 So, in our submission, it does
21 look from the disputed documents as though the
22 City staff were very concerned about potential
23 liability. I think that the City would probably
24 concede that. But who, if anyone, at the City was
25 looking after potential public safety issues

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1 during this interim time is absolutely in the
2 Commissioner's jurisdiction to determine.

3 MR. MARROCCO: Okay.

4 MS. LIE: And the extent to
5 which the concern for potential liability may have
6 affected the decision to get an opinion from CIMA
7 about public safety recommendations or it may have
8 over road those conversations, in commission
9 counsel's submission, is absolutely highly
10 relevant to the Commissioner's mandate to
11 determine if appropriate steps were taken to
12 disclose the report.

13 MR. MARROCCO: Good. I have
14 it.

15 MS. LIE: Okay. So, that kind
16 of covers off, I would say, the category 1 and
17 category 2 documents, which relate to
18 Mr. Boghosian's retainer, what he was asked to do,
19 his communications with CIMA, et cetera.

20 The category 3 documents
21 include, you'll recall, just additional
22 correspondence between counsel. When I say
23 counsel, I mean legal counsel. And many of those
24 e-mails that were exchanged between Ms. Auty and
25 Mr. Sabo and Mr. Boghosian in, kind of, that

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1 January 2019 timeframe, they all involved legal
2 counsel, external and internal counsel, talking
3 about how to approach city council and how to
4 include comments on the reports that would go to
5 city council, for example, and include, in my
6 submission, what would be viewed as some
7 wordsmithing for the report that would ultimately
8 go to city council.

9 So, from commission counsel's
10 perspective, when you're talking about whether or
11 not appropriate steps were taken to disclose the
12 report to counsel and whether or not there was any
13 misconduct in failing to disclose the report any
14 sooner, all of those discussions about how to
15 approach city council are highly relevant to the
16 Commissioner's mandate.

17 So, Mr. Registrar, if you
18 could go to the next page.

19 So, the other sections of the
20 terms of reference that I wanted to highlight for
21 you are section 13:

22 "If anyone in the public
23 works office or roads
24 department request,
25 direct or conduct any

1 other friction test,
2 asphalt assessment or
3 general road safety
4 reviews or assessments on
5 the RHVP."

6 And 14:

7 "Did subsequent
8 consultant reports
9 provide additional
10 support and rebuttal to
11 the conclusions contained
12 in the report?"

13 So, our submission is that the
14 documents surrounding who was going to contact
15 CIMA are highly relevant to these two sections of
16 the terms of reference and also the communications
17 that Mr. Boghosian and other staff had with
18 Mr. Malone in the lead-up to his final report, the
19 interim measures report that was dated February 4,
20 2019, are highly relevant because to the extent
21 that those communications may have effected
22 Mr. Malone's views, the Commissioner should be
23 able to examine what was discussed and how it was
24 communicated to Mr. Malone.

25 I would note that the City did

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1 argue with respect to term of reference 13 that
2 city council deliberately excluded City legal
3 staff from the question of whether anyone in the
4 public works office or roads department requested
5 a general safety assessment. If that's the case,
6 I would submit that city council specifically did
7 not exclude anyone when they decided to draft
8 sections 8 and 9 as broadly as they did, when they
9 said were appropriate steps taken. They never
10 actually said were appropriate steps taken by
11 public works staff? It was a very open-ended
12 question about whether or not appropriate steps
13 were taken to disclose the report and whether or
14 not there was any misconduct in failing to
15 disclose the report. And so, that, in my
16 submission, indicates that legal staff are just as
17 implicated in those questions as public works
18 staff would be.

19 So, let me now talk about the
20 categories. I'm going to -- I'm not going to take
21 you through each document. You have our Schedule
22 C, which includes our position and argument with
23 respect to each of the documents. But I do want
24 to just make some broad points with respect to the
25 documents in each category.

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1 You can take down this
2 document. Thank you, Mr. Registrar.

3 So, the category 1 documents
4 are the documents relating to Mr. Boghosian's
5 retainer. So, I expect that you have our point on
6 this. We do concede that many of these documents
7 would ordinarily be protected by solicitor-client
8 privilege. For example, a retainer letter is
9 protected by solicitor-client privilege. But in
10 this case, because of the content, because there
11 was a specific discussion about contacting CIMA
12 and how they were going to go about doing that,
13 our submission is that the terms of reference and,
14 in particular, the terms relating to appropriate
15 steps, constitute an implied waiver. In our
16 submission, without these documents, it's very --
17 it would be unfair and it wouldn't give the
18 Commissioner a complete picture of what was
19 actually happening at the time, again, because the
20 evidence, the public evidence, does show that
21 public works staff were engaging with CIMA with
22 respect to the roadside safety assessment, but
23 were also told by legal not to communicate with
24 Mr. Malone.

25 Let me now take you to -- so,

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1 now category 2 documents, these are the CIMA
2 documents. I do want to take you to
3 Mr. Boghosian's draft opinion.

4 So, Mr. Registrar, if you
5 could pull up the disputed documents brief,
6 tab 15. If you go to page 372, please.

7 So, here is the part of
8 Mr. Boghosian's opinion letter that summarizes his
9 conversation with Mr. Malone on December 11, 2018.
10 If you could scroll down a little bit. So, here
11 you'll see that Mr. Malone was reporting to
12 Mr. Boghosian the recommendations that CIMA had
13 made previously, in 2015, and which of those
14 recommendations had been implemented.

15 If you go to the next page,
16 you'll see in the second full paragraph
17 Mr. Boghosian writes:

18 "When asked to rank in
19 order of greatest
20 contribution to the
21 inordinate number of wet
22 road crashes -- "

23 And that's just referring to
24 the fact that CIMA had previously found that there
25 was a disproportionate number of wet road

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1 collisions on the Red Hill Valley Parkway as
2 compared to other comparable expressways, you'll
3 see Mr. Boghosian says:

4 " -- Mr. Malone advises
5 as follows."

6 Bullet point number 1, so this
7 is the greatest contributing factor to the
8 inordinate number of wet road crashes:

9 "Slipperiness of the road
10 surface, i.e., the road
11 is slipperier when wet
12 than other roads, which
13 leads to greater
14 accidents than on roads
15 with similar large
16 numbers of horizontal
17 curves in wet road
18 conditions."

19 And so, commission counsel
20 submits this note in particular is highly relevant
21 to the work of the inquiry because no where else
22 in the inquiry's documents or database is there
23 any indication that Mr. Malone held the view that
24 slipperiness of the road surface was the greatest
25 contributing factor to the disproportionate number

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1 of wet road cashes. And that's important because
2 of course the Tradewind report deals with
3 friction, and so commission counsel has not, of
4 course, been able to ask Mr. Malone about this
5 because of the privilege dispute, but absolutely
6 commission counsel should have the opportunity to
7 explore that with Mr. Malone.

8 MR. MARROCCO: I'm just trying
9 to understand. Mr. Malone was called as a
10 witness, I assume?

11 MS. LIE: He has testified,
12 but he has not yet covered, kind of, the period
13 post disclosure of the report.

14 MR. MARROCCO: Is there any
15 reason why he couldn't be asked, without any
16 reference to the letter, whether, in his opinion,
17 the slipperiness of the road surface contributed
18 to the inordinate number of wet road crashes?

19 MS. LIE: So, commission
20 counsel has not asked him that question in
21 interviews and he hadn't been asked about this
22 timeframe yet. He will be called back as a
23 witness in the coming months.

24 MR. MARROCCO: But let's
25 assume that you don't have -- that this letter was

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1 privileged.

2 MS. LIE: Right.

3 MR. MARROCCO: You have still
4 read it and you can formulate a question from it,
5 which presumably Mr. Malone would answer this way.
6 The only thing you couldn't do if he answered
7 it -- well, if he answered it differently, you
8 couldn't put this document to him and ask if him
9 if it accurately recorded his conversation with
10 Mr. Boghosian, but you could ask Mr. Boghosian if
11 he spoke to -- well, maybe not if they're arguing
12 about his testimony being privileged. But you can
13 make an attempt to get this evidence from
14 Mr. Malone. Correct?

15 MS. LIE: I mean, I suppose we
16 could ask him, you know, please rank in order of
17 greatest contribution the contributing factors,
18 but the problem is what if he doesn't say
19 slipperiness of the road surface or if he denies
20 that slipperiness of the road surface is --

21 MR. MARROCCO: What's the
22 percentage? I understand that and I understand
23 what you're saying, but it's highly unlikely that
24 he would not rank the slipperiness of the road
25 surface as important, given what Mr. Boghosian has

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1 said in the letter. But anyway, that answers
2 my --

3 MS. LIE: Right. The issue is
4 if he doesn't give this evidence, we don't have
5 any about to put it to him and suggest that he may
6 have said something different at some earlier
7 date. That's the conundrum that we're in and the
8 Commissioner won't have this information before
9 him when he's making his findings.

10 MR. MARROCCO: Won't have
11 before him the fact that Mr. Boghosian summarized
12 Mr. Malone's conversation with him in this way?

13 MS. LIE: That's correct. And
14 the other reason this is important in my
15 submission is that this comes in an opinion letter
16 that's ultimately sent to City legal staff, so
17 there's no question that Ms. Auty and City legal
18 had this information, including that Mr. Malone
19 ranked slipperiness of the road surface as the
20 greatest contributing factor, yet it wasn't until
21 January 30, 2019 that Mr. Malone even gets a copy
22 of Tradewind report. And, again, I think that
23 that is relevant to the Commissioner's mandate to
24 make findings on whether or not appropriate steps
25 were taken to disclose the Tradewind report. The

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1 fact that legal counsel are all aware of this or
2 are told this but somehow nobody sends Mr. Malone
3 a copy of the Tradewind report, in my submission,
4 is highly relevant to the work of this inquiry.

5 MR. MARROCCO: All right.

6 MS. LIE: So, the other part
7 of this letter, just while with I'm on it -- it's
8 not this letter. I'm sorry. If you go to
9 tab 75 -- no, I'm sorry. Tab 57. Sorry about
10 that.

11 So, tab 57 contains the final
12 opinion letter. And you'll actually note that it
13 looks very much like the draft opinion letter.
14 There's really only -- the biggest difference is
15 actually found at page 719, where there is a
16 summary of the conversation that Mr. Boghosian
17 participated in with Mr. Malone. And so, this is
18 a summary of the call of February 1, 2019 where
19 Mr. Malone provides his preliminary assessment
20 before he provides his draft report.

21 And so, you have our argument,
22 which is that even if the entire opinion letter is
23 ultimately found to be privileged, our submission
24 is that the conversation itself was not protected
25 by solicitor-client or litigation privilege,

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1 particularly because this conversation was
2 specifically about safety measures and not
3 litigation, so the facts of that or a summary of
4 that conversation should be disclosed in any
5 event.

6 So, within the category 2
7 documents, we also have notes of the December 11
8 call. There are many notes of the January 30,
9 2019 and February 1, 2019 calls. With respect to
10 the January 30, 2019 call, so this is again the
11 call where Mr. Boghosian and the city staff speak
12 with Mr. Malone for the first time about sending
13 him the Tradewind report and getting an opinion on
14 interim safety measures, there's two things I want
15 to say about that call.

16 So, the City appears to take
17 the position that all notes relating to that
18 January 30, 2019 call are subject to privilege
19 because the entire conversation was privileged,
20 but I do want to point out that it appears, at
21 least from commission counsel's review of the
22 records, that one person's notes of that call have
23 already been disclosed in the inquiry.

24 And so, Mr. Registrar, if you
25 could turn to our supplementary brief, tab 2.

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1 So, these are notes of Jasmine
2 Graham, who is the communications officer, and
3 Ms. Graham was a participant in the -- sorry, this
4 is of the February 1 call -- February 1, 2019
5 call. And if you go to the next tab, tab 3, this
6 is an excerpt of the overview document. So, just
7 by way of context, the commission counsel had
8 taken all of the documents that were publicly
9 disclosed and prepared overview documents that
10 summarized all of the documents in chronological
11 orders, so this overview document at tab 3, this
12 is an excerpt of it, it has been disclosed
13 publicly. In fact, it's on the inquiry's website.

14 So, if you'll see at
15 paragraph 737, if you scroll down a little bit,
16 that there's reference to undated handwritten
17 notes when appear to have been authored by
18 Ms. Graham relating to a discussion related to
19 friction testing with multiple references to an
20 individual referred to as Brian.

21 And if you go to -- so, you'll
22 see that this is just a transcription of the notes
23 that we've given you at tab 3, but if you go to
24 the next page after this one just as an example,
25 in the middle of the page there it says:

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1 "Brian has the Golder and
2 Tradewind reports. Has
3 comments and level of
4 detail, whatever David
5 wants."

6 And there's references to
7 David, Gord, Jasmine, Brian, Dan. So, our review
8 of those notes indicate that this is likely from
9 the February 1, 2019 call with Mr. Malone and
10 Mr. Boghosian, and so commission counsel's
11 submission on this is it cannot be that the only
12 record of this February 1 call are the notes of
13 Jasmine Graham, the communications officer, and
14 that the Commissioner is going to base any
15 findings with respect to what happened on that
16 call based on Jasmine Graham's notes, but
17 commission counsel is not able to also show the
18 Commissioner the notes of other participants of
19 the call, including a detailed summary of the call
20 from Mr. Boghosian to City legal staff in his
21 final report. It would just be -- it simply
22 doesn't make sense that the Commissioner would
23 only get Ms. Graham's evidence of what happened on
24 that call and nobody else's. So, as a matter of
25 fairness and consistency, we would say all of the

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1 notes relating to at least this call certainly
2 need to be disclosed and commission counsel need
3 to be able to ask the notetakers or participants
4 of this call what actually happened and what was
5 discussed.

6 The other document that I want
7 to take you to with respect to the January 30 or
8 February 1 calls is in the disputed documents
9 brief at tab 98. So, these are the notes of
10 Mr. Boghosian from the January 30, 2019 call with
11 Mr. Malone.

12 If you go to page 1068,
13 there's actually a transcription of
14 Mr. Boghosian's notes. And I just wanted to just
15 highlight this for you just as an example of why
16 we say the communications with CIMA during this
17 period are important.

18 So, you'll see in the second
19 row there's some notes on the right-hand column,
20 "slippery when wet or flashing." On the left
21 Mr. Boghosian has recorded, "thinks that it should
22 be done." On the right hand where it says stress,
23 it's wet road issue. On the left, Mr. Boghosian
24 has noted, "he won't do that, skated by the
25 issue." Then underneath it it says, "will say UK

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1 those types of communications where external
2 counsel is providing some feedback to the
3 consultant about what they should or should not
4 include in their report is, again, highly relevant
5 to the questions before the Commissioner.

6 So, category 3, let me just
7 make some brief submissions on this and then I'm
8 going to pass it over to Ms. Leclair. You can
9 take this down. Thank you, Mr. Registrar.

10 So, category 3 includes the
11 Mr. Boghosian legal opinions. You already have
12 our argument on that. I guess the one thing I
13 would say is even apart from the summaries of the
14 calls with Mr. Malone, which for all the reasons
15 I've said which we said are not privileged, we
16 would say that the rest of the opinion letter
17 would be protected by solicitor-client privilege.
18 I don't dispute that.

19 But I would submit that the
20 content of it is highly relevant to the work of
21 the inquiry. Ms. Contractor said, well, you know,
22 the fact that legal advice was obtained may be
23 relevant, but what was actually said is not. And,
24 in my submission, when you talk about the question
25 of whether appropriate steps were taken and

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1 whether or not there was misconduct in failing to
2 disclose the report, it actually does make the
3 content of the legal opinion relevant because it
4 really shows what city staff were concerned about,
5 what they were thinking about. And in my
6 submission, they might actually explain why wasn't
7 until January 30 that CIMA receives the Tradewind
8 report for the very first time. Again, because it
9 speaks to this question of whether or not City
10 legal staff were potentially more concerned about
11 liability than perhaps public safety or
12 potentially about disclosing the report.
13 Ultimately, it's going to be up to the
14 Commissioner to decide, but in our submission, he
15 needs to have all of that evidence. He needs to
16 have the full picture in order to make his
17 findings with respect to that question of whether
18 or not appropriate steps were taken and whether or
19 not there was any misconduct in failing to
20 disclose the report.

21 The other -- so, that
22 argument, I think, actually applies for much of
23 the category 3 documents, but again, the
24 category 3 documents, the ones that relate to the
25 reports that are going to council where

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1 Mr. Boghosian, Mr. Sabo and Ms. Auty are talking
2 about exactly how they want to frame it to city
3 council, I would submit, are highly relevant to
4 the question of whether appropriate steps were
5 taken to disclose the report to city council.

6 The only other note that I
7 would make with respect to the category 3
8 documents is that there are two handwritten notes
9 of Ms. Graham, tabs 21 and tabs 72, and the City
10 simply has led no evidence about what those notes
11 relate to. I think for tab 21 they kind of
12 included them in one of those categories of
13 documents, Mr. Boghosian documents, but there's no
14 evidence about when that note was taken, why it
15 was taken, who was there, et cetera. And, again,
16 I would submit that the onus is on the City to
17 provide the evidence to substantiate its claims
18 for privilege.

19 Let me now just turn to
20 category 5, which is the Shillingtons letter.

21 MR. MARROCCO: Is your
22 colleague -- did you say --

23 MS. LIE: Yes. My colleague
24 is going to deal with categories 4 and 6, so let
25 me deal with 5 and then that way we don't have to

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1 go back and forth.

2 MR. MARROCCO: Right. Okay.

3 MS. LIE: Let me deal with 5
4 and then maybe we'll take a short break to allow
5 her to switch seats with me and do 4 and 6.

6 MR. MARROCCO: Go ahead.

7 MS. LIE: Category 5 is the
8 Shillingtons letter and I do want to pull a copy
9 of that letter up, so, Mr. Registrar, that's the
10 disputed documents brief, tab 1.

11 So, you'll recall that the
12 Tradewind report was provided to Shillingtons by
13 Mr. Moore in August of 2017. Mr. Moore also
14 advised Shillingtons that the report had not gone
15 to counsel. I do think just in terms of context
16 it's important for you to know that even though
17 Shillingtons had the Tradewind report, it had not
18 actually disclosed the Tradewind report to
19 opposing counsel in the litigation at the time --

20 MR. MARROCCO: Yes. I knew
21 that. I think someone told me that.

22 MS. LIE: Okay. Good. And
23 ultimately what happens is in November of 2018, a
24 note goes to Shillingtons saying that we don't
25 want to disclose the report and ultimately it's

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1 not included in the City's -- the City's affidavit
2 of documents isn't served at that time.

3 So, this letter, commission
4 counsel does concede that it is protected by
5 solicitor-client privilege. It is a legal opinion
6 that's being sent from a lawyer to its client.

7 MR. MARROCCO: Yes. It's
8 between Shillingtons and the City of Hamilton
9 legal, okay.

10 MS. LIE: You get it, okay.
11 So, if you go to the next page, you'll see just in
12 the document we've given to you in the disputed
13 documents brief commission counsel has agreed to
14 provide -- to make certain redactions just to
15 redact out portions of it that really relevant to
16 the litigation specifically because we want to be
17 fair and we don't want to get more than we need to.

18 MR. MARROCCO: But this
19 redaction doesn't mean anything.

20 MS. LIE: Right. My only
21 point is there are more redactions later on in the
22 document. My only point is that commission
23 counsel has indicated that it's willing to make
24 certain redactions.

25 So, this documents, you'll

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1 have seen, it refers under the City of Hamilton
2 heading it at talks about the report. In the
3 second paragraph, you'll see it says:

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

16 So, the fact that there's a
17 reference to, for example, buried reports in a
18 document going to city staff, Diana Swaby, on
19 January 31, 2018, is relevant.

20 If you go to page 5 of this
21 document. Sorry, it's page 15 of the record. No,
22 sorry, page 16. One more page. My apologies.

23 So, this is all in the
24 Shillingtons letter. So, the Shillingtons letter
25 actually refers specifically to the Tradewind

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1 report. You'll see here under friction testing
2 Survey Summary Report Shillingtons says:

3 "We have been provided
4 with a copy of a friction
5 testing survey summary
6 report for that LINC and
7 Red Hill Valley Parkway
8 dated November 20, 2013
9 prepared by C. Leonard
10 Taylor of Tradewind
11 Scientific. Gary Moore
12 of the City of Hamilton
13 has advised the City
14 Commission the report as
15 it was considering
16 repaving options."

17 Then it goes on to describe
18 the Tradewind report. And then ultimately you'll
19 see in the fourth paragraph it says:

20 "We are advised that the
21 friction report did not
22 go to counsel."

23 So, the Shillingtons letter
24 specifically referred to the Tradewind report. It
25 doesn't attach a copy of it, but it describes some

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1 of the content of the Tradewind report and that is
2 sent to Diana Swaby on January 31, 2018, and that
3 is eight months before the discovery of the
4 Tradewind report by Mr. McGuire in the engineering
5 services department.

6 So, commission counsel submits
7 that this document is highly relevant to a few of
8 the terms of reference. One of them, of course,
9 is identifying all individuals who received the
10 report, because it shows that Ms. Swaby -- sorry,
11 received the report or information about the
12 report. It shows that Ms. Swaby received certain
13 information about the report on January 31, 2018.
14 It also is relevant to the question of whether
15 appropriate steps were taken to disclose the
16 report because commission counsel should be able
17 to explore what steps, if any, Ms. Swaby took when
18 she received this letter that referred to the
19 Tradewind report not having gone to counsel and
20 the fact that there were what external counsel
21 referred to as, quote, unquote, "buried reports."

22 I understand that the City is
23 now saying that they're prepared to provide some
24 kind of an agreed statement that Ms. Swaby
25 received this letter and I think that the City had

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1 indicated it didn't reference the Tradewind
2 report, but it did. In our submission, that's not
3 actually sufficient because we need to know not
4 just that the Tradewind report was referenced, but
5 also how it was described and the context in which
6 it was given in order for the Commissioner to make
7 his findings on whether or not appropriate steps
8 were or were not taken in response to this letter,
9 for example.

10 MR. MARROCCO: Could she not
11 be asked -- well, did she testify?

12 MS. LIE: Not yet and I don't
13 believe that we've asked her about this document
14 because of the privilege claims. So, the approach
15 that commission counsel --

16 MR. MARROCCO: Not about the
17 document. I understand that. But could she not
18 be asked if she was ever advised that -- when she
19 became aware of the report, when she first became
20 aware of it and so on and did she ever provide the
21 report to anybody? I mean, Shillingtons are
22 corresponding with her. Where did they get the
23 report from?

24 MS. LIE: Shillingtons got it
25 from Mr. Moore, so we know that. Shillingtons --

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1 so, we know that --

2 MR. MARROCCO: So, Mr. Moore,
3 did Mr. Moore ever provide her with a copy of the
4 report? She could be asked those questions.
5 Right?

6 MS. LIE: Right, but without
7 this document, there's nothing grounding any
8 questions about January 31, what information she
9 obtained.

10 MR. MARROCCO: Okay.

11 MS. LIE: And what she did in
12 response to receipt of this letter, for example.
13 Without actually the letter, it's really hard to
14 ask questions, I would submit, in a vacuum. It's
15 similar to the point that we were making about
16 Mr. Malone being asked about slipperiness of the
17 road, for example. The document really does
18 provide a grounding for these questions and also
19 it makes it difficult for us to ask Ms. Swaby
20 about what information she received and we
21 actually have a document that shows exactly how
22 the Tradewind report was described to her, for
23 example. It would actually, in my submission, be
24 unfair to Ms. Swaby to ask those questions of her
25 without that context.

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1 So, subject to your questions,
2 those are my submissions on those categories. I'm
3 happy to just -- if we could just take -- assuming
4 you don't have questions, I would ask for a short
5 break to allow Ms. Leclair to --

6 MR. MARROCCO: Sure. We'll
7 take five minutes and give you a chance to get set
8 up.

9 --- Recess taken at 2:31 p.m.

10 --- Upon resuming at 2:41 p.m.

11 MR. MARROCCO: I think we're
12 good to go.

13 SUBMISSIONS BY MS. LECLAIR:

14 Good afternoon, Mr. Marrocco.

15 As indicated by my co-counsel, I will be
16 addressing the documents in categories 4 and 6.
17 In the interest of time, I will attempt to be
18 brief. We will rely on commission counsel's
19 written submissions where possible.

20 I'm going to start with
21 category 4. So, the Public Inquiries Act in
22 subsections 33(c) and (13) provide the only
23 restrictions on evidence at public inquiries are
24 documents subject to privilege. This is supported
25 both by the language of the Act itself and the

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1 Court of Appeal for Ontario in its decision in
2 Bortolotti referenced at tab 3 of the commission
3 counsel's book of authorities.

4 Addressing first the documents
5 now at tabs 6, 83 and 84 in the disputed documents
6 brief, commission counsel submits that these
7 documents are not privileged. The documents are
8 transcripts of examinations for discovery of City
9 representatives both who have been called as
10 witnesses before the inquiry in which they
11 provided evidence under oath respecting their
12 knowledge or lack of knowledge with respect to
13 friction testing and concerns regarding friction
14 on the RHVP and LINC.

15 As stated by the Superior
16 Court in Juman and Doucette, which is at tab 27 of
17 the compendium, discovery transcripts are not
18 themselves privileged. On this point and in the
19 interest of time, commission counsel relied on its
20 written submissions with respect to the purpose of
21 litigation privilege and that it cannot apply to
22 discovery transcripts.

23 It appears that the City does
24 not contest that the documents are not subject to
25 privilege raising for the first time in its reply

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1 factum that the City was relying on the deemed
2 undertaking rule in respect of the discovery
3 transcripts.

4 Commission counsel further
5 relies on its written submissions with respect to
6 the privilege claim asserted over the document at
7 tab 104. [REDACTED]

[REDACTED]

18 And further, as indicated in
19 Schedule C to commission counsel's factum, I note
20 that commission counsel is prepared to withdraw
21 its request over the document at tab 104 should
22 you find that the document at tab 84 is not
23 privileged.

24 Commission counsel submits
25 that pursuant to --

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1 MR. MARROCCO: Can I just stop
2 you for a minute, Ms. Leclair. In other words, if
3 the letter from Belinda Bain to Diana Swaby is
4 admissible, is admitted in evidence, then that's
5 good enough or no?

6 MS. LECLAIR: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

11 MR. MARROCCO: Okay. I see.

12 MS. LECLAIR: Turning now to
13 the deemed undertaking, commission counsel submits
14 that pursuant to the Supreme Court in Juman, which
15 I referred to previously, non-parties such as the
16 inquiry are not bound by the terms of the deemed
17 undertaking. The court held in that case at
18 paragraph 55 that not being privileged, the
19 discover transcript could not be exempt from
20 seizure notwithstanding the deemed undertaking
21 rule. The City's reply factum referred to
22 paragraph 56 of that decision and I believe you
23 were taken there earlier today, in which the court
24 held that the warrant would only provide the
25 police with access to its material, not its use.

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1 Commission counsel submits that the court further
2 contemplated circumstances in which documents
3 protected by a deemed undertaking can in fact be
4 accessed and used in proceedings by a party not
5 bound by its terms. In paragraph 57 --

6 MR. MARROCCO: But does that
7 mean that the deemed undertaking, which is an
8 undertaking flowing, I guess, mutually between
9 parties to litigation, trumps -- well, pardon the
10 use of that word -- the public interest in a
11 public inquiry?

12 MS. LECLAIR: I think in this
13 case, because we submit that the discovery
14 transcripts do not raise questions with respect to
15 privilege and this being a motion for
16 determination of privilege as discussed by my
17 co-counsel earlier today, commission counsel
18 respectfully submits that the matter should be put
19 before the Commissioner to determine what use, if
20 any, can be made of the discovery transcript as
21 situated to make this determination given the
22 breadth of evidence before them.

23 MR. MARROCCO: I understand,
24 but if the deemed undertaking rule means you can't
25 use the transcript, which would be up to the

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1 Commissioner, but if it means that, then that
2 means the deemed undertaking rule between the
3 parties supersedes a public inquiry, does it not?

4 MS. LECLAIR: We do not
5 concede that the deemed undertaking applies.

6 MR. MARROCCO: No, I'm not
7 suggesting that you're saying that to me. I'm
8 saying isn't that the logical end you get to when
9 someone says you can seize it, but you can't use
10 it because of the deemed undertaking rule?

11 MS. LECLAIR: So, Registrar,
12 if we can actually go to that case, I believe it's
13 in the compendium at tab 27.

14 MR. MARROCCO: I read it,
15 actually.

16 MS. LECLAIR: That's okay if
17 we don't want to call it up. I think at
18 paragraph 57 it does contemplate that pursuant
19 to -- sorry, let me start over. The court held
20 that if criminal charges were brought, a
21 prosecution could compel a witness to produce a
22 copy of the transcript and then the trial judge
23 could subsequently determine what, if any, use
24 could be made.

25 MR. MARROCCO: Right. Okay.

1 Fine. Thank you.

2 MS. LECLAIR: And barring any
3 further questions with respect to the category 4
4 documents, I will now proceed to my submissions
5 with respect to category 6.

6 As previously established by
7 my co-counsel, the City has the onus for
8 demonstrating that any privilege attaches to the
9 disputed documents in category 6 and commission
10 counsel submits that the City has not satisfied
11 that onus. The City has not provided any evidence
12 that the category 6 documents were created for the
13 purpose of seeking or providing legal advice and
14 it has also not provided any evidence that the
15 litigation [REDACTED]

[REDACTED] remains ongoing.

17 So, the two documents I'm
18 referring to are e-mail exchanges [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 Counsel to the City argues in
25 its reply factum and this morning that related

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1 RHVP litigation is still ongoing and that the City
2 continues to be locked in what is essentially the
3 same legal combat.

4 Commission counsel submits
5 that the City has not provided any evidence that
6 there were separate ongoing proceedings that raise
7 common issues and share the essential purpose of
8 the initial action. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Such an
14 interpretation would affect the result in
15 perpetual litigation privilege or unrelated
16 proceeding which have no common elements other
17 than the road they occurred on.

18 In the alternative, commission
19 counsel submits that in calling this inquiry and
20 directing the Commissioner to answer 24 broad
21 questions, the City waived any privilege over
22 communications between legal services and the
23 municipal prosecutor's office that relate to the
24 discussion regarding the Tradewind report,
25 friction testing or safety as it relates to the

1 RHVP.

2 The Commissioner was tasked
3 with, among other questions, and as you've heard
4 earlier today, identifying all individuals who
5 received a copy of the Tradewind report or were
6 advised of the information and recommendations
7 contained therein and to determine if appropriate
8 steps were taken to disclose the report once it
9 was discovered in 2018.

10 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

21 Subject to any questions,
22 Mr. Marrocco, those are my submissions.

23 MR. MARROCCO: Can you just
24 help me with tab 73? [REDACTED]

[REDACTED]

1 MS. LECLAIR: Registrar, if we
2 can go to the disputed documents, tab 73, please.
3 You can scroll down to the -- thank you.

4 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

10 MR. MARROCCO: So this is
11 February 6.

12 MS. LECLAIR: Correct.

13 MR. MARROCCO: The release of
14 the report to counsel and to the public, I assume,
15 is February 7 or 8?

16 MS. LECLAIR: It's February 6.
17 So, the e-mail itself is earlier in the day, so it
18 is later, much later, on February 6 that the
19 disclosure happens. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

23 MR. MARROCCO: [REDACTED]
[REDACTED]
[REDACTED]

1

MS. LECLAIR: [REDACTED]

[REDACTED]

11

MR. MARROCCO: Okay. Thank

12

you. I asked the questions as we went along.

13

MS. LECLAIR: Okay.

14

MR. MARROCCO: I'm fine.

15

Thank you very much.

16

MS. LECLAIR: Thank you.

17

MS. CONTRACTOR: Mr. Marrocco,

18

I have a few points in reply. I know it's been a

19

long day, so I don't intend to take too long.

20

MR. MARROCCO: Go ahead.

21

REPLY SUBMISSIONS BY MS. CONTRACTOR:

22

The first point is with

23

respect to commission counsel's assertion that the

24

December 11 call between Mr. Malone and

25

Mr. Boghosian was not for the dominant purpose of

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1 litigation. I just want to reiterate the City's
2 position on this, is that that is inconsistent
3 with the evidence of Mr. Boghosian and Ms. Auty
4 and specifically I would refer you to Ms. Auty's
5 cross-examination, question 138, in which she
6 states that's she was seeking information about
7 mitigation measures for the purposes of
8 litigation.

9 Commission counsel's assertion
10 that the December 11 call was not for the dominant
11 purpose of litigation is also not consistent with
12 the content of Mr. Boghosian's legal opinion
13 itself, which specifically talks about mitigation.
14 And I would refer you to tab 57, page 12 and 13 in
15 section E, which is entitled risk management,
16 mitigating steps pending resurfacing.

17 And certainly the facts
18 themselves are also inconsistent here. Commission
19 counsel takes the position that the January 30
20 call with CIMA and the subsequent engagement of
21 CIMA relates primarily to the safety and interim
22 measures and not litigation because CIMA was given
23 the Tradewind report, specifically asked about the
24 impact of the report on safety measures, and my
25 friend took you to the specific parts of the CIMA

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1 memo in this regard. And I think it's very
2 important to note that no such request was made of
3 CIMA before or immediately after the December 11
4 call.

5 And with respect to tab 104,
6 Ms. Bain's correspondence, [REDACTED]

[REDACTED] It clearly constitutes legal advice [REDACTED]
[REDACTED]
[REDACTED]

10 A few points on my friends'
11 arguments regarding waiver. She noted that the
12 substance of legal advice or the wordsmithing, as
13 she put it, is not relevant in our view for an
14 investigation to the disclosure of the report or
15 the findings of the report. And, more
16 importantly, commission counsel's assessment of
17 the information provided to counsel on February 6
18 is simply not relevant to the terms of reference.
19 And the question is whether the Tradewind report
20 or its findings are disclosed and whether
21 appropriate steps were taken, but it's limited to
22 the Tradewind report and the information and
23 recommendations contained therein.

24 Commission counsel again
25 contends that the terms of reference did not

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1 their question or to impeach Mr. Malone, but
2 that's not a basis to betray legal privilege.
3 They're entitled to ask Mr. Malone these
4 questions, but to assist them with framing or
5 impeaching, that's, in our view, not a basis to
6 deem these documents admissible.

7 With respect to the City's
8 release of Ms. Graham's January 30 call but not
9 the notes from Mr. Boghosian, again, I'll refer
10 you to the submissions that I made at the outset
11 about the City's agreement with counsel that the
12 City waived privilege -- that the fact that the
13 City waived privilege over some documents cannot
14 in and of itself be used as a basis to seek
15 productions of the disputed documents.

16 And, lastly, commission
17 counsel claims that this motion should not be
18 framed as a motion to quash the summons. In our
19 view, that is the appropriate way to frame this
20 motion, so we can obtain direction from you,
21 Mr. Marrocco, on whether the summons stands as is
22 and what parts of the summons we need to comply
23 with, if any.

24 MR. MARROCCO: Do I have
25 jurisdiction to do that? Do I have jurisdiction

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1 to do that?

2 MS. CONTRACTOR: I'm not able
3 to hear you.

4 MR. MARROCCO: Can you hear me
5 now? Can you hear me now?

6 THE REGISTRAR: It's on
7 Ms. Contractor's side.

8 MS. CONTRACTOR: I'm not sure
9 who did that, but that worked. Thank you to
10 whoever did that.

11 MR. MARROCCO: My question
12 was: Do I have jurisdiction to do that, to decide
13 that question about the summons?

14 MS. CONTRACTOR: You do as the
15 Commissioner's designate. In the first instance,
16 we would be moving before the Commissioner to
17 quash the summons and, as such, as his designate,
18 you stand in his shoes and are able to make that
19 finding in our respectful submission.

20 May I have a moment to just
21 consult with my colleagues? I want to make sure I
22 haven't missed anything.

23 MR. MARROCCO: Sure. Go
24 ahead. We'll take five minutes and give you a
25 chance to talk.

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1 --- Recess taken at 3:02 p.m.

2 --- Upon resuming at 3:06 p.m.

3 MS. CONTRACTOR: Mr. Marrocco,
4 barring any questions you may have, I have no
5 further submissions.

6 MR. MARROCCO: All right.
7 That's fine. So, I take it now I've heard from
8 everyone. In that case, I will give you my
9 decision as soon as I have it. I'm mindful of the
10 Commissioner's schedule, so I'll make every effort
11 to get it out as quickly as possible.

12 MS. CONTRACTOR: Thank you
13 very much.

14 MS. LIE: Just on that point,
15 I wonder if we can just go off the record for a
16 moment.

17 MR. MARROCCO: I guess it
18 depends on what you say as to whether we're off
19 the record.

20 MS. LIE: I want to talk about
21 timing.

22 MR. MARROCCO: Sure, go ahead.

23 --- (Off-record discussion)

24 --- Whereupon the proceedings adjourned at
25 3:08 p.m.