

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONOURABLE
J. WILTON-SIEGEL
held via Arbitration Place Virtual
on Wednesday, September 21, 2022 at 1:00 p.m.

VOLUME 57

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1 Arbitration Place Virtual
2 --- Upon resuming on Wednesday, September 21, 2022
3 at 1:00 p.m.

4 MS. HENDRIE: Good afternoon,
5 Commissioner.

6 JUSTICE WILTON-SIEGEL: Good
7 afternoon.

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

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

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

5 Commissioner, before we start,
6 just to give you an overview of today's
7 proceedings, we have Kevin Bentley here to testify
8 as our witness this afternoon, and following Mr.
9 Bentley's testimony there will be brief oral
10 submissions on a motion brought by the City
11 auditor.

12 JUSTICE WILTON-SIEGEL: Thank
13 you.

14 MS. HENDRIE: If we could have
15 the Court Reporter affirm Mr. Bentley, please.

16 KEVIN BENTLEY; AFFIRMED

17 EXAMINATION BY MS. HENDRIE:

18 Q. Good afternoon, Mr.
19 Bentley.

20 A. Good afternoon.

21 Q. I'm going to start to
22 this afternoon with some questions about your
23 educational and professional background and your
24 employment history. I understand that you were
25 employed by the Ministry of Transportation from

1 around 1986 until your retirement in June 2019; is
2 that correct?

3 A. That is correct.

4 Q. Since you retired in June
5 2019 have you been fully retired or have you been
6 employed in other capacities?

7 A. I have been employed on a
8 part-time basis with an engineering consultant,
9 Dillon Consulting in London.

10 Q. Are you still employed on
11 a part-time basis?

12 A. I am.

13 Q. In terms of your
14 educational background, can you tell us a bit
15 about that. Where did you attend university?

16 A. I attended university at
17 McMaster University in Hamilton, graduating in
18 1986 in civil engineering and in business
19 management.

20 Q. Are you a licensed
21 professional engineer in Ontario?

22 A. I am, and remain as --
23 licensed as a professional engineer in Ontario.

24 Q. And when you joined the
25 MTO in 1986 was that straight out of McMaster or

1 were you employed elsewhere before?

2 A. No, straight out of
3 McMaster.

4 Q. We don't need to cover
5 everything between 1986 until when you retired in
6 2019, but just to give us a little bit of an
7 overview about some of your roles over time, I
8 understand that from around April 2002 until
9 December 2012 you were the manager of engineering
10 in the west region; is that correct?

11 A. That is correct.

12 Q. Where is the west region?
13 Sort of, what area does that cover?

14 A. It's based out of London,
15 Ontario and stretches from Windsor to Guelph,
16 Cambridge, up Tobermory, so basically the
17 southwestern area of Ontario.

18 Q. And am I correct that at
19 some point between when you held that role as
20 manager of engineering, you also at some point in
21 time held the role of regional director of the
22 west region, perhaps in an acting capacity?

23 A. That is correct.

24 Q. And when was that?

25 A. So that was two different

1 time periods, if I recall, in around 2009 and then
2 again in early 2013.

3 Q. So both times that you
4 held that role was in an acting capacity?

5 A. That is correct.

6 Q. I understand that you
7 were the director of maintenance from in and
8 around July 2013 to October 2016; is that correct?

9 A. That is correct.

10 Q. And was that position in
11 west region, or was it in a different sort of
12 branch of the MTO?

13 A. So that was a corporate
14 role, so that was looking after the maintenance of
15 the provincial highway system for all of Ontario,
16 so it was based out of St. Catharines where the
17 corporate office of MTO is.

18 Q. Thank you. And your
19 position at the time when you retired from the MTO
20 in June 2019 was chief engineer; is that correct?

21 A. That is correct.

22 Q. When did you start as
23 chief engineer?

24 A. So in 2017 till 2019.

25 Q. And that was the position

1 that you held at the time you retired?

2 A. That is correct.

3 Q. What were your roles and
4 responsibilities as chief engineer?

5 A. So roles and
6 responsibilities. So I had oversight on the
7 design -- planning, design, engineering,
8 construction, asset management of provincial
9 highway system for the province of Ontario. So
10 under my leadership there were directors who
11 managed each of the areas, including construction,
12 highway standards, investment strategies and
13 maintenance.

14 Q. In terms of sort of how
15 you would characterize that role, was it more
16 technical or policy related or was it sort of a
17 mix of both?

18 A. I would say it was a mix
19 of both. Certainly I would describe, you know,
20 having to have a knowledge across all of those
21 disciplines, being planning, engineering, design
22 and construction and maintenance, but then having
23 specific experts in each of those areas that were
24 part of my branch.

25 Q. Who did you report to in

1 that role?

2 A. I reported to the deputy
3 minister.

4 Q. Do you remember who it
5 was in, say, early 2019?

6 A. Stephen Rhodes.

7 Q. Who or which divisions
8 within the MTO reported to you directly, let's
9 say?

10 A. So that was the
11 provincial highways management division. What I
12 was referring to was branches that reported to me.
13 So highway standards branch, as an example, was
14 one of the branches that reported to me.

15 Q. And highway standards
16 branch, that's the branch that -- what was at the
17 time the MERO office, the materials engineering
18 and research office, was in?

19 A. That is correct. So MERO
20 was part of the highway standards branch.

21 Q. And what was the
22 reporting relationship between you and the manager
23 of MERO?

24 A. So it was an indirect
25 reporting relationship. So the manager of MERO

1 reported to the director of highway standards
2 branch, who in turn reported to me.

3 Q. And as I understand it,
4 the manager of MERO in early, mid 2019 was Becca
5 Lane?

6 A. That is correct.

7 Q. So Ms. Lane reported
8 indirectly to you?

9 A. Correct.

10 Q. Thank you. So turning
11 now to February 2019. Registrar, if we would call
12 overview document 10A, at images 99 and 100. And,
13 Mr. Bentley, we're going to be calling documents
14 up on screen, and the Registrar has the capacity
15 to call things out and hand some -- make them
16 bigger or smaller, so please feel free to just
17 direct us as needed if you need us to expand on
18 something for you.

19 A. Okay, thank you.

20 Q. So if you look at
21 paragraph 244, you'll see that on February 1st,
22 2019, Edward Soldo at the City of Hamilton
23 e-mailed you, with a copy to Gord McGuire, under
24 subject line "pavement friction." And in the --
25 he asked -- gave a little intro there at the

1 bottom of page 99. And, Registrar, if we could
2 call up the two paragraphs on page 100 at the top
3 there.

4 You'll see in the third and --
5 second and third paragraphs of Mr. Soldo's e-mail,
6 he wrote:

7 "Do you have a person the City
8 can contact regarding pavement friction testing
9 and anticipated values for SMA pavements? Would
10 like to see what data MTO has in this area."

11 At the time you received this
12 e-mail, February 1st, did you know Edward Soldo?

13 A. Yes, I did. Edward Soldo
14 previously worked for the City of London when I
15 was actually working in London for MTO, so I knew
16 Edward for some files we worked on together for
17 MTO in the City of London.

18 Q. And Mr. McGuire who was
19 copied, did you know him?

20 A. I did not know him.

21 Q. At the time you received
22 this e-mail from Mr. Soldo on February 1st, did
23 you have any idea why he was contacting you, or
24 was his e-mail sort of out of the blue that day?

25 A. It seemed to be a very

1 routine e-mail. I did not know why he was
2 reaching out to me.

3 Q. We know that there were
4 subsequent discussions, and we can see one of
5 those e-mails, which I'll have some questions
6 about, there at paragraph 245, but I take it from
7 your answer there that this was your first contact
8 with Mr. Soldo about the issues that ultimately
9 gave rise to this inquiry or are subject of this
10 inquiry; is that correct?

11 A. That is correct.

12 Q. And was this the first
13 contact that you had with anybody at the City of
14 Hamilton?

15 A. That is also correct.

16 Q. Do you know why Mr. Soldo
17 contacted you specifically?

18 A. Sorry, do I know why he
19 contacted me specifically?

20 Q. Yeah. Did you have a
21 sense or -- do you have a sense of why it was you
22 at the MTO that he contacted at this time?

23 A. It would just be
24 speculation on my part, other than we obviously
25 knew each other.

1 Q. Through your working
2 relationship when you were both in London?

3 A. Correct.

4 Q. As you'll see there in
5 paragraph 245, the next contact that we see
6 between you and Mr. Soldo in the documents the
7 inquiry has received is 10 days later on February
8 11th and, as I said, we'll have some more
9 questions about those subsequent discussions, but
10 am I correct that at the time you received Mr.
11 Soldo's February 1st e-mail, you didn't
12 immediately respond?

13 A. That is correct.
14 Certainly a lot of information I was dealing with
15 every day and it seemed to be quite routine.
16 Basically when his question was based on who can
17 he contact, I probably asked staff to try and
18 figure out who the best contact would be for him
19 to -- good to talk to.

20 Q. I take it you didn't
21 perceive any urgency from him based on what he'd
22 said in his e-mail?

23 A. That's correct.

24 Q. And I think you said you
25 would perhaps have reached out to staff internally

1 to see if you could identify who the best contact
2 is. Do you recall doing that, or is that just
3 something that you think you may have done?

4 A. That's just something
5 that I would routinely do.

6 Q. At that time -- so Mr.
7 Soldo there in the first paragraph, he mentions
8 pavement friction testing and anticipated values
9 for SMA pavements. At that time what was your
10 understanding of sort of the concepts that he was
11 asking about?

12 A. So again during my -- my
13 general knowledge of pavement friction testing and
14 SMA pavements?

15 Q. Yes.

16 A. So, yeah, so I guess over
17 my career and having been involved in the design,
18 construction and maintenance of highways, I was
19 certainly aware of the ministry's practices, you
20 know, generally. I'm not an expert in pavement
21 friction testing, but awareness of, in general
22 terms, what we did in terms of pavement friction
23 testing, and had seen results in the past for
24 different pavements on provincial highways, and
25 certainly was aware of stone mastic asphalt based

1 on, again, being involved in projects where MTO
2 had used stone mastic asphalt.

3 Q. You had an awareness,
4 but, for example, it wouldn't be -- you wouldn't
5 be the contact that Mr. -- to be able to speak to
6 these issues with Mr. Soldo; is that fair?

7 A. That is fair.

8 Q. The inquiry has heard
9 evidence from a number of MTO witnesses about the
10 MTO's use of friction number 30, which isn't
11 mentioned here, but did you have a sense of -- did
12 you have any understanding of the significance of
13 that FN30 at this time?

14 A. I was, you know, aware of
15 the ministry's testing relative to FN30 and, you
16 know, a general guideline around what we did when
17 it was above or below FN30.

18 Q. What was your
19 understanding of generally what was done when it
20 was below FN30?

21 A. I guess some of the prior
22 involvement with highways related to FN less than
23 30 was we had kind of put those, again, on
24 provincial sections, provincial highway. We would
25 be, you know, monitoring that friction on a basis,

1 and also looking at other characteristics of that
2 highway. And when I was in the region, if we had
3 concerns about a specific section of highway, we
4 could request friction testing if other factors
5 thought that that was something that we needed to
6 look at.

7 Q. Thank you. You mentioned
8 earlier that you aware sort of in general terms of
9 what the MTO did with -- in terms of pavement
10 friction testing. Were you aware of sort of the
11 different purposes for which the MTO would test
12 friction?

13 A. I was aware. So as I
14 said before, there could be tests for specific
15 section of highway where there could be a concern
16 based on other factors. You know, there was
17 testing on some different types of asphalt if
18 there were concerns around the friction quality of
19 that asphalt, and I also was aware that we did
20 friction testing for -- for including materials on
21 to our designated source of materials list.

22 Q. Thank you. Registrar, if
23 we could call up HAM28695 at image 3. Thank you.

24 So, Mr. Bentley, you'll see
25 down at the bottom there there's a February 11th

1 e-mail from Mr. Soldo to you, and that was --
2 that's the same e-mail that was at paragraph 245
3 that had been up on the screen earlier. You'll
4 see here about 10 days later Mr. Soldo writes you
5 again under the same subject line "pavement
6 friction" following up on his earlier e-mail and
7 says, "Was wondering if you could give me a call.
8 Thanks."

9 So between that February 1st
10 e-mail that we looked at and this e-mail on the
11 11th, do you recall if you had any contact with
12 Mr. Soldo or was this the next point of contact?

13 A. It was the next point of
14 contact.

15 Q. When I asked you earlier
16 about the February 1st e-mail, as I understood
17 your evidence was that that was sort of an out of
18 the blue e-mail. When he e-mails you on February
19 11th did you have any understanding about what he
20 was -- did you have any further understanding
21 about what he was e-mailing you about?

22 A. In terms of the context,
23 I would say the answer would be yes, because we
24 were aware of the -- you know, some of the matters
25 with respect to the Red Hill Valley Parkway, and

1 specifically there had been some media requests
2 and also a statement, I believe, by Andrea Horvath
3 at the time.

4 Q. So was it through the
5 media and the statement by Ms. Horvath that you
6 came to first learn about some of the issues or
7 the context surrounding Mr. Soldo's e-mail?

8 A. That is correct.

9 Q. Registrar, if we could
10 call up MTO 38359, at images 6 and 7. Mr.
11 Bentley, while we're waiting for the document to
12 be pulled up, this is a February -- this will be a
13 February 11th, 2019 statement that Ms. Horvath --
14 was issued by Ms. Horvath's office.

15 Registrar, if we could call up
16 the press release on image 7. I'll give you a
17 moment to review. But just to summarize, this
18 is -- this statement was issued by Ms. Horvath in
19 relation to the Red Hill Valley Parkway and 2013
20 friction testing that had not been publicly
21 released. And at the end of the second paragraph
22 the statement mentions friction testing performed
23 by the Ministry of Transportation. So it says:

24 "Horvath and the official
25 opposition are also calling for provincial

1 Ministry of Transportation friction tests on the
2 roadway which were referenced in a 2015 public
3 works meeting to be released now. Those tests
4 were conducted by the ministry shortly after the 7
5 kilometre parkway was completed."

6 Is this -- I take it this is
7 the press release that you were referring to?

8 A. That is correct.

9 Q. Registrar, we can end
10 this call out. Thank you.

11 Mr. Bentley, you'll see that
12 there are some subsequent e-mails where the media
13 gets in contact with staff at the MTO, and this
14 e-mail chain continues on for a number of pages,
15 but suffice to say that this generated follow-up
16 by media to the ministry's office and some
17 internal discussions at the MTO on February 11th
18 and the 12th about how to respond to the media
19 inquiries. And the inquiry has received two
20 e-mail chains, including the one that is up on the
21 screen, that proceeded sort of parallel to each
22 other on February 11th and 12th in relation to the
23 media inquiries and responses to the media.

24 The Registrar can scroll
25 through this if you would like, if it would be

1 helpful, but that's sort of a summary of what this
2 document is. And then, Registrar, if we could
3 call up MTO 38360 at image 3.

4 So this is the other -- this
5 is the other e-mail chain sort of happening at the
6 same time. And you'll see down at the bottom
7 there's what is described by Mike Winterburn as
8 our lines on the Red Hill Valley Parkway. That's
9 the evening of February 11th. And then a third of
10 the way down the page there's an e-mail from Tom
11 Harmantas at 9:22 the next morning, on
12 February 12th, and you are copied on that.

13 And from my review, this is --
14 that 9:22 e-mail is the first e-mail that you were
15 copied on. Do you recall receiving these e-mails
16 on that day?

17 A. I recall receiving that
18 e-mail because it's in front of me here, but as
19 you can appreciate, having -- covering all the
20 issues across the province, we would see if not
21 10s, if not 20s of these type of -- what we called
22 issues management e-mails every day. So I cannot
23 say that I recall receiving this e-mail. I mean,
24 obviously I did. I remember the issue, but in
25 terms of receiving it at 9:22 a.m., I cannot speak

1 to that specificity.

2 Q. Okay. Fair enough. More
3 generally, do you recall receiving e-mails and
4 media inquiries in relation to the Red Hill Valley
5 Parkway sort of February 11th, February 12th?

6 A. I do.

7 Q. So just to sort of piece
8 together the timeline, the e-mail that Mr. Soldo
9 sent you that we looked at before on February
10 11th, that comes into your in-box mid-afternoon,
11 2:24 p.m., and then there is these e-mails sort of
12 that start with Andrea Horvath's statement and
13 then proceeds through the MTO internally, and this
14 e-mail here on February 12th. So the 9:22 a.m.
15 e-mail, that's the first e-mail that we see you
16 copied on.

17 So do you recall if you were
18 sort of just -- even if you didn't receive an
19 e-mail directly, were you otherwise aware on
20 February 11th of these issues?

21 A. I recall that I was.

22 Q. Was that just sort of
23 through the media or the grapevine at the --
24 through the grapevine at the MTO?

25 A. That, yes, I was aware --

1 as I recall, I was aware that people -- because
2 also one of my direct contacts at the time was Bob
3 Nichols and Elyse Heaton who were copied there
4 below. I knew that they were working with the
5 minister's office on this issue, so I kind of knew
6 it was in the works, so to speak.

7 Q. Mr. Nichols, is he in
8 communications or media relations?

9 A. Correct.

10 Q. Thank you. As clear from
11 these documents and the other documents the
12 inquiry received, it seems like there are sort of
13 multiple things happening at once. There's Mr.
14 Soldo contacting you, the press release, media
15 inquiries, and MTO staff trying to sort of piece
16 things together following the media inquiries.
17 Does that sort of align with your recollection,
18 there was lots of things happening all at the same
19 time?

20 A. That is correct.

21 Q. Just to sort of flag for
22 you, I've tried to organize my questions sort of
23 chronologically and in a way that makes sense, but
24 there are quite a few e-mails that cross over each
25 other and overlap, so we'll be bouncing around

1 from document to document a little bit. If at any
2 point you want me to go back to a document or call
3 up multiple documents at the same time, I'm happy
4 to do that to sort of situate you in the context.

5 A. Okay.

6 Q. Staying here on this
7 document for a moment, if you look at the
8 bottom -- Registrar, if we could call up the
9 bottom third of the page. Perfect. Yes. Thank
10 you.

11 In the initial response sent
12 by the MTO, the fourth bullet down says:

13 "MTO conducted friction
14 testing on the pavement surface starting in 2007,
15 only to evaluate the performance of the stone
16 material used by the Red Hill Valley Parkway
17 projects, aggregate supplier for use in future
18 provincial projects. Minister Yurek will be
19 ordering the release of these test results and
20 asking MTO officials to offer technical assistance
21 to the City of Hamilton."

22 And this was sent on
23 February 11th. As of February 11th as I read
24 this, the decision had been made to release the
25 MTO's friction test results; is that fair?

1 A. That's fair. So this
2 e-mail is from Mike Winterburn who was the -- in
3 the minister's office in a communications role.

4 Q. To your knowledge, who
5 made the decision to release the friction test
6 results? Was that the minister?

7 A. I have no knowledge of
8 that.

9 Q. But you weren't involved
10 in that decision?

11 A. Correct.

12 Q. And in the top bullet
13 there, it says:

14 "MPP Donna Skelly and the
15 mayor of Hamilton have both called for a review of
16 what happened with the Red Hill Parkway. Minister
17 Yurek has asked MTO officials to review all
18 ministry involvement with pavement testing on the
19 Red Hill Parkway."

20 Q. Do you recall the
21 direction from the minister to have MTO officials
22 review all ministry involvement in relation to the
23 Red Hill?

24 A. To the best of my
25 recollection, this is the only direction we

1 received were these draft key messages that had
2 been sent from the minister's office.

3 Q. So it was never direct
4 from the minister or somebody else above you; it
5 was through these media responses that you learned
6 of this direction?

7 A. Correct.

8 Q. And broadly speaking, how
9 would you characterize what your role or your
10 involvement in this direction was?

11 A. I guess making sure that
12 it did happen, and when you had the e-mail that
13 had come in the next morning to Tom Harmantas,
14 you'll see the direction was for us to do some
15 fact checking, I believe. If you can pull that
16 back up again, please.

17 Q. Registrar, could we close
18 this callout. So there where Mr. Harmantas says,
19 "we will need to release the test results along
20 with a readers notes explaining them," is that
21 what you're referring to?

22 A. Correct.

23 Q. So you describe your role
24 as sort of to make sure that MTO staff and MTO
25 officials were reviewing the ministry's

1 involvement and providing information as needed?

2 A. Correct.

3 Q. Thank you. Registrar,
4 can we close this document out and go back to
5 overview document 10A, at images 100 and 101.
6 Thank you.

7 So, Mr. Bentley, you'll see in
8 paragraph 246, which stretches on to both pages,
9 there's an e-mail from Heather Evoy to Ms. Lane
10 and others at the MTO, and in the blue text there,
11 she refers to Kevin and she says "Kevin has edited
12 the three questions."

13 And to situate you, this
14 e-mail is an excerpt from that bigger e-mail chain
15 that we just had up on the screen, but it's a
16 little bit easier to see in this format because
17 the colours show.

18 So there where Ms. Evoy says
19 "Kevin has edited three questions," I take it that
20 Kevin is you; is that right?

21 A. That is correct.

22 Q. Who is Ms. Evoy?

23 A. So Ms. Evoy was my
24 executive assistant, and she was the one that
25 primarily dealt with what we called issues

1 management or dealing with requests from media or
2 dealing with requests from our Queens Park office.

3 Q. Specifically in this
4 context in relation to the Red Hill Valley Parkway
5 media inquiries and responses, what was Ms. Evoy's
6 role?

7 A. So as seen here, her role
8 was to reach out to the -- more the subject matter
9 experts, in this case Becca Lane, to gather the
10 information and ensure accuracy of the
11 information.

12 Q. And then in terms of sort
13 of the interplay between what she was doing and
14 what you were doing in relation to these
15 responses, how would you describe that?

16 A. So she would gather the
17 information and then bring that information for me
18 to review and to weigh in on.

19 Q. And make changes or edits
20 as necessary?

21 A. That is correct.

22 Q. Is that how you would
23 sort of describe your role in this context, is
24 primarily to review and sign off on responses or
25 information?

1 A. That's correct.

2 Q. Thank you. Registrar, if
3 we could -- we can close this callout or this
4 document. Turning now to -- picking back up on
5 that February 11th e-mail from Mr. Soldo and your
6 discussions with Mr. Soldo and the City of
7 Hamilton in February 2019. Registrar, if we could
8 call up Hamilton 28727, at images 2 and 3.

9 Before I get to my questions,
10 just so that I don't forget, Registrar, this
11 document will need to be marked as an exhibit.
12 It's not in any of the overview documents, so if
13 we could mark this as Exhibit 150.

14 THE REGISTRAR: Noted. Thank
15 you, counsel.

16 EXHIBIT NO. 150: E-mail chain
17 dated February 13, 2019, 3 pages; HAM28727.

18 BY MS. HENDRIE:

19 Q. So, Mr. Bentley, you'll
20 see there the image on the right side is that
21 February 11th e-mail that we've looked at before,
22 and above that you'll see there's a response the
23 next day, on February 12th, from you to Mr. Soldo,
24 with Ms. Lane copied, and you write:

25 "Ed, as discussed, here are

1 the four files for each lane for the 4 kilometre
2 section where friction testing was completed to
3 evaluate the stone for inclusion on the DSM list.
4 I have cc'd Becca Lane if you have any questions
5 about the testing."

6 Attached to your e-mail, as we
7 say, were four PDFs, one for each lane of the Red
8 Hill Valley Parkway, with graphs plotting the
9 MTO's 2008 to 2014 friction test results for each
10 lane. And do you recall -- do you recall sort of
11 these discussions on February 11th and
12 February 12th?

13 A. I do.

14 Q. You'll see on the left
15 screen there's an e-mail that Mr. Soldo sent in
16 response thanking you and asking for some
17 additional information in relation to the graphs
18 that you had provided. In your e-mail to Mr.
19 Soldo, it says "as discussed." And we know that
20 there was a telephone call on February 12th, which
21 we'll come to, but when you say "as discussed,"
22 was that in reference to the phone call or a
23 different discussion?

24 A. No, to the phone call.

25 Q. Who was present on that

1 call? Was it just you and Mr. Soldo, or was
2 anybody else on the line?

3 A. I can't say for certain,
4 but I would -- based on I'll say my practice, I
5 would believe that Becca Lane may have been
6 included on that call, and perhaps Heather Evoy as
7 well.

8 Q. So for sure you and Mr.
9 Soldo, possibly Ms. Lane and Ms. Evoy?

10 A. Correct.

11 Q. Had you -- do you recall
12 how the call got arranged? Did you just pick up
13 the phone and call Mr. Soldo, which sort of
14 appears based on his earlier e-mail, that he's
15 just inviting you to give him a call?

16 A. That's my recollection.

17 Q. So no other e-mails or
18 anything between?

19 A. That is correct.

20 Q. Registrar, if we could
21 keep image 2 up and also call up image 1.

22 In the evening on the 12th of
23 February, Mr. Soldo wrote a note to file about the
24 teleconference and the discussion with you which
25 he sent to himself and with a copy to Mr. McGuire

1 and Dan McKinnon at the City. And you'll see
2 there -- we can call it up and expand it if that
3 would be helpful for you.

4 A. That would be helpful.

5 Q. Sure. So, Registrar, at
6 the bottom -- sorry, actually there's the lower
7 note to file. Yeah. That continues on to the
8 other page. Thank you, Registrar.

9 Mr. Bentley, I'll give you a
10 moment to just review these notes, and you can let
11 me know when you're finished.

12 A. Okay.

13 Q. Looking at these notes,
14 do they appear to be an accurate reflection of
15 what was discussed on the call?

16 A. They do.

17 Q. Are there any notes that
18 you disagree with or think are perhaps an
19 incorrect or incomplete reflection of the call?

20 A. On that day there are --
21 I mean, I guess we'll speak to February 13th,
22 where there was a correction of information about
23 the 2007 testing versus the 2008 to '14 testing.
24 On February 12th, they are an accurate reflection
25 of our discussion, based on the recollection of

1 that.

2 Q. So to the extent that
3 there might be something that is an incorrect
4 piece of information that then gets corrected down
5 the line that is reflected here, that's a
6 recollection -- the incorrectness in this notice
7 is perhaps --

8 A. As of February 12th,
9 correct.

10 Q. Thank you. Did you take
11 any notes on this call?

12 A. I did not.

13 Q. I think you may have
14 answered this but just to confirm, the
15 February 12th teleconference with Mr. Soldo, is
16 that your first substantive discussion with him?

17 A. That is correct.

18 Q. I can take you to some
19 of -- specifically to some of Mr. Soldo's notes
20 but sort of generally, can you tell us what you
21 recall about that discussion?

22 A. I recall that prior to
23 that discussion -- again, as I say, I don't recall
24 whether or not Becca was part of that call, but I
25 certainly had some discussions and had reviewed

1 the information before having the conversation
2 with Mr. Soldo. But the conversations at that
3 time were that the friction testing, as I said
4 here, was done to look at a particular stone for
5 use on our designated -- on our DSM list. As
6 (skipped audio) seen here, it was a 4 kilometre
7 section only. Speaks to the data. And then I had
8 sent the data over to him for him to look at
9 himself.

10 After we had a conversation --
11 again, because it was based on the MTO testing
12 method, so it was very specific to the MTO
13 testing. Again, for him to understand -- to put
14 some context to him around the data before I sent
15 it to him.

16 And then I guess the final
17 point there is that, you know, as per, as you saw,
18 the direction from the minister's office, we
19 offered our assistance and specifically again, as
20 I said before, Becca Lane was more of a subject
21 matter expert in the area of friction testing, so
22 again the reference to her as a manager of
23 materials and engineering research office
24 available to help him interpret the data, because
25 that was something she was much more qualified to

1 speak to.

2 Q. I think that's consistent
3 with the e-mail that you had sent to Mr. Soldo
4 earlier that night where you copied Ms. Lane and
5 offered her assistance.

6 In terms of the nature of sort
7 of the conversation, would you say it was sort of
8 a back and forth between Mr. Soldo and yourself,
9 or was it really you providing information and
10 context, him perhaps asking you some questions,
11 but sort of how would you describe that?

12 A. As I recall, it was more
13 of an information-sharing call. Again, given
14 the -- you know, we were trying to go back and
15 find information from dating back 12 years prior,
16 2007, 2008, trying to find that information, which
17 had we spent, you know, February 11th and 12th
18 looking for it, verifying it, and then again it
19 was primarily more information sharing, as I
20 recall, on my part than Mr. Soldo asking
21 questions.

22 Q. How would you describe
23 the sort of tone or demeanour of Mr. Soldo on that
24 call, if you can recall?

25 A. I don't recall, but

1 certainly nothing jumps out at me that there was
2 any -- anything out of just an information sharing
3 type tone.

4 Q. In terms of Mr. Soldo's
5 knowledge or familiarity with what's reflected
6 here on the notes, how would you describe that in
7 terms of his awareness or his knowledge of the
8 concepts and topics we're discussing?

9 A. I would say that his
10 awareness was much less than I would say compared
11 to myself, and obviously it was certainly not a --
12 again, part of the reason for the call was he was
13 certainly not knowledgeable. I don't think that
14 certainly was his area of expertise. It was
15 around pavements and friction testing and so
16 forth. So the call really before sending the data
17 was to -- for him, to provide him some context and
18 some understanding around the data.

19 Q. I think you said you may
20 have spoken with Becca or Ms. Lane. Do you recall
21 that? Was that something that you did in
22 preparation for this call?

23 A. I can't say for certain,
24 but I do recall having a conversation and
25 reviewing those Excel documents with Becca, and I

1 would certainly, based on my practice, would have
2 had that call before I -- you know, I would
3 certainly want to be knowledgeable of the data
4 before I had a conversation with someone else
5 about it.

6 Q. In terms of the
7 information here, would this have been new
8 information for you sort of that you would have
9 learned between February 11th and February 12th;
10 it wasn't information that you knew prior to
11 speaking with Ms. Lane or anybody else at the
12 ministry?

13 A. That is correct. I would
14 have no reason to be aware that MTO had done
15 friction testing on the RHVP. I certainly would
16 not have been aware of the -- I had no involvement
17 in that timeframe with the DSM list. I had no
18 involvement at all with materials and engineering
19 office, as I said previously. At that time I was
20 working in a regional office, London.

21 Q. In the sort of the
22 third -- it's the first paragraph of that second
23 callout there it says -- the second sentence says:

24 "Run for seven year, although
25 some years the testing was not undertaken."

1 At the time of the call, did
2 Mr. Soldo already know that the MTO had done
3 friction testing for a number of years, or was
4 this new information for him that you were
5 conveying?

6 A. I recall that this was
7 new information for Mr. Soldo.

8 Q. Do you recall what his
9 reaction was to you providing that information?

10 A. Again, my recollection is
11 there was no, I'll say, extraordinary reaction.

12 Q. Then --

13 A. (Indiscernible).

14 Q. Thank you. Two

15 paragraphs below:

16 "I asked for the data to be
17 sent over. Received shortly after the call by
18 e-mail."

19 So I take it that's the --
20 those are the -- the PDF documents that you sent
21 to him are the four files that you sent to him
22 subsequent to your call?

23 A. That's correct.

24 Q. At that time prior to
25 your call you hadn't sent any documents or

1 friction test data to the City?

2 A. That's correct.

3 Q. In that same paragraph

4 there, it says:

5 "Kevin Bentley identified that
6 the same methodology may not have been used in
7 assessing the end friction value in the City
8 testing."

9 Do you know what that's in
10 reference to?

11 A. So by that point I was
12 aware that the City had done some testing as well.
13 I think it was, if I recall, it was the Tradewind
14 testing, and that was not done using the same
15 testing methodology. I had been advised by Becca,
16 you know, that it was a different method of
17 testing than the brake trailer that MTO used.

18 Q. So had you read the
19 Tradewind report, or was this information that was
20 conveyed to you through Ms. Lane?

21 A. I just was aware that the
22 City had done testing, but I had not read the
23 report or seen the report.

24 Q. Would this have been new
25 information that you were conveying to Mr. Soldo

1 as well?

2 A. Which, the methodology
3 was different?

4 Q. Yes.

5 A. I don't recall that, but
6 I just wanted him to be aware that the test
7 results that they had and the test results from
8 MTO were not directly comparable.

9 Q. And then the last -- the
10 next sentence there says:

11 "For comparison, the
12 specification for Highway 407 includes a value of
13 30 where more investigation is required."

14 The reference to FN30 and the
15 407, that was information that you conveyed to Mr.
16 Soldo?

17 A. Yes, based on providing
18 context. I'm not sure about -- I don't think I
19 would have used the word "investigation," but
20 perhaps monitoring would have been probably the
21 word that I would have used.

22 Q. In terms of the context
23 that you were looking to provide to him, do you
24 recall why you wanted to provide him that context,
25 or for sort of what purpose you were sharing this

1 information about the 407?

2 A. I don't recall. It
3 could've been triggered by a question from Ed. I
4 do not recall.

5 Q. In the next paragraph
6 down there's reference to Charles Brown, who is
7 the auditor at the City of Hamilton. It says:
8 "The MTO indicated that
9 Charles Brown has connected with them as well last
10 Friday on this matter as well as several media
11 outlets."

12 Do you recall discussing Mr.
13 Brown's contact with the MTO with Mr. Soldo?

14 A. I recall -- I mean,
15 advising him, yes, that Mr. Brown had connected
16 with us as well.

17 Q. When you say "us," was
18 that you specifically or others at the MTO?

19 A. Others at the MTO.

20 Q. Did you have any
21 knowledge or insight into who it was that Mr.
22 Brown contacted or what was discussed, or really
23 was this just an FYI?

24 A. It was just an FYI. I
25 don't recall anything further.

1 Q. You may have mentioned
2 this earlier, but the four graphs that you
3 provided which are referenced here, where did you
4 get that information from or those documents from?

5 A. Through Becca Lane.

6 Q. So those were documents
7 that Ms. Lane provided to you to then pass on to
8 Mr. Soldo?

9 A. That is correct.

10 Q. Thank you, Registrar, we
11 can close this document out. If we could call up
12 overview document 10A, page 106. Thank you. If
13 we could call up paragraph 262.

14 The next day, February 13th,
15 2019, you e-mailed Mr. Soldo attaching the data
16 underlying the MTO's friction testing graphs and
17 the SMA mix design for the Red Hill Valley
18 Parkway. And the two documents that you sent, the
19 first one was a spreadsheet containing the MTO's
20 friction test results for the northbound and
21 southbound lanes from 2008 onwards, and then the
22 second document referenced there, and I'll call
23 them up for you in a moment, was a one-page PDF
24 excerpt from the Red Hill Valley Parkway mix
25 design.

1 We asked Ms. Lane about these
2 documents when she testified, and we understand
3 from her that the two documents here that you sent
4 to Mr. Soldo were documents that were provided to
5 her by MERO staff, and then she then provided them
6 to you. Generally does that align with your
7 recollection of how you obtained these documents?

8 A. It does align, yes.

9 Q. More generally, and
10 you've touched on this already, the process, as I
11 understand it, for you obtaining information and
12 documents was sort of through Ms. Lane and her
13 staff and then that would come to you; is that
14 correct?

15 A. Generally through me to
16 Ms. Evoy to Ms. Lane and back, yes, that's
17 correct.

18 Q. Okay. In terms of sort
19 of the work that you were doing on your end, were
20 you doing any independent research or information
21 gathering, or was it all sort of came up the chain
22 to you through staff?

23 A. I was not doing anything
24 other waiting for information from staff, correct.

25 Q. Thank you, Registrar. We

1 can close this. If we can call up -- I'll just,
2 Mr. Bentley, call up each of the documents that
3 you sent. So if we could call up HAM54586, and
4 we'll need to call this up in native. Sorry,
5 Registrar.

6 This is the spreadsheet of
7 2008 to 2014 test results that you sent to Mr.
8 Soldo. So what was your understanding, if you had
9 one, of how this spreadsheet was prepared or where
10 the information that was in this spreadsheet came
11 from?

12 A. I'm not aware of who
13 prepared this spreadsheet or where the data came
14 from.

15 Q. It came to you from Ms.
16 Lane or Ms. Evoy and then you forwarded it on?

17 A. As I said earlier,
18 recollection that I reviewed this -- the sheets in
19 this Excel sheet with Ms. Lane before having a
20 conversation with Mr. Soldo.

21 Q. So you reviewed them
22 before they went out to Mr. Soldo?

23 A. Correct.

24 Q. Thank you, Registrar, we
25 can close this document, and I'll call up the mix

1 design that you -- that was the second attachment,
2 which is HAM54587. Thank you.

3 So, Mr. Bentley, this is the
4 second attachment. Do you recall seeing this
5 document?

6 A. I do.

7 Q. Did you have any
8 understanding of where Ms. Lane or her staff had
9 obtained this information from or how it came into
10 the MTO's possession?

11 A. I'm not aware. I do
12 recall a conversation that perhaps it came from
13 the DSM application by the court.

14 Q. That conversation was
15 around the time that you were sending it to Mr.
16 Soldo?

17 A. Yeah. Again, it wasn't
18 part of Mr. Soldo's request, but we thought it was
19 helpful to pass that information along because we
20 had it in our files. We were unsure whether or
21 not Mr. Soldo had that information.

22 Q. Right, okay. So just
23 passing on anything you could find that you
24 thought might be helpful?

25 A. Correct.

1 Q. Thank you. Registrar, we
2 can close this document out, and if we can call up
3 image 106 of overview document 10A, and also on
4 the second screen HAM28727.

5 You'll see that in
6 paragraph 262 on the left side, that's the
7 February -- summary of the February 13th e-mail
8 that you sent to Mr. Soldo with the data, and then
9 two minutes later, you'll see in the document up
10 on the right side of the screen, at 3:50, Mr.
11 Soldo sent another note to file of a discussion
12 that you and he had.

13 So the timing here suggests to
14 me that you and Mr. Soldo would have spoken at
15 some point in time before your 3:48 e-mail, just
16 based on the timing of when his note to file from
17 your discussion is timed. Does that sound
18 correct, that you had a subsequent discussion and
19 then you sent the data?

20 A. That's correct.

21 Q. Do you recall how the
22 phone call on February 13th came to be and how
23 that got organized?

24 A. Sorry, the 13th. Oh,
25 sorry, I don't recall a phone call on the 13th. I

1 only recall the phone call on the 12th.

2 Q. You only recall one phone
3 call with Mr. Soldo?

4 A. Correct.

5 Q. Registrar, if we could
6 perhaps call out the note to file that Mr. Soldo
7 sent on February 13th there on the right side.
8 Mr. Bentley, I'll give you just a moment to review
9 those to see if reading these refreshes your
10 memory at all.

11 A. Yeah, that refreshes my
12 memory. If I could just see -- what was the date
13 of that, sorry?

14 Q. Sure. So that's
15 February 13th at 3:50.

16 A. Okay.

17 Q. Just to sort of situate
18 you, this is what I was referring to earlier,
19 there's a bit of crossing, so you send your e-mail
20 with the underlying data at 3:48 that day, and
21 then Mr. Soldo's note to file from your phone call
22 is at 3:50.

23 So just to sort of orient in
24 time, my earlier question was if the order of
25 evidence of what happened on the 13th was that

1 there's a telephone call at some point, and then
2 later that day you send -- or subsequent to the
3 phone call you send the additional data?

4 A. Correct.

5 Q. Do you recall if this
6 phone call on February 13th was just you and Mr.
7 Soldo or if anyone else was present?

8 A. I can't recall.

9 Q. Do you have any
10 recollection of how that phone call on February
11 13th came to be? I don't see any e-mails
12 organizing the call between what you sent on
13 February 12th and then your subsequent e-mails on
14 February 13th after the call.

15 A. I don't recall.

16 Q. Do you recall -- we can
17 call up Mr. Soldo's notes again from the call if
18 that assists, but do you recall sort of how the
19 conversations on February 12th and on
20 February 13th compared if there was -- sort of
21 what the difference is or what the similarities
22 between those phone calls were in terms of nature
23 of conversation and sort of the tone?

24 A. I would say the tone was
25 professional, and it was again an information

1 sharing call.

2 Q. So you were sharing
3 information with Mr. Soldo?

4 A. Correct. As you can
5 probably appreciate, we were gathering --
6 continued to gather information and was, you know,
7 clarifying and gathering more information as, you
8 know, even between the 12th and the 13th.

9 Q. The subsequent
10 communications, the phone calls and the e-mail --
11 or the phone call and the e-mails on the 13th were
12 sort of in continuance of that, the information
13 sharing and clarification or providing additional
14 information?

15 A. Correct.

16 Q. Registrar, if we could
17 call out the note to file there on the right side.
18 So there where he references what he says is:

19 "Reintegrated the need for
20 base information, scope of project, and also
21 identified the need for verification of any
22 approvals from the City of Hamilton for this work
23 to take place on RHVP and any transmittals of
24 information during or at the end of the study."

25 Do you recall if those were

1 requests that Mr. Soldo made to you or reiterated
2 to you?

3 A. I kind of remembering him
4 asking a question about whether or not the City
5 was aware of these test results.

6 Q. I take it --

7 A. And I recall that we were
8 trying to find any documentation in our files
9 about whether or not the information had been
10 shared or not.

11 Q. In the second paragraph
12 there where it says "discussed the need for
13 coordinated collaboration regarding
14 communications," do you recall whose suggestion
15 this was and why it was needed?

16 A. I guess it was a
17 suggestion from our communications folks that they
18 wanted to make sure, you know, certainly we're
19 connecting and discussing the inquiries to make
20 sure the same consistent information was being
21 supplied. So I guess that was at my -- I
22 instigated that -- asked for that sharing to take
23 place, and identified Bob Nichols as the person
24 from our side.

25 Q. Mr. Nichols was who you

1 were referring to earlier in one of the e-mail
2 chains that we looked at?

3 A. Correct.

4 Q. In the last paragraph
5 there, it says:

6 "Discuss the need to have an
7 updated friction test undertaken to validate
8 deterioration of pavement friction since 2014.
9 MTO undertook the testing previously in-house and
10 would be willing to do the testing on behalf of
11 the municipality."

12 Do you recall who raised the
13 need, as it's described there, for updated
14 friction testing?

15 A. I do not recall that. I
16 do note that the second part of that paragraph,
17 again based on a previous document that we looked
18 at, that we were to offer assistance to the City
19 of Hamilton, and in that vein I offered that we
20 would be willing to do the testing. And again if
21 the City was looking for it to be consistent with
22 that 2008 to 2014 testing, it was something that
23 MTO could do with the same test method.

24 Q. Right. That being the
25 locked wheel tester that the MTO has?

1 A. Correct.

2 Q. So you don't recall if it
3 was a request or a question or a need identified
4 by Mr. Soldo or if it was something that you
5 offered in terms of --

6 A. No, it was something that
7 I offered. We offered to do that friction
8 testing.

9 Q. The need that's described
10 here in terms of the need to have an updated
11 friction testing done, was that something that you
12 and Mr. Soldo had similar views on in terms of
13 that being needed, or do you recall that?

14 A. I don't recall any
15 conversation about the need for the test to be
16 done. I can't recall the offer made by MTO to do
17 the testing.

18 Q. In terms of you mentioned
19 earlier that it would make sense for it to be the
20 same method used for the testing to compare it
21 to -- to be able to compare to the 2008 to 2014
22 testing, was that something that you mentioned to
23 Mr. Soldo on the call?

24 A. In terms of the -- yes,
25 the consistency and being able to compare results,

1 that would have been -- well, certainly had been
2 previously discussed. I would think that I
3 emphasized that again in terms of why we'd be
4 willing to do it. I think that's captured by his
5 note where he said that we had previously done the
6 testing.

7 Q. When you said "previously
8 discussed," you're referring to the February 12th
9 telephone call?

10 A. Correct.

11 Q. Do you recall what Mr.
12 Soldo's response was to your offer to have the MTO
13 do the friction testing?

14 A. I recall it was kind of a
15 thanks, we'll get back to you.

16 Q. Was that the status at
17 the end of the call, it was the City would get
18 back to you about the offer?

19 A. It was just an open
20 offer, correct.

21 Q. Registrar, we can close
22 this out, and if we could call up -- keep up image
23 106 of the overview document and also call up
24 image 107.

25 Mr. Bentley, you'll see there

1 in paragraph 263, which starts on page 106 and
2 carries over to 107, there's another e-mail that
3 you send on February 13th about an hour after your
4 3:48 e-mail. So this is a 4:50 e-mail.

5 A. Can we expand that,
6 please.

7 Q. Sure, yes. Registrar, if
8 we could call that out, and then just that top
9 part there. Thank you. I'll just give you a
10 moment to review your e-mail.

11 A. Okay.

12 Q. So just to summarize, in
13 this e-mail you advise Mr. Soldo that the City
14 requested the 2007 friction testing because of the
15 early age SMA issues, and that the subsequent
16 testing was done for potential use on provincial
17 highways, and that last -- that reference to
18 potential use on provincial highways, is that a
19 reference to the DSM?

20 A. That is correct.

21 Q. Why were you sending this
22 information to Mr. Soldo? Is this, as we've
23 talked about, just to clarify or correct
24 information that had been previously shared?

25 A. That is correct.

1 Q. I think some of the
2 earlier e-mails referred to all of the testing
3 being done for DSM purposes; is that fair?

4 A. That's correct, although
5 I think, if I do recall, perhaps the 2007 results
6 were not included in those Excel spreadsheets that
7 we talked about earlier. They were 2008 to 2014.

8 Q. That's correct, and I'm
9 going to take you back to that spreadsheet in just
10 a moment. But that's correct, that was just the
11 2008 to 2014 data?

12 A. So on the previous day,
13 you know, it was our understanding, and I think it
14 was Becca Lane's understanding as well, that all
15 the testing had been done I'm going for say for
16 DSM purposes. As we dug into it further and based
17 on the dot dot dot, that means that we were still
18 looking at things, obviously. Again, it was --
19 trying to go through historical files and find
20 information and so forth was difficult. But from
21 what we could tell, in 2007, they were -- those
22 results were specifically requested by the City,
23 versus the 2008 to '14 were as a result of that
24 DSM application.

25 Q. As you said, you were

1 piecing things together based on what you could
2 find in the files and the information and sort of
3 presenting that to Mr. Soldo, clarifying and
4 correcting as needed?

5 A. Want to correct that,
6 again, that there was two different purposes to
7 the test data, 2007 versus '8 to '14.

8 Q. When you refer to "we" in
9 that top line there, who is the "we"?

10 A. The "we" was the
11 collaborative effort, but I think it would
12 certainly include Becca Lane primarily was, if you
13 want to call it, the lead, if you want to call it,
14 researcher or coordinating all the data gathering.

15 Q. So where you write in the
16 fourth line there, "no concerns were identified
17 with the initial friction qualities," would that
18 have been information that Ms. Lane provided to
19 you, or was that information that you gathered
20 elsewhere?

21 A. No, that would have been
22 provided by Becca and in our conversation about
23 the review of the data.

24 Q. At the end there where
25 you say:

1 "Based on a preliminary review
2 of MTO's records and based on the intended purpose
3 of this testing, it would appear that these
4 results were not shared with the City."

5 Do you recall what information
6 this statement was based on and how you came to
7 the conclusion that at this time it looked like
8 the results hadn't been shared with the City?

9 A. So this was in response
10 to Mr. Soldo's request for any documentation
11 around the sharing of the information with the
12 City, and as I said, based on this review and in
13 the matter of -- you know, in couple of days
14 review, we hadn't found any e-mails or
15 transmittals where the 2008 to 2014 data had been
16 shared with the City.

17 Q. "Based on the intended
18 purpose of this testing." That's the intended
19 purpose of the DSM testing?

20 A. Correct.

21 Q. Can you just explain what
22 the significance of that statement is?

23 A. So my recollection is
24 that when we're considering an inclusion for let's
25 say in this case an aggregate or a stone onto the

1 designated source materials list, there are tests
2 that we do, and one of them is a test section
3 where we can test it for suitability, in this case
4 friction. And so we were, instead of constructing
5 another test strip somewhere else, just
6 identifying that this 4 kilometre section of the
7 RHVP was being used as that test section.

8 Q. Thank you. Registrar, we
9 can close this document, and if we could pull up
10 the spreadsheet that we had open before which is
11 HAM54586.

12 So, Mr. Bentley, this is the
13 same spreadsheet that we've looked at before that
14 just has the, as you mentioned, the 2008 to 2014
15 data. I believe you mentioned that you referred
16 or you reviewed these results with Ms. Lane; is
17 that correct?

18 A. That's correct.

19 Q. Can you tell us sort of
20 when that review happened and what you recall of
21 your review with Ms. Lane?

22 A. I recall that it was on
23 February 12th, based on the reviewing them prior
24 to sharing them with Mr. Soldo, and just looking
25 at the data for completeness and so forth and

1 having a -- and noticing I guess -- one other
2 thing I noticed I guess at the time, if I recall,
3 was that there was one year that was missing.

4 Q. Correct. 2013 was
5 missing. So as you said, this spreadsheet only
6 includes the 2008 to 2014 data. Do you recall if
7 you reviewed the 2007 results?

8 A. I don't recall reviewing
9 the 2007 results.

10 Q. Do you recall based on
11 your review of these results what your view was on
12 the Red Hill Valley Parkway friction test results?
13 Perhaps, Registrar, if we could go to the tab
14 that's called "Summary and Plot FN Versus Year".
15 That might be a better tab to look at. Perhaps
16 zoom in a little.

17 A. I mean, in general terms
18 I guess my conversation with Ms. Lane, as I
19 recall, was around, you know, the general I'll say
20 decline in the numbers as one might anticipate as
21 a pavement ages. You know, certainly seeing some
22 numbers that were below 30 but averages that were
23 above. So nothing really I'll say jumped out at
24 me in terms of the data.

25 Q. You noted a decline, but

1 that was consistent with sort of your
2 understanding of how pavements deteriorate over
3 time?

4 A. Correct.

5 Q. Was there anything in
6 these results that caused you any concern or any
7 pause?

8 A. Again, not being my --
9 not being a subject matter expert in this area, it
10 didn't cause me any concern, or none that Becca
11 flagged at the time. So I guess more accurately
12 for me to say is nothing seemed to be of concern
13 to -- a strong concern to Becca.

14 Q. If you look in row 10
15 there, I appreciate it might be a bit small on
16 your screen, but it shows the lows and the
17 averages for each of the four lanes in 2014.
18 Obviously the Red Hill Valley Parkway is a
19 municipal highway, not a provincial highway. But
20 in your view, if you saw these numbers and
21 averages in the lows here on an MTO highway, do
22 you know what your views would have been with
23 respect to these numbers?

24 A. I guess the first thing I
25 would note here, these were tested at a posted

1 speed of 90 kilometres an hour, which is not -- I
2 can't think of a provincial highway that's posted
3 at 90 kilometres an hour. So typically our
4 testing is done at either 80 or a 100. So again
5 it would be hard for me to make a direct
6 correlation because I'm not familiar with data for
7 testing at 90. You know, you're right, there are
8 some numbers lower than 30, so in generality, but
9 having been involved in years with highways where
10 perhaps we had lower than 30, they were not --
11 didn't seem to be abnormally low, just some
12 isolated ones. The average is still above 30.

13 Q. Were those numbers that
14 are under 30, would those have warranted any
15 monitoring or investigation?

16 A. If this was a provincial
17 highway, I think -- I mean, the friction number is
18 just one aspect that we consider. You can
19 certainly look at the geometrics of the road,
20 collision experience, climate, all different
21 things when you're considering, you know, whether
22 or not to monitor a section of highway, but it
23 certainly would have been worth a review anyway in
24 terms of whether you wanted to do ongoing monitor.

25 Q. Do you recall if you

1 discussed or shared any of your views about the
2 friction test results with Mr. Soldo after you
3 sent the spreadsheet to him?

4 A. My recollection is that
5 we did not discuss the results.

6 Q. Thank you, Registrar, we
7 can close this document out now.

8 If we could call up HAM48996.
9 Thank you. Perhaps we could either zoom in or
10 call it up. It's a bit small for me.

11 A. And me.

12 Q. Thank you. So this is
13 the next contact that we see between yourself and
14 Mr. Soldo. Now this is about 10 days after the
15 February 12th phone call. And he e-mailed you
16 requesting a call with MTO's pavement specialists
17 to talk about what type of pavement should be used
18 on the Red Hill, and asking about the MTO's
19 experience with high friction pavement on
20 curvilinear roads.

21 And then you responded, you'll
22 see, cc'ing Ms. Lane, as you say, to allow her
23 to -- to allow Mr. Soldo to arrange a meeting with
24 her and her staff. Do you recall if at that this
25 point you sort of had handed things over to

1 Ms. Lane or if you were sort of still involved
2 directly with Mr. Soldo?

3 A. My recollection is that I
4 basically handed this over. I mean, they were now
5 getting into technical specifics that Ms. Lane was
6 much more qualified to speak to. We come to
7 pavement design and friction testing, and my
8 recollection is that my instructions were to Becca
9 to -- you know, again, to offer assistance to the
10 City of Hamilton as we were instructed to do, so
11 again trying to be helpful.

12 And basically in terms of
13 handing it off, my recollection was just sort of
14 keep me in the loop and let me know if there's
15 anything that I need to know in terms of anything
16 of concern to her in terms of things that were not
17 happening or happening or questions being asked
18 that I should be of concern. So basically handing
19 it off to her and continuing to -- and asking her
20 to follow up with me as needed.

21 Q. Would you say sort of --
22 we know that there are some subsequent e-mails
23 between Ms. Lane and staff at the City of
24 Hamilton, some of which you're copied on and some
25 of which you're not, but would you say that sort

1 of reflects your role and Ms. Lane's role as of
2 this point, February 22nd, onwards?

3 A. That's correct.

4 Q. We've looked at a number
5 of -- sorry, Registrar, we can close this out now.
6 Thank you.

7 We've looked at a number of
8 e-mail chains where you've provided information
9 and documents to Mr. Soldo, and as you sort of
10 described the call -- the calls that you had with
11 him, it was an information sharing on your part
12 with him. Do you recall if you ever received any
13 documents from him during your discussions, either
14 consultant reports or friction test results?

15 A. I did not receive any
16 documents from Mr. Soldo to the best of my
17 recollection.

18 Q. Registrar, we can close
19 this out, and if we could call up overview
20 document 10A, at pages 186 and 187.

21 Now, Mr. Bentley, jumping
22 forward a bit in time to March, 2019 you'll see in
23 paragraph 481, which continues on page 187, Mr.
24 McGuire e-mailed Ms. Lane on March 20th under the
25 subject line "follow up with the City of

1 Hamilton."

2 Perhaps, Registrar, we could
3 call up Mr. McGuire's e-mail which is the top of
4 page 187. Thank you. So in the second paragraph
5 there, he says:

6 "I wondered if we can have a
7 conversation about the potential to test our
8 facility again prior to our resurfacing works."

9 And then asks at the end there
10 if we could arrange a call in the next week if Ms.
11 Lane was available.

12 Registrar, we can close this
13 out. And I can summarize Ms. Lane's response,
14 that she provided a contact for Mr. McGuire with
15 somebody else in the MTO and then --

16 A. Totally unrelated matter.
17 It was for liquidated damages, yeah.

18 Q. Okay. And then with
19 respect to the friction testing, she said:

20 "With respect to friction
21 testing, I will check with staff to see if the
22 friction trailer is ready to hit the road. We
23 will need some warm weather. Stay tuned."

24 Just to clarify for you, you
25 were not copied on this e-mail, but at this point

1 were you still in the loop, so-to-speak, about the
2 City of Hamilton friction testing and any advice
3 that Ms. Lane was providing on resurfacing?

4 A. No. I mean, I don't have
5 any specific conversation with Becca, but it's not
6 that I didn't, you know, speak to Becca -- I mean,
7 as you would appreciate there's lots of pavement
8 issues that we would have discussions on, but I
9 can't recall having a specific conversation, other
10 than I -- maybe this will come later on. I do
11 recall saying, what's happening with testing,
12 where are we at with that, because my concern was
13 that we didn't want to be seen as not being
14 helpful, as we were instructed to be.

15 Q. That takes us then to
16 you'll see -- sorry, Registrar, if we could call
17 out paragraphs 483 and 484. There was a call
18 arranged about 9 days later on March 29th.
19 Felicia Horinga sent an e-mail to Mr. Soldo, and
20 in her e-mail she wrote:

21 "Kevin Bentley and Becca Lane
22 from the Ministry of Transportation have asked
23 that I schedule a 30-minute meeting with you about
24 the MTO undertaking friction testing."

25 So is this what you were

1 referring to when you said that you had been
2 asking sort of what's the status with the friction
3 testing?

4 A. That's correct, and Becca
5 is saying that she didn't know.

6 Q. So this was to sort of
7 check in with the City about your request and the
8 status?

9 A. Correct.

10 Q. Sorry, your offer. And
11 then you'll see that there was a calendar
12 invitation circulated for a meeting on April 2nd
13 with the title "MTO undertaking friction testing."
14 Ms. Lane, Mr. Soldo and Mr. McGuire were listed as
15 the required attendees for this meeting, along
16 with you. Generally can you tell us about what
17 the purpose of this meeting was beyond sort of
18 what you've just told us?

19 A. Not beyond -- I had no
20 recollection of that meeting on April 2nd.

21 Q. Is that that you don't
22 think it happened, or you just don't recall either
23 way?

24 A. I don't recall either
25 way.

1 Q. I take it then based on
2 that, you don't recall what if anything Mr. Soldo
3 or Mr. McGuire said about the MTO's offer to
4 perform friction testing?

5 A. That's correct. And just
6 as clarification when it says "Mr. Bentley
7 circulated," of course that would have been
8 actually Ms. Horinga, you know, with access to my
9 calendar who would have actually sent out the
10 appointment.

11 Q. Right. It would have
12 been Ms. Horinga on behalf of yourself?

13 A. Correct. So no
14 recollection of whether that meeting happened or
15 didn't happen and what was discussed at the
16 meeting, if it did happen.

17 Q. We know eventually that
18 there was no friction testing conducted on the Red
19 Hill Valley Parkway by the MTO in 2019. Do you
20 have any insight into why it was that that offer
21 was never taken up by the City?

22 A. I have no information on
23 that.

24 Q. Do you recall how those
25 discussions with Hamilton about the testing

1 concluded or sort of where they were left at?

2 A. To the best of my
3 recollection, nothing after March the -- after a
4 conversation, you know, at this kind of
5 March 29th, April 2nd, I don't recall anything
6 further, any further discussions with Hamilton
7 about the offer to do friction testing.

8 Q. From your perspective,
9 the MTO was prepared to do that testing if the
10 City had wanted it?

11 A. From my recollection,
12 yes, absolutely. We had made the offer, and to
13 the best of my recollection Hamilton never --
14 never got a request from Hamilton to do that
15 testing.

16 Q. After this April 2nd
17 teleconference, which I appreciate you don't
18 recall, but after this point, do you recall if you
19 had any further substantive involvement with the
20 Red Hill Valley Parkway or the City of Hamilton on
21 these issues between April and June 19, 2019 when
22 you retired?

23 A. I do not recall. The
24 only other issue that I can recall happening
25

1 in that timeframe was -- and I don't know whether
2 it had come in yet or not -- was the request from
3 the City of Hamilton for an apology from the
4 ministry. But that was -- you know, the response
5 was dealt with after I left MTO. So that was the
6 only thing I'm aware of, was that request for an
7 apology.

8 Q. But ultimately concluded
9 after you retired?

10 A. That's correct. And I
11 want to say on a technical basis, I wasn't aware
12 of anything else from the City of Hamilton.

13 Q. Thank you. Registrar, we
14 can close that out. Commissioner, I have no
15 further questions for Mr. Bentley.

16 JUSTICE WILTON-SIEGEL: Thank
17 you. I should ask whether any of the
18 participants' counsel have questions for Mr.
19 Bentley. Start perhaps with counsel for Golder?

20 MS. RAMASWAMY: Good
21 afternoon, Commissioner. I do have one question
22 for Mr. Bentley.

23 EXAMINATION BY MS. RAMASWAMY:

24 Q. You had spoken earlier
25 about your awareness of friction testing methods,

1 and in that context you had spoken about stone
2 mastic asphalt. Do you recall that, Mr. Bentley?

3 A. I do.

4 Q. Could you tell us what
5 percentage or how much of SMA is used on MTO
6 highways in Ontario?

7 A. You mean currently, or in
8 what timeframe are you speaking to?

9 Q. Just historically. Is it
10 widely used, one-third of highways in MTO have
11 SMA, or do you have a sense of how much SMA is
12 essentially used?

13 A. Today I don't. Obviously
14 I retired in 2019. There is a history that other
15 people from MTO can speak to, obviously better,
16 but my recollection is that we had started I'll
17 say trials of SMA back in sort of the mid-2000s
18 and maybe had one project even earlier than that,
19 but it wasn't being -- you know, wasn't being
20 widely used by MTO. Other friction courses,
21 different pavements were being used more widely
22 than SMA.

23 Q. Sorry, please finish.

24 A. So again, it depends on
25 the time that your -- the particular year. It

1 varies dramatically in terms of how much SMA that
2 the ministry....

3 Q. My recollection is that
4 perhaps the first trial was in 1996 on one of the
5 400 series highways. Is that accurate or does
6 that align with your recollection?

7 A. My recollection is there
8 was one trial project done in the mid to late
9 1990s.

10 MS. RAMASWAMY: Those are all
11 my questions. Thank you, Mr. Bentley. Thank you,
12 Mr. Commissioner.

13 JUSTICE WILTON-SIEGEL: Ms.
14 Talebi for the City?

15 MS. TALEBI: We have no
16 questions for Mr. Bentley this afternoon,
17 Commissioner, thank you.

18 JUSTICE WILTON-SIEGEL: Thank
19 you.

20 MS. MCIVOR: I can confirm
21 that MTO has no additional questions for Mr.
22 Bentley either.

23 JUSTICE WILTON-SIEGEL: Thank
24 you very much, Ms. McIvor. I don't think Dufferin
25 is on the line; is that correct, Ms. Hendrie?

1 MS. HENDRIE: That's correct.

2 JUSTICE WILTON-SIEGEL: That
3 concludes Mr. Bentley's testimony, so thank you
4 very much, Mr. Bentley, for appearing this
5 afternoon. I appreciate your time. You're
6 certainly excused, and I think we're now going to
7 take a break until 3:30. Is that correct, Ms.
8 Hendrie?

9 MS. HENDRIE: I believe that's
10 the timing.

11 JUSTICE WILTON-SIEGEL: Until
12 we begin hearing the motion for directions from
13 the City's auditor with respect to the summons
14 that's been issued to the auditor. So we'll stand
15 adjourned then until 3:30.

16 MS. HENDRIE: Thank you.

17 --- Recess taken at 2:34 p.m.

18 --- Upon resuming at 3:30 p.m.

19 MS. LAWRENCE: Good afternoon,
20 Commissioner.

21 JUSTICE WILTON-SIEGEL: Good
22 afternoon.

23 MS. LAWRENCE: For the
24 remainder of today we have brief oral submissions
25 in respect of a motion brought by the office of

1 the City auditor in respect of a summons that was
2 served on Domenic Pellegrini, an individual within
3 the auditor's office, just to orient you to the
4 process leading to today.

5 For the remainder of today --
6 (technical interruption). Apologies,
7 Commissioner. That was an unfortunate tech issue.
8 Hopefully you didn't have too many issues in
9 hearing me.

10 I'll start again.

11 We are proceeding today in
12 respect of a motion that was issued to Mr.
13 Pellegrini, who is in the office of the City
14 auditor. The motion today is seeking the
15 attendance of Mr. Pellegrini -- pardon me -- the
16 summons is seeking the attendance of Mr.
17 Pellegrini at the hearing.

18 The Municipal Act requires
19 that representatives from the office of the
20 auditor must preserve secrecy in their work and
21 that its staff are not competent or compellable as
22 witnesses in civil proceedings. Given these
23 provisions, there is a motion for direction before
24 you, because of course both commission counsel and
25 the office of the City auditor do not want anyone

1 to be offside the Municipal Act provisions, and so
2 we have worked very cooperatively and efficiently
3 to bring this legal issue to you, the legal issue
4 being whether Mr. Pellegrini should be called to
5 testify given the Municipal Act provisions.

6 We opted for a motion in
7 writing, and I know that you have received and
8 reviewed the facta from both parties and a letter
9 from counsel for the City, and you have sought
10 very brief oral submissions today.

11 So with that introduction, and
12 apologies for the technical issues, I suggest that
13 we proceed to the brief submissions in this
14 motion. Thank you.

15 JUSTICE WILTON-SIEGEL: Thank
16 you, Ms. Lawrence. I propose that we proceed in
17 the following way, I hope with the concurrence of
18 counsel.

19 First of all, Mr. Uukkivi -- I
20 hope I've pronounced your name correctly -- I
21 would appreciate receiving brief submissions from
22 you. Before you do that, by way of overview,
23 first of all, I have read several times the facta,
24 tried to understand the -- I hope I understand the
25 issues.

1 As I see it, there are really
2 two separate arguments, perhaps they are related
3 in some way, that you raise. The first is that
4 the effect of the summons is to investigate the
5 investigator, as you've put it. I'll come back to
6 that in a second. The second is really based on
7 the existence of the secrecy provision.

8 If I understand the first
9 argument, my question is whether that is resolved
10 by the limitation expressed by commission counsel
11 with respect to the testimony that they seek,
12 which doesn't engage the conduct of -- it doesn't
13 bring into question in any way in the course of
14 this inquiry, as I understand it, the propriety of
15 the actions -- of any actions on the part of the
16 City auditor. And I think at a point in your
17 factum you more or less acknowledge that by saying
18 or acknowledging that there is no question of
19 political or other activity that brings the
20 independence into question, but that this is more
21 a matter of principle for you.

22 The second question is the one
23 that I'm more interested in, and that is really
24 the purpose of the secrecy provision, specifically
25 what is the purpose as you see it of the secrecy

1 provision, in whose favour does it run, and what
2 is the significance of that for the issue before
3 us. With that said, I'll be happy to hear your
4 brief submissions and then we can take it from
5 there.

6 I should say before we proceed
7 as well, I know the City has indicated that they
8 do not take a position on this motion. I'll just
9 confirm that or, alternatively, Ms. Talebi, give
10 you an opportunity to speak if there's something
11 that you feel you should address after hearing Mr.
12 Uukkivi's submissions before we hear from
13 commission counsel.

14 MS. TALEBI: Thank you, Mr.
15 Commissioner. I can confirm that still remains
16 our position. We don't take a position in this
17 motion.

18 JUSTICE WILTON-SIEGEL: Okay.
19 Thank you. Okay, Mr. Uukkivi, it's over to you.

20 MR. UUKKIVI: Thank you,
21 Commissioner. The pronunciation of my surname was
22 very good. So even Estonianized it enough that it
23 made me feel at home.

24 SUBMISSIONS BY MR. UUKKIVI:

25 MR. UUKKIVI: I think that you

1 fairly summarized the first argument. I think
2 that they are intended to show two separate
3 arguments but they are somewhat interrelated, just
4 from the perspective that it really stems from a
5 wholistic interpretation of the provisions of the
6 Municipal Act that give the powers to each of the
7 -- this judicial commission as well as to the
8 office of the City auditor. And so both issues
9 kind of spin out from that singular -- the
10 interpretation of the act. I don't propose to get
11 into any detail on statutory interpretation or any
12 of those -- and bore anybody with the rules of
13 statutory interpretation, but I will make some
14 reference to those provisions.

15 I'll start with the second
16 question or the second piece that you're most
17 interested in about the secrecy provisions and
18 really start off with the observation or
19 commentary that if a matter is to be statutorily
20 required to be kept secret -- and your question
21 was secret from whom, I think is sort of the nut
22 of what you would like addressed. The way the
23 Municipal Act really operates is that it's secret
24 from the people that are being investigated, and
25 so secret from council, for instance, if the

1 council is being investigated, or secret from the
2 municipality, because the job of the office of the
3 City auditor is to independently go in and look at
4 what is being done and conduct any number of
5 different kinds of investigations, which run
6 from -- anywhere from value for money all the way
7 through to serious frauds or other types of those,
8 which have all been downloaded to the office of
9 City auditor as a function of ensuring that there
10 is transparency into the operations of a
11 municipality.

12 So if the goal of a provision
13 is to keep secret from that municipality what it
14 is that the auditor general does, and I'll get to
15 this provision more specifically, with only two
16 exceptions in this specific provision, being one
17 if there's criminality, then Criminal Code would
18 allow that information to be accessed, or in
19 circumstances where the auditor general decides to
20 report out, then the purpose -- I would suggest
21 it's a perverse result if the municipality can
22 then go order a judicial investigation -- sorry,
23 an investigation, judicial or otherwise, that
24 includes or requires the disclosure of that secret
25 information.

1 So this goes back to sort of
2 this overarching theme that I think I had in my
3 factum, which was that you have -- in many of the
4 cases that have been considered to date, the look
5 has been a question of, well, you've got a
6 lieutenant governor ordering a judicial inquiry or
7 a public inquiry into a matter where it's under --
8 like maybe there were actions taken under a
9 specific statute.

10 But it's different in this
11 case because the municipality -- both of the --
12 both audits are -- the inquiry and the audit are
13 happening under the same statute under almost
14 parallel provisions.

15 So from that perspective, I
16 would suggest that the secrecy -- if the secrecy
17 is from the municipal corporation to allow the
18 office of the City auditor to do its work, and
19 both the judicial inquiry and the auditor general
20 are brought into existence by a decision of the
21 municipal council, they are sort of both operating
22 underneath that direction.

23 And so because of that, it --
24 I mean, I would suggest it's a strange result to
25 be able to first get the results of an auditor

1 general's work and then decide well, we're going
2 to have a judicial inquiry of that.

3 Now, I appreciate that the
4 judicial inquiry in this case is much broader, but
5 that would sort be in a nutshell how I think that
6 that secrecy provision is intended to operate.

7 And so from that perspective
8 it would seem that both -- whether it was the
9 municipal council acting on its own decision or
10 through a judicial inquiry, the office of the City
11 auditor can't be at the mercy of the municipal
12 council, and it's at that position or that point
13 where I think the -- it brings into sharp focus
14 the purpose, in my view, of what that secrecy
15 provision is.

16 I don't think it can be
17 overemphasized that a municipality does not enjoy
18 an independent constitutional existence as well,
19 and so it is really driven from the language of
20 the statute. They hold delegated powers, and so
21 because of the way that the whole rubric has been
22 set out under the statute when you flow it
23 through, both operations or both sets of
24 investigatory powers being exercised are coming
25 from the same place, which has been municipal

1 council.

2 Maybe I'll just conclude sort
3 of my remarks on that by saying that if you're
4 left with a question at the end of the day, you
5 know, what's the City's remedy if the office of
6 the City auditor improperly exercises its
7 jurisdiction and can it somehow get behind it --
8 let's say the office of the City auditor goes
9 rogue -- the answer in my view is quite
10 straightforward, and that's that there is an
11 administrative decision-making process. That
12 means that it triggers and it's a process under
13 the exercise of a statutory authority, which means
14 that it's subject to judicial review.

15 So there is a process if there
16 is something that is done untoward in the office
17 of the City auditor. It just can't be a parallel
18 process, but rather it has to be following the
19 Judicial Review and Procedures Act, which brings
20 in obviously a different standard of review to the
21 conduct of the office of the City auditor I think
22 is otherwise available through the judicial review
23 process.

24 JUSTICE WILTON-SIEGEL: I
25 accept much of what you say as starting for this.

1 There are separate jurisdictions which stem from
2 the same provision of the Public Inquiries Act,
3 and I think we would agree there can be
4 considerable overlap in terms of what the City
5 council asks each entity to investigate. That
6 doesn't strike me as the end of the discussion,
7 more like the beginning. And I accept what you
8 say about the ability of City council to seek an
9 administrative law remedy if the auditors were to
10 go rogue, as you put it.

11 Setting that aside for the
12 moment, my first question is much of this seems to
13 be premised on a perspective that the summons
14 involves investigating the auditor general, and I
15 don't understand the request for testimony in this
16 particular case to engage that issue, and I'm not
17 sure you do either.

18 MR. UUKKIVI: No. I agree
19 with that. That's coming back to your first
20 question, obviously.

21 JUSTICE WILTON-SIEGEL: Okay.
22 Am I right? You didn't see that as engaged in
23 this particular case; you are just concerned that
24 a decision in this case could be used for that
25 purpose in another case?

1 MR. UUKKIVI: And quite
2 broadly, not just in the context of a auditor
3 general, but also in the context of an integrity
4 commissioner or an ombudsperson. The challenges
5 are quite broad because all of the provisions
6 through all of 2023.1 and onwards are all similar,
7 and so the ramifications of this decision are --
8 you know, it sort of -- it does create an
9 important precedent because this circumstance has
10 not been considered.

11 And so I certainly have worked
12 very carefully with commission counsel to try and
13 narrow the issue as much as we could, and I do
14 thank Ms. Lawrence for all of the assistance that
15 she provided, and she was very fair in identifying
16 the exact things that she wanted to understand.

17 And in this case I understand
18 exactly what you have said is that it's really a
19 process-oriented questioning of how this report
20 made its way through the -- through -- from being
21 discovered through to the report out to council.
22 But at the same time, that's still going into very
23 much what the office of the City auditor did, and
24 so that is definitely a concern, and I don't have
25 as easy a time separating whether it's sort of the

1 conduct of the office of the City auditor versus
2 the process of the office of the City auditor.

3 I don't see there being as
4 clean a distinction perhaps as Ms. Lawrence was
5 trying to draw, and that's where I think that my
6 concern lies in terms of the jurisdiction about
7 the ability to get behind that process.

8 JUSTICE WILTON-SIEGEL: I
9 can't speak for Ms. Lawrence. As I look at this,
10 what's sought is evidence with respect to the
11 actions not of the -- of Mr. Pellegrini, really,
12 but the actions of City employees who interacted
13 with Mr. Pellegrini. That seems to me to be
14 qualitatively different.

15 MR. UUKKIVI: Yes. And it's
16 the fact that the only reason those individuals
17 were interacting with Mr. Pellegrini that creates
18 the problem because he was only doing that job
19 exercising his authority as an investigator in the
20 office of the City auditor.

21 JUSTICE WILTON-SIEGEL: Yes,
22 but it seems to be a long way away from
23 investigating the investigator.

24 MR. UUKKIVI: Right. Okay, I
25 take your point. But it's still sort of

1 collecting the information that Mr. Pellegrini
2 obtained through that process, and it may or may
3 not be useful to this commission in terms of the
4 ultimate outcome and the recommendations that are
5 ultimately issued by the commission. But it still
6 comes back to the issue that Mr. Pellegrini was
7 only able to get there through the exercise of his
8 own authority.

9 JUSTICE WILTON-SIEGEL: Let me
10 take you to the secrecy provision. Is there any
11 reason why the City couldn't waive the secrecy
12 provision?

13 MR. UUKKIVI: I don't think
14 that the City could waive it. I suppose the
15 question is whether --

16 JUSTICE WILTON-SIEGEL: Could
17 the City ask for a report on the very matters that
18 the commission counsel seeks the evidence?

19 MR. UUKKIVI: I actually --
20 not if the office of the City auditor were to
21 remain independent. The City couldn't direct the
22 office of the City auditor to report on anything.
23 I mean, in the office of the City auditor's
24 charter it specifically says that they are to
25 engage and report on and look into and investigate

1 anything that they want to investigate. So they
2 would have to change that charter, and in which
3 case if they did, I'm not sure that it would --

4 JUSTICE WILTON-SIEGEL: Isn't
5 that -- I read the charter differently. It seemed
6 to me that the City auditor is entitled to
7 commence audits on its own, clearly, but I didn't
8 read it to the effect that the City could not
9 request an audit on a specific subject.

10 MR. UUKKIVI: Yeah, okay, I
11 take your point. I agree that the City could
12 request an audit on a specific thing, yes.

13 JUSTICE WILTON-SIEGEL: Could
14 they not request a report on the very matters that
15 are the subject of this?

16 MR. UUKKIVI: Yeah, and I
17 suppose that would -- by extension that would mean
18 that you could order the City auditor to produce a
19 report on the substance of this matter, if I
20 follow through --

21 JUSTICE WILTON-SIEGEL: That's
22 where I was going. So when I step back from that,
23 it seems to me two things might follow from that.
24 The first is that it would appear that the secrecy
25 or confidentiality provision really runs in favour

1 of the City, and I would add to that -- I'm not
2 sure there's any right by which a party being
3 investigated can enforce confidentiality.

4 MR. UUKKIVI: No, I agree with
5 that. Absolutely not. Because the office of the
6 City auditor makes the decision on what to report
7 in its own -- in his or her own discretion is what
8 gets released through that report.

9 JUSTICE WILTON-SIEGEL: Right.

10 MR. UUKKIVI: So the question,
11 I guess, to get right down to the heart of it is,
12 is if the City requests an audit of a specific
13 issue or you were to order the office of the City
14 auditor to produce or audit or report on a
15 specific issue, whether there's any discretion in
16 the office of the City auditor in deciding what it
17 is that they produce or report. And I think that
18 -- and that then goes to the heart of the question
19 of independence. And if the office of the City
20 auditor doesn't have discretion on what it is that
21 they report on or how they conduct the audit, then
22 they are not an independent arm any more. They
23 are not conducting an independent audit.

24 JUSTICE WILTON-SIEGEL: That's
25 perhaps a more extreme view of independence.

1 Independence goes more to the investigation.
2 Nothing in the nature of the circumstances that
3 we're discussing would go to inhibit the
4 investigation, it would simply be a report with
5 respect to specific matters after an investigation
6 commenced by the auditor general, or City auditor.

7 I go one step further, and
8 that's the reason why I have proceeded down this
9 road. If the City has the right to do what we've
10 just said, then shouldn't that inform the view of
11 the operation of the secrecy provision in the
12 context of a summons?

13 MR. UUKKIVI: So, I mean, I
14 think the secrecy provision is slightly different
15 than I -- like, I mean, I read it to say that it
16 -- I'm sorry, I'm just reading the secrecy
17 provision again here. It's section 232.22(2).

18 JUSTICE WILTON-SIEGEL: I'm
19 not so much interpreting section -- the
20 confidentiality provision or secrecy provision, as
21 asking whether that circumstance shouldn't inform
22 the relationship between that provision and
23 section 33 of the Public Inquiries Act. Your
24 position is that there's a conflict, and the
25 commission counsel's position is there's no

1 conflict. I'm trying to address the question in
2 that context and I wonder if the logic of what we
3 have just discussed wouldn't resolve that
4 question.

5 MR. UUKKIVI: Certainly. I
6 mean, you've given me a question that -- I mean,
7 I'm usually so much quicker to --

8 JUSTICE WILTON-SIEGEL: No,
9 that's quite all right. I'm happy to have you
10 think it through. It's that which came to my mind
11 when I read the materials and because it wasn't
12 specifically addressed, I thought I should give
13 you the opportunity to be aware of what I was
14 reflecting on and to respond.

15 MR. UUKKIVI: Yeah, and I
16 think it's -- obviously it's a challenging
17 question. When you flow the logic through, it
18 runs that if the City can order the auditor
19 general or request or direct the auditor general
20 to produce a specific kind of report, does that
21 then mean that the City -- does that inform a
22 secrecy provision.

23 JUSTICE WILTON-SIEGEL: Not so
24 much the secrecy provision as the question of
25 potential conflict between section 33 and the

1 secrecy provision.

2 MR. UUKKIVI: The conflict
3 continues because the secrecy provision is there
4 to put a shield around the work that the auditor
5 general is doing. It's not there to -- like, it's
6 not there to protect the fact of the audit. It's
7 not there to protect the directions an auditor
8 general has received from council to do a specific
9 kind of work; it's there to protect the work
10 itself and the work product itself.

11 So if the work product itself
12 is protected there continues to be a conflict
13 between two levels that are looking into the same
14 issue. Like, I think I appreciate the question
15 you're asking, and I just continue to have a
16 concern that the nature of the -- if the secrecy
17 provision puts a cloak around the work of the
18 auditor general and not the audit itself or the
19 directions received, then it still has to go to
20 the very issue that's being looked at here, which
21 is Mr. Pellegrini's work while he was working on a
22 question -- it was a self-directed question,
23 obviously, by the office of the City auditor, but
24 I think that's not relevant for this discussion
25 we're having because it really doesn't matter if

1 it's the City directing the audit or whether it's
2 the auditor general acting on its own independent
3 jurisdiction as given to it through the charter.
4 It's the question of when does that secrecy begin
5 and at what point does that sort of cloak of
6 secrecy shield the work of the office of the City
7 auditor. And if you're able to go in and start
8 saying, well, okay, we're just going to look at
9 the procedural stuff that Mr. Pellegrini did or
10 ask him questions about the work product that he
11 obtained from the City, it really loses the
12 purpose of the secrecy provision from the City
13 council.

14 So asking the question in
15 terms of how the City council can direct and whose
16 secrecy it is to waive, it has to be the office of
17 City auditor's secrecy as an independent body to
18 protect the information it collects, and then once
19 it reports out on that information, then that
20 report goes back to council and is a public
21 document. But it's sort of the way sausage is
22 made, and I would include in that sausage-making
23 process Mr. Pellegrini's work when he went in and
24 interviewed City staff.

25 JUSTICE WILTON-SIEGEL: Well,

1 another question I have is how can it be
2 confidential when you're talking about a report
3 that the City wants about how its staff reacted as
4 employees when they, in this case, learned of a
5 document? You could just as easily say how can it
6 be confidential if the question is -- from the
7 City, if the question is about corrupt practices
8 on the part of an employee? Surely the City is
9 entitled to call for all information relating to
10 an investigation which the City auditor instituted
11 on its own behalf, if you like, with respect to
12 corruption on the part of its employee.

13 MR. UUKKIVI: And I think
14 that's the awkward issue that we're dealing with
15 because, you know, the office of the City auditor
16 wants to help.

17 JUSTICE WILTON-SIEGEL: I
18 understand that.

19 MR. UUKKIVI: So the challenge
20 I think that -- it's almost like bad facts made
21 bad law here, and I'm worried about the optics of
22 this because it's certainly not the intention of
23 Mr. Pellegrini or the office of the City auditor
24 specifically to try and shield information that
25 would be important for the commission's

1 decision-making process. But if we were to take a
2 step back and say, well, what do you know and what
3 do you have. You've got a report, you've got a
4 redacted report, and you've got a report to City
5 council saying here's a problem, how do you want
6 to deal with it, council. We're stopping our
7 other investigatory process in order to tell you
8 about this thing that we just found, this report,
9 this road friction report that we found.

10 Like, that was a two-month
11 period of time and how City staff reacted, well, I
12 mean, is it really required to get into that with
13 what the investigator heard at that moment in
14 time? Would it be nice, sure. Maybe the
15 appropriate thing is for the office of the City
16 auditor to report on or finish a report that it
17 just didn't do because of the inquiry.

18 JUSTICE WILTON-SIEGEL: Well,
19 I'm not sure -- at one stage in your factum you
20 suggest that the evidence that is sought is not
21 relevant. I'm not sure you are really pushing
22 that, how it isn't relevant, but let me just put
23 the last question I have, which follows really
24 from the point that you made.

25 If the alternative is to

1 request a report on these very matters, is for
2 City council to request a report on these very
3 matters, which you say would be within the
4 jurisdiction of the City council and would require
5 disclosure on the part of the auditor, hasn't the
6 City council already effectively done that by
7 setting the terms of reference?

8 MR. UUKKIVI: They have not
9 directed that the office of the City auditor
10 report on it in the usual way to City council.
11 What they have done is they have asked for an
12 inquiry to be done and --

13 JUSTICE WILTON-SIEGEL: I've
14 said that literally they have not required such a
15 report. I guess my point is -- my question is
16 more from the substantive point of view, have they
17 not asked that the City auditor provide a report
18 which will be conveyed to the inquiry, and in that
19 sense should that perspective again not be the one
20 that informs the issue before us today?

21 MR. UUKKIVI: Well, it's a bit
22 of a difference in kind, though, and I think it's
23 not a insignificant difference in kind because the
24 preparation of a report is -- and reporting to
25 council or reporting to the commission is a

1 different process than subpoenaing a witness who
2 isn't necessarily going to be the author of that
3 report or presenting it to council. So I don't
4 mean to make it sound like it's a hairsplitting
5 exercise, because I do think that there's a
6 difference in kind.

7 JUSTICE WILTON-SIEGEL: I'm,
8 unlike you, trying to identify whether there is a
9 dividing line between the circumstances where you
10 see Mr. Pellegrini can assist the inquiry and
11 beyond which you say the inquiry cannot or should
12 not proceed. I invite you to -- if you have
13 thought of that, whether there is such a dividing
14 line.

15 MR. UUKKIVI: I would suggest
16 that the statute provides a dividing line, being
17 that the report itself could stand on its own and
18 be filed with the commission, but giving evidence
19 on that report and how it came about and
20 questioning on the content of the report is
21 outside of the purview of the commission. And so
22 the -- so if the commission were to report -- or
23 office of the City auditor were to report on the
24 outcome of a process, it would still not be within
25 the purview of the commission to then go and ask

1 more questions about the process or the outcome of
2 that report.

3 JUSTICE WILTON-SIEGEL:
4 Effectively you say there is no dividing line. I
5 was inviting you to reflect on whether there are
6 circumstances where the independence is engaged as
7 opposed to the circumstances where it is not
8 engaged. I'm not trying to make you say something
9 that you're not comfortable with, but your
10 response suggests that you don't see -- put
11 another way, I may or may not agree that this a
12 case of bad facts make bad law. Is there a way
13 that you can deal with the bad facts in a way that
14 produces law that's acceptable to you but is
15 consistent with what commission counsel is trying
16 to achieve?

17 MR. UUKKIVI: Well, I mean, I
18 guess it's at what point can you break down
19 independence and what does independence mean, I
20 suppose. Back to your question of -- you asked me
21 and you felt I was going too far on what I
22 believed independence to mean. Properly stated,
23 my view would be that if a process is to be
24 independent, the decisions of what to report on
25 and what not to report on in the context of an

1 investigation, like, it would have to be in the
2 discretion of the office of the City auditor to
3 make that decision for independence to exist. Or
4 perhaps it's maybe not even -- maybe it's a little
5 bit more subtle than that. Maybe it is that the
6 conclusions that you draw from a set of facts that
7 you discover are the ones that are subject to the
8 independence, and maybe that's where I'm
9 struggling about, because facts are obviously
10 facts. And if a known set of facts is put to a
11 City auditor to report on, or same thing with a
12 judicial inquiry, then I would suggest that the
13 conclusions drawn by the office of the City
14 auditor are definitely subject to their own
15 purview. I'm very comfortable with that spot.
16 The question then becomes how much farther does it
17 go to protect the process beyond just the
18 conclusions drawn from known facts.

19 JUSTICE WILTON-SIEGEL: And
20 this would not be -- this engages, as you
21 undoubtedly accept, something other than the
22 conclusions. It's not the conclusions or the
23 reasons for the conclusions that constitute the
24 testimony that's sought here.

25 MR. UUKKIVI: And I accept

1 that. And then taking it to the step then to
2 say -- and this is where I think that some of my
3 commentary about relevance came in, and perhaps I
4 -- I used perhaps the wrong legal principle on it,
5 but it really is the fact that the evidence being
6 sought from Mr. Pellegrini is partially either to
7 corroborate or to call into question other
8 evidence that's been heard. It means that it's
9 sort of calling for somebody to provide their -- I
10 mean, if it goes beyond let's say their
11 observations or what somebody told them at that
12 time, you know, that whole process engages the
13 investigation.

14 And so that's where -- I don't
15 know that there's a bright line, but it's getting
16 really close to that spot where you're talking
17 about somebody that went in, made a decision to
18 ask some questions, and got some answers from the
19 individual. That questioning process is where --
20 it's a question of, well, what are the facts, what
21 are you calling on Mr. Pellegrini to provide. And
22 what I see there being -- the requests are being
23 made is for evidence to talk about things that
24 either a witness said, didn't say, and to look at
25 what it is that they remembered when they gave

1 evidence to this commission. And to compare those
2 notes.

3 JUSTICE WILTON-SIEGEL: How
4 does that engage issues of independence on the
5 part of the auditor general?

6 MR. UUKKIVI: I think that's
7 where I'm struggling to provide you with a very
8 clear answer because I am certain and confident in
9 my response on the question of the conclusions and
10 the decision-making process. I'm admittedly less
11 certain on the fact-finding exercise, but I still
12 think that for me it goes a little bit -- it has
13 to go farther than just the conclusory and
14 decision-making process. Otherwise, you end up
15 risking making any investigator a witness any time
16 there's an outcome that a City doesn't agree with
17 or doesn't like or they don't like the process.

18 So rather than engaging the
19 judicial review process and looking into the
20 reasonableness of the decision-making process, you
21 are now much more directly engaging at the heart
22 of the auditor general's jurisdiction and their
23 authority under the Municipal Act. That's where
24 my discomfort lies about going and why I think it
25 goes further than simply just the conclusory and

1 decision-making process within the auditor
2 general's office.

3 JUSTICE WILTON-SIEGEL: So you
4 see this ultimately as engaging or on opening the
5 door to an alternative process to judicial review
6 of an inquiry that City council is not happy with?

7 MR. UUKKIVI: That's one of
8 the -- and I don't mean just the Hamilton City
9 council.

10 JUSTICE WILTON-SIEGEL: No,
11 no, I don't mean that, a City council is not happy
12 with. You're saying it opens the door to an abuse
13 of process that would be implemented by way of a
14 judicial review of the investigation?

15 MR. UUKKIVI: Yes, yes. And I
16 think that the reality is that a judicial review
17 process is in many cases and in many circumstances
18 very unsatisfactory to the applicant bringing that
19 judicial review because all they're allowed to do
20 is challenge the reasonableness of the decision as
21 opposed to the content. And that's seen from the
22 Debiassy (ph) decision as an example of the --
23 they couldn't get behind that provision. Like,
24 that wasn't put there to say that -- I mean, that
25 decision was just there to show you how the

1 judicial review process should work. And so
2 that's -- and I do have a very significant concern
3 about that and --

4 JUSTICE WILTON-SIEGEL:
5 Ultimately I think maybe that is your concern.

6 MR. UUKKIVI: Yes.

7 JUSTICE WILTON-SIEGEL: Okay.
8 Well, I have no further questions. I'll let Ms.
9 Lawrence speak to the issues that have been
10 raised, to the extent she wants to add anything.

11 MR. UUKKIVI: I feel better
12 for Ms. Lawrence because she's had some time to
13 think about your questions.

14 JUSTICE WILTON-SIEGEL: You
15 have a few minutes by way of reply.

16 MR. UUKKIVI: All right.

17 Thank you.

18 SUBMISSIONS BY MS. LAWRENCE:

19 MS. LAWRENCE: Thank you,
20 Commissioner, for your questions. I think it was
21 very useful to better understand the parties'
22 positions.

23 As you will have seen in
24 commission counsel's submissions to you,
25 commission counsel is proposing to examine Mr.

1 Pellegrini on very limited points. One, how he
2 came into possession of a redacted copy of the
3 2014 Golder report, and that is, broadly, the
4 details of who provided it, how he received it,
5 and when.

6 Second, how he came into
7 possession of any agreements before he came into
8 possession of an unredacted copy of the Golder
9 report and the Tradewind report.

10 And then finally, to the
11 extent that Mr. Pellegrini may have evidence, Mr.
12 Pellegrini's meeting with Mr. Moore on February 4,
13 2019.

14 So it's quite limited in terms
15 of the information that commission counsel is
16 seeking to elicit from Mr. Pellegrini, and it goes
17 to, as my friend put it, either corroborating or
18 calling into question evidence of other witnesses.
19 And perhaps put differently, it deals with the
20 context of City staff and how they were dealing
21 with the issue of the Golder report and the
22 Tradewind report. These are obviously highly
23 relevant to several of the terms of reference that
24 are before you.

25 The summons does not require

1 Mr. Pellegrini to provide any documents, any work
2 product prepared by him or others within the
3 office of the auditor, nor -- except to provide a
4 little narrative -- is requesting him to speak
5 more broadly about the work of the auditor.

6 So you have -- so just that
7 context I think is useful given the discussions
8 that you had or the interaction you had just now
9 with my friend about where the line is on what and
10 when an auditor should be compelled to provide
11 information to an inquiry.

12 I certainly understand my
13 friend's concern, the policy concern, that
14 judicial inquiries called by a municipality could
15 be used against their independent bodies like
16 auditors or ombudsmen. That is not the issue you
17 have before you here. That is a policy concern
18 that frankly should be assessed on the facts of
19 any case that ever arises, and I would anticipate
20 that using other common law remedies, in addition
21 to judicial review, having that kind of misuse of
22 the judicial inquiry process could be resolved in
23 an appropriate way by the courts.

24 Rather what you have here,
25 commission counsel submits, is the clear

1 application of what the Municipal Act permits.
2 The judicial inquiry process is really quite
3 unique and rarely used. It is intended to engage
4 a fact-finding process, and as you know, you have
5 certain terms of reference that limit the scope of
6 your inquiries.

7 It's undisputed as between the
8 parties that the inquiry has the power of summons
9 under Section 33 of the Public Inquiries Act, and
10 the only restriction on the ability to summons
11 evidence under that section is that the evidence
12 is relevant and not privileged.

13 We spoke -- you spoke -- the
14 back and forth with my friend just now was about
15 the Municipal Act, and there are several sections
16 that are relevant here.

17 The first is section 223.2 of
18 the Municipal Act, and I'm happy to have the
19 Registrar put these up if that would be useful,
20 although I know you have hard copies of the
21 Municipal Act. So that provision says every
22 person acting under the instruction of the auditor
23 general, here Mr. Pellegrini, is to preserve
24 secrecy over all matters that come into their
25 knowledge in the course of their duties. And you

1 did have some back and forth about what are the
2 course of the duties. Is it conclusions? Is it
3 the fact-finding work? Is it the work product?
4 And I submit it is all of the above in terms of
5 preserving secrecy. The Municipal Act does not
6 draw a bright line in terms of where the
7 preservation of secrecy begins or ends.

8 However, that does not end the
9 analysis. The preservation of secrecy is one of
10 several related and interrelated provisions within
11 the Municipal Act. But starting just with the
12 preservation of secrecy.

13 Preserving secrecy or any
14 other duty of confidentiality that's in a statute
15 does not mean that the work of in this case the
16 auditor is always immune to being produced
17 pursuant to summons. In fact, quite the opposite.
18 Statutory promises of confidentiality don't bar
19 the production by summons of information in the
20 holder's hands, unless it is privileged or the
21 legislature has used language specifically
22 prohibiting its introduction.

23 So recognizing the policy
24 concerns around independence relating to auditors
25 in particular, as an overarching principle, it is

1 only where the legislature has expressly
2 prohibited information from being compellable by
3 summons that that information will be -- will not
4 be disclosed.

5 So I would take it that
6 there's nothing about the auditor in particular or
7 his independence that changes that statutory
8 interpretation that you must apply here. And that
9 principle has been well-trod in the case law,
10 including the Transamerica case that we have in
11 our factum, and the two inquiry decisions: One,
12 the pediatric forensic pathology inquiry which
13 ordered the disclosure of information from the
14 CPSO, who was a holder and had a duty of
15 confidentiality; and Commissioner Linden in the
16 Ipperwash public inquiry who ordered disclosure of
17 information and the police, who also had a duty of
18 secrecy.

19 So of the course the police,
20 the College of Physician and Surgeons, who has
21 investigatory powers, and the auditor are all very
22 different entities, but it's clear that on its
23 face you must look to the legislature and the
24 legislation to determine what can be excluded and
25 what cannot, and we should do that before we

1 overlay any issues around independence. There's
2 no explicit language in the Municipal Act that
3 bars production by summons.

4 So then you have to look, I
5 think, to the language that is there to interpret
6 whether you can harmoniously and coherently read
7 the Public Inquiries Act with the Municipal Act,
8 and I submit that you can, and you can
9 specifically in the context of the judicial
10 inquiries. They are unique and different and they
11 serve an important role that is not expressly
12 referenced in the Municipal Act, but needs to be
13 reflected in an appropriate statutory
14 interpretation.

15 We went to the broad
16 preservation of secrecy, that obligation. And I
17 agree with my friend that that obligation is to
18 cloak the work of the auditor during the
19 investigation process. That is not unlike the
20 duty of confidentiality that CPSO investigators
21 have, nor that police have. It's all for the same
22 purpose.

23 The Municipal Act has two
24 particular express exceptions for -- around the
25 preservation of secrecy. So persons are required

1 to preserve secrecy and shall not communicate
2 information to another person around the course of
3 their duties, except in connection with the
4 administration of this part of the Municipal Act,
5 including reports made by the auditor or under the
6 Criminal Code.

7 So there is -- there's no
8 global, universal preservation of secrecy.
9 Obviously issues of criminality can be
10 communicated outside the auditor to another person
11 and, where appropriate, issues in the context of
12 the administration of the auditor's work. I think
13 I heard my friend's argument to be that where the
14 auditor is of the view that they should report
15 their work, they have the discretion to do so.
16 And I don't take issue with that position, but it
17 does certainly in my view, in my submission,
18 demonstrate that where the auditor decides to
19 report, and they do have an ongoing reporting
20 obligation to council under the Municipal Act,
21 that the spirit of the Municipal Act can be read
22 harmoniously between the idea that there could be
23 a judicial inquiry seeking evidence and, in a
24 parallel process, the auditor making a report.

25 It is also my submission that

1 the fact that the auditor could be compelled to
2 provide a report to the City council if requested
3 also demonstrates that the secrecy provisions are
4 not watertight and that they need to be
5 interpreted holistically within the act that also
6 permits the judicial inquiry process.

7 The last aspect of the
8 Municipal Act which may be useful in the statutory
9 interpretation to find a way to harmoniously read
10 the auditor's role and the judicial inquiry role
11 is the provision that specifically precludes
12 persons acting under the instructions of the
13 auditor from being compelled to testify in civil
14 proceedings.

15 It's well established that
16 public inquiries are not civil proceedings. They
17 don't enforce or vindicate private rights, and
18 there are no legal consequences that flow from
19 determinations of a commissioner.

20 So taking these provisions
21 together the auditor must preserve secrecy, except
22 in connection with the act, including providing
23 reports, which in this case the request for a
24 report was superceded by the terms of reference
25 and the initiation of this inquiry, or in

1 connection with the Criminal Code. But that
2 secrecy is -- has nuance, in that the auditor
3 could be required to produce documents or
4 information when summonsed by a person with
5 authority to do so. And I recognize my friend's
6 position is that the independence of the auditor
7 could be affected by that.

8 In my view, you have to look
9 to the Municipal Act and the fact of independence
10 does not change the way that the Municipal Act
11 reads. And looking at the common law, it's very
12 clear that if a person has authority to issue a
13 summons then the recipient of that summons must
14 comply, unless there is some valid reason,
15 including privilege, to object to doing so.

16 Here it's very clear that the
17 Municipal Act prohibits the office of the
18 attorney -- pardon me -- the office of the auditor
19 to be a witness in civil proceedings. So the
20 Municipal Act has said, yes, there's secrecy. The
21 common law has said, but sometimes the auditor
22 will be required to produce documents. And the
23 legislature has said quite clearly that they may
24 be compellable or competent witnesses in non-civil
25 proceedings. So where does that lead to, reading

1 the interpretation of the act and the case law?

2 Commission counsel submits

3 that there's -- reading those two things together,
4 the judicial inquiry process is one specific and,
5 frankly, unique place where an auditor may be
6 compelled to testify and to provide documents to
7 the extent that those documents are relevant to
8 the judicial inquiry. It would be entirely
9 contrary to the purpose of the inquiry, and the
10 fact that the Municipal Act provides for a
11 judicial inquiry process, if the act limited the
12 ability for city council, one, to make the choice
13 between using the auditor (ph) process or using
14 the judicial inquiry process, and then limited, by
15 implication, the ability to seek information from
16 any source, including those who report to council
17 like the auditor.

18 The Municipal Act simply
19 shouldn't be interpreted and wouldn't have been
20 written to restrict the judicial inquiry's ability
21 to obtain such information without very express
22 language making that clear.

23 On the very last issue, this
24 issue of independence and whether that, layered
25 onto this interpretation, changes the analysis.

1 In commission counsel's submission, it does not.

2 Well, again, going back to
3 recognizing the concern that the auditor and those
4 similar to the auditor like ombudsmen might have,
5 it is commission counsel's submission that the act
6 must be interpreted to provide for that very
7 concern that the auditor has that City council
8 could bring a judicial inquiry where it does not
9 like what the auditor has done, and that is a
10 concerning issue, but that's a policy issue that
11 would have to be dealt with on the facts. It's
12 not an issue before today. Rather, looking at the
13 issue that you have before you today, it's very
14 clear that the Municipal Act permits the judicial
15 inquiry process to obtain information from any
16 source, including the independent entities that
17 report to City council.

18 Subject to any questions you
19 may have of me, those are my submissions.

20 JUSTICE WILTON-SIEGEL: No, I
21 don't have any questions. Any reply?

22 REPLY SUBMISSIONS BY MR. UUKKIVI:

23 MR. UUKKIVI: I just have a
24 very brief point. And it's really -- the issue
25 that I have and where I think that my position

1 differs from commission counsel is on the whole
2 issue of the law that's come out that deals with
3 the secrecy provisions and the right -- the fact
4 that a civil proceeding is different than a
5 judicial inquiry. And I think that -- I'm not
6 going to repeat the written submissions I've made
7 on this point, but it really turns down on a
8 question of where you think you draw your
9 jurisdiction from, because in those cases the
10 government of Ontario who drafts the legislation
11 is the one that starts the public inquiry into the
12 process, and the -- the debate in those cases was
13 not on the question of jurisdiction or the right
14 to seek the information, but rather on how broadly
15 that confidentiality provision or secrecy
16 provision in an individual statute applies.

17 In this case I'm using the
18 secrecy provision as almost a proxy for the
19 jurisdictional issue that I think exists and the
20 conflict that exists, as opposed to just looking
21 at whether or not there are circumstances in which
22 you can look behind that secrecy provision. And
23 because of the fact that you've got -- I mean, the
24 provision in there that says that the office of
25 the City auditor is not competent or compellable

1 in civil proceedings is there and it's easily
2 understood, but I don't think the legislature
3 would think that they would have to include a
4 provision that says, well, you -- like, if a
5 secrecy provision exists, why would the
6 legislature then turn around and say, well, you
7 have to keep it secret from all other steps that
8 municipal council decides to take including in the
9 context of a judicial inquiry.

10 Because it's the same body
11 that's ordering the judicial inquiry versus the
12 City audit or using the office of the City
13 auditor's office. It would be unusual to find a
14 distinction drawn in a piece of legislation, and I
15 don't think that I'm asking for an interpretation
16 of that legislation that goes too far. I think
17 that we just have to be careful in understanding
18 that issue of jurisdiction, and I think I just
19 don't want that lost in the context of my
20 submissions, and specifically the fact that I
21 don't agree that the fact that there isn't a
22 specific prohibition against disclosure to the
23 entire world, that that secrecy provision doesn't
24 protect that information from a subsequent
25 judicial inquiry started.

1 And it kind of goes back to
2 the question, well, what if now after we finish
3 this judicial inquiry the City of Hamilton then
4 asks the office of the City auditor to report on
5 the judicial inquiry. It could end up being a
6 never-ending circle. I guess I make that point to
7 say they are independent processes of each other
8 and they're independent offices of each other.
9 I'll just leave it at that.

10 JUSTICE WILTON-SIEGEL: They
11 are independent offices. I'm not sure that that
12 raises a jurisdictional question. I understand
13 that's the way you cast it. But I have difficulty
14 getting beyond perceiving this as a question of
15 how -- maybe I'll put it this way -- how Section
16 33 of the Public Inquiries Act and Section 223.22
17 of the Municipal Act fit together and whether
18 they -- the two side-by-side give rise to a
19 conflict or not. That seems to me to take you
20 back to the question of how do you interpret the
21 operation of the secrecy provision.

22 MR. UUKKIVI: Right. You have
23 my submissions on that point. If there is
24 something specifically that you would like me to
25 highlight again, or to try and clarify, because I

1 know that I would be happy revisit it. I agree,
2 it always brings us back to how you interpret that
3 secrecy provision, and it does come down to that,
4 and so I'm violently agreeing with you, I suppose,
5 on that at least.

6 JUSTICE WILTON-SIEGEL: Okay.
7 Thank you very much. We will adjourn. I will get
8 you a decision as quickly as I can.

9 MR. LEDERMAN:
10 Mr. Commissioner, just before we adjourn, there's
11 just one point I wanted to clarify. Mr. Uuvviki
12 indicated at the outset that the City doesn't take
13 a position on this matter, but I do want it noted
14 that we did provide a letter on August 22nd that
15 just qualified that, and that was on the basis
16 that we had understood in subsequent discussions
17 with counsel that the scope of the evidence that
18 was intended to be called from Mr. Pellegrini was
19 really narrowed down to the receipt of the
20 Tradewind report. But the point that I just
21 wanted to reiterate, in light of Ms. Lawrence's
22 submissions, that the scope of the evidence that
23 is sought to be called may extend beyond that and
24 relate to any discussions with any City staff, it
25 does engage qualification that we had advised in

1 our letter on August 22nd simply saying that in
2 the event that a decision or a ruling is made that
3 Mr. Pellegrini's evidence could be called, that we
4 would also therefore wish for production of any
5 notes or documents relating to any discussions
6 with City staff in the interest of fairness and
7 consistency.

8 I just wanted that point to be
9 reiterated in light of the submissions that were
10 made today.

11 JUSTICE WILTON-SIEGEL: Okay.
12 Well, then, before we conclude perhaps we should
13 address whether this is a theoretical or a live
14 issue. Is it possible to get a read on whether,
15 given the specific nature of the testimony which
16 is sought, there are in fact any contemporaneous
17 notes associated with the meetings or interviews?

18 MR. UUKKIVI: I can certainly
19 advise you that there are at least one set of
20 contemporaneous notes that I have in my --
21 contemporaneous notes that I have in my
22 possession, and my voice will grow louder if those
23 notes are sought.

24 JUSTICE WILTON-SIEGEL: So --

25 MS. LAWRENCE: Commissioner,

1 if I may.

2 JUSTICE WILTON-SIEGEL: Yes.

3 MS. LAWRENCE: I did provide
4 the three areas earlier to you about the scope of
5 the potential evidence, and I perhaps too quietly
6 included a caveat on the last of the three parts,
7 being Mr. Pellegrini's discussions with Mr. Moore
8 on February 4, 2019. I said earlier to the extent
9 it may be relevant, or some other caveat, to
10 attempt to convey both to -- to both my friends
11 that I anticipate that that evidence will not form
12 part of commission counsel's examination of Mr.
13 Pellegrini. I, of course, can't speak to what
14 other people may cross-examine him on, but my --
15 commission counsel's intention is to focus on the
16 interactions regarding the redacted and the
17 unredacted Golder reports and how they made their
18 way to Mr. Pellegrini.

19 It's my understanding that
20 there are no contemporaneous notes in respect of
21 those two aspects of the evidence that would be
22 relevant or would meet the caveats that Mr.
23 Lederman put in the letter that we provided to
24 you.

25 MR. LEDERMAN: Yes, that was

1 my understanding, and that's why I felt the need
2 to express or position in light of Ms. Lawrence's
3 inclusion of the reference to the potential that
4 they would be seeking to call evidence from Mr.
5 Pellegrini in relation to that February 2019
6 discussion with Mr. Moore, because I had
7 understood that that was not the subject of the
8 evidence or the scope of what was being sought as
9 part of this in any event.

10 JUSTICE WILTON-SIEGEL: Well,
11 I can't comment on that. Your letter is dated the
12 18th. Commission counsel's factum is dated the
13 22nd. So you've had that since the 22nd.

14 MR. LEDERMAN: I'm sorry, I
15 think our letter is -- sorry, I'm not sure I
16 understood Ms. Lawrence's submission. Is the
17 February 2019 discussion intended to be called
18 from the witness that is being sought from Mr.
19 Pellegrini or is it not? If it is, then the
20 caveat that we have expressed in our
21 correspondence, I am expressing the view that that
22 needs to be reiterated. If, however, it is in
23 relation to only the receipt of the redacted
24 Golder report in which there are no notes
25 surrounding that, then there is no need for my

1 condition with respect to the position of the City
2 in this respect.

3 JUSTICE WILTON-SIEGEL: Mr.
4 Uukkivi, I take it that you're referring to the
5 fact that there are notes of the meeting between
6 Mr. Pellegrini and Mr. Moore?

7 MR. UUKKIVI: Correct.

8 JUSTICE WILTON-SIEGEL: At the
9 present time you're not aware of any notes with
10 respect to the other interactions that are
11 contemplated in the factum of the commission
12 counsel?

13 MR. UUKKIVI: Correct, and I
14 will double check that and if I have misspoken
15 then I will advise at least Ms. Lawrence of that
16 fact, but it's my understanding there are no
17 contemporaneous notes of the stuff that we're
18 talking about here today.

19 JUSTICE WILTON-SIEGEL: Okay.
20 Well, we'll stand adjourned, and I will get a
21 decision as quickly as I can. I believe we stand
22 adjourned until 9:30 on Friday morning. Is that
23 correct, Ms. Lawrence?

24 MS. LAWRENCE: That's correct.

25 JUSTICE WILTON-SIEGEL: At

1 which time Mr. Malone will be the witness before
2 the inquiry. Thank you very much. I appreciate
3 submissions from both counsel. It's very helpful,
4 and as I say, we will now stand adjourned until
5 Friday morning.

6 --- Whereupon at 4:44 p.m. the proceedings were
7 adjourned until Friday, September 23, 2022 at
8 9:30 a.m.

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