

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONOURABLE
HERMAN J. WILTON-SIEGEL
held via Arbitration Place Virtual
on Tuesday, December 13, 2022 at 9:32 a.m.

VOLUME 81

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1 Arbitration Place Virtual
2 --- Upon resuming on Tuesday, December 13, 2022 at
3 9:32 a.m.

4 MR. LEWIS: Good morning
5 Commissioner. Counsel, Registrar. I would like
6 to start off with the land acknowledgement.

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

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

25 Today this meeting place is

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

4 Before we get to the matters
5 at hand today, Commissioner, just as a
6 housekeeping matter I would like to introduce a
7 document as an exhibit, which document was raised
8 during Ms. Nicole Auty's examination on October
9 4th, 2022 but has not yet been marked as an
10 exhibit. It was just inadvertently omitted at
11 that time.

12 Registrar, the document is
13 HAM64319, that's again HAM64319, which is an
14 e-mail exchange between Ron Sabo, Nicole Auty
15 dated January 17, 2019. I ask that that be marked
16 as the next exhibit, which is number 219.

17 THE REGISTRAR: Noted.

18 EXHIBIT NO. 219: E-mail
19 exchange between Ron Sabo
20 and Nicole Auty dated
21 January 17, 2019; HAM64319

22 MR. LEWIS: Commissioner,
23 we're here today for you to hear motions by the
24 City of Hamilton and Golder Associates seeking
25 leave to file expert reports responding to those

1 delivered by commission counsel.

2 First, Golder seeks leave to
3 file a report by Dr. Hassan Baaj, responding the
4 report of Dr. Geraldo Flintsch. Counsel for
5 Golder submitted a letter dated December 7, 2022
6 setting out the anticipated contents of Dr.
7 Bauge's report and the relevance to inquiry's
8 terms of reference.

9 The City of Hamilton seeks
10 leave to file two reports; one by Mr. David Hein,
11 responding to the report of Dr. Flintsch, and one
12 by Mr. Dewan Karim, responding to the report of
13 Russell Brownlee.

14 Counsel for the City also
15 submitted a letter dated December 7, 2022 setting
16 out the anticipated contents of the reports of
17 Mr. Hein and Mr. Karim and the relevance to the
18 inquiry's terms of relevance. And the letters
19 from counsel for Golder and the City respectively
20 have been posted on the inquiry's website.

21 On Friday, December 9th you
22 directed that counsel for Golder was to proceed
23 first and the City counsel for the City second.
24 So I would ask Ms. Roberts for Golder to proceed.

25 MS. JENNIFER ROBERTS: Thank

1 you. Commissioner, Counsel.

2 SUBMISSIONS BY MS. JENNIFER ROBERTS:

3 So Golder seeks leave to
4 submit an expert report from Dr. Hassan Baaj of
5 the University of Waterloo. Dr. Baaj is a tenured
6 professor and the chair and sustainable pavement
7 engineering and civil and environmental
8 engineering at the University of Waterloo. He's a
9 doctor at Ansell Engineering from the National
10 Institute of Applied Sciences of Leon, bachelor of
11 civil engineering from the University of Damascus.
12 I don't intend to go through his CV. He has
13 extensive experience in materials engineering and
14 particular focus on asphalt.

15 In his report of
16 November 2022, Dr. Flintsch develops detail on the
17 outline he provided in his primer at the very
18 outset of this inquiry. My client Golder is
19 largely in agreement with the findings and
20 observations of Dr. Flintsch. My focus is on a
21 particular area of Dr. Flintsch's November report.

22 In his primer Dr. Flintsch
23 describes the characteristics of pavement surface
24 that affect friction. He describes the two main
25 components that affect the tire pavement friction

1 of microtexture and macrotexture, and really we're
2 focusing here on microtexture.

3 Microtexture is defined scale
4 texture on the surface of an aggregate and how it
5 interacts with the tire. Microtexture is
6 primarily affected by the aggregate and its
7 surface aggregates and its polishing
8 characteristics. In broad strokes, the more
9 resistance to polishing the better. The
10 frictional properties of the aggregate will be
11 able to provide, in particular whether it will be
12 able to provide good and enduring frictional
13 characteristics.

14 You'll remember at the outset
15 of this hearing we went to the evidence in
16 relation to the design and construction of the Red
17 Hill Valley Parking, and part of that evidence was
18 that Dufferin proposed to supply aggregate from a
19 quarry in Quebec, the Varennes quarry, and that
20 aggregate was to be used both in the stone mastic
21 asphalt surface on the main line as well as the
22 SD2 asphalt for the ramps. And although that
23 aggregate from the Varennes quarry had been used
24 in Quebec it had no history of use in Ontario and
25 was not on the designated source materials list in

1 Ontario.

2 So there's in 2002 there was
3 an incidence of process of the qualification of
4 that aggregate and the first phase of the hearing
5 in June of this year went into that qualification,
6 both in terms of the laboratory testing results
7 that were provided as well as what testing had
8 been conducted to assess its polishability.

9 As part of the data provided
10 to qualify the aggregate as suitable for use on
11 the Red Hill Valley Parkway, Dufferin provided a
12 number of laboratory tests. Chief amongst these
13 that I want to focus is on the Micro-Deval
14 abrasion and Los Angeles abrasion test, as well as
15 test used in Quebec to measure the resistance to
16 polishability, which was the coefficient of
17 polishing by projection test, which I'll call the
18 CPP test.

19 So in Ontario the test that
20 the MTO uses to assess polishability of an
21 aggregate is the polish stone value test, and
22 there's been significant evidence on that.

23 In Quebec they use a different
24 test to assess the same thing, which is whether
25 the aggregate is susceptible to polishing. And we

1 understand the CPP test to be an equivalent
2 methodology.

3 In his November 2022 report
4 Dr. Flintsch focuses on one particular test
5 assessing the polishability of the aggregate,
6 which the PSV testing. But, as I said, this is
7 just one of the tests that were provided by --
8 sorry -- this is just one of the tests that would
9 assess polishability, and Dr. Flintsch does not in
10 his of November report consider the other testing
11 results provided by Dufferin which are relevant to
12 the assessment of resistance to polishing.
13 Specifically, Dr. Flintsch does not consider the
14 results from the Micro-Deval and LA abrasion
15 testing and he does not consider the results of
16 the CPP testing.

17 So the essence of my
18 submission here is that Dr. Flintsch hasn't
19 considered all of the evidence and that the
20 totality of the evidence is important in
21 evaluating the aggregate. We propose that Dr.
22 Baaj of the University of Waterloo will assess
23 these additional tests and augment the evidence
24 provided by Dr. Flintsch.

25 Dr. Hassan has worked for

1 LaFarge and has significant experience in
2 materials engineering and is well-qualified to
3 provide that analysis of the laboratory as well as
4 the CPP test results.

5 We anticipate that Dr. Bauge's
6 evidence will address all of the testing conducted
7 on the Varennes quarry aggregate, indicating its
8 quality and resistance to polishing, and this will
9 supplement Dr. Flintsch's findings. The testing
10 conducted on the aggregate in 2007 is, we submit,
11 important to the assessment of the quality of the
12 aggregate.

13 JUSTICE WILTON-SIEGEL: If
14 what you're saying is the testing of Dr. Baaj --
15 sorry -- the report of Dr. Baaj is really limited
16 to conducting an equivalent analysis in respect of
17 these three additional tests to that of Dr.
18 Flintsch in respect of the PSV test, that would
19 seem to be relatively straightforward and not
20 involve any particular additional evidence; is
21 that correct?

22 MS. JENNIFER ROBERTS: That is
23 correct. He's going to look at evidence that is
24 already in the record.

25 JUSTICE WILTON-SIEGEL: It's

1 already in the record?

2 MS. JENNIFER ROBERTS: That's
3 correct.

4 JUSTICE WILTON-SIEGEL: And
5 not beyond.

6 MS. JENNIFER ROBERTS: Not
7 beyond. He will, I'm confident, identify
8 additional academic analysis that casts light on
9 the testing but if you're asking specifically
10 about whether there's additional evidence that
11 will be introduced, the answer is no.

12 JUSTICE WILTON-SIEGEL: With
13 respect to the aggregate no?

14 MS. JENNIFER ROBERTS:
15 Correct.

16 JUSTICE WILTON-SIEGEL:
17 Simply with respect to the meaning or
18 understanding, scientific basis of these tests.

19 MS. JENNIFER ROBERTS: Yes,
20 that's right.

21 So I think that that's
22 important but it goes to a point that I want to
23 highlight here, and that is I think that an
24 assessment of all of that evidence that was
25 brought forward by Dufferin and reviewed by Golder

1 and others in 2007 is an important part of this
2 assessment and really goes to an overview of what
3 was done at the time and whether the testing that
4 was done provided a realistic and thorough
5 assessment of the likelihood that this aggregate
6 would provide good and enduring resistance to
7 polishability.

8 And part of that -- and I'm
9 going to go back to this theme -- but I think that
10 this deserves particular scrutiny because one of
11 the issues that's been a persistent theme is this
12 notion of whether this aggregate didn't provide
13 the qualities that it should have, and I think
14 that it's an important exercise to undertake and
15 scrutinize with some focus, is whether any of the
16 test data in 2007 indicated that the aggregate was
17 likely susceptible to undue polishing.

18 I want to turn to some other
19 aspects of -- Flintsch's findings.

20 JUSTICE WILTON-SIEGEL: So
21 that is essentially prospective, looking at the
22 testing in 2007?

23 MS. JENNIFER ROBERTS: Yes.

24 JUSTICE WILTON-SIEGEL:
25 Whether it adequately addressed the likely future

1 performance of the aggregate.

2 MS. JENNIFER ROBERTS: Right.

3 That's exactly what I'm looking at. So whether --
4 all that work that was done in 2007, part of that
5 is whether that was a sufficient survey and so
6 Dr. Baaj is going to look at that. And then in
7 fairness to the work that was done in 2007,
8 whether there was anything there that should have
9 been, could have been a flag to say, no, this
10 aggregate might not have been resistant to
11 polishing.

12 I now want to turn to a
13 different part of Dr. Flintsch's assessment, and
14 really what I'm scrutinizing here is his findings
15 in his report in paragraphs 2.1.5 about polished
16 stone value, because he looks at the PSV testing
17 that was done and PSV testing was done on the
18 Varennes aggregate 1992 and again in 2008. It was
19 tested also in 2017 by Golder but that was by
20 taking cores of the aggregate that had been in
21 service and -- for 10 years in the Red Hill Valley
22 Parkway.

23 Dr. Flintsch in particular
24 focuses on the data from the testing conducted in
25 2017 of the recovered asphalt, recovered

1 aggregate. What he states is that PSV testing in
2 2017 resulted in a test result of 45, and he
3 describes it as relatively low compared to British
4 standards which he refers to. And he goes on to
5 say that this indicates that the aggregate is
6 susceptible to polishing. PSV would -- and the
7 issue we have here is that PSV is typically
8 conducted on virgin aggregate. The question is
9 whether an apples and apples comparison can be
10 made to test results from virgin aggregate as
11 opposed to the in-service aggregate.

12 We're anticipating that Dr.
13 Baaj has not yet provided analysis on this topic
14 but we anticipate that he will not agree that such
15 a comparison can be made. In other words, what
16 in-service testing results doesn't tell you what
17 you would have found in 2007.

18 In particular --

19 JUSTICE WILTON-SIEGEL: And
20 that's the point I want to stop at. The issue
21 about -- there can be two issues. One is, what
22 does that testing say about the aggregate in 2007;
23 the other is what does it say about the aggregate
24 in 2017.

25 MS. JENNIFER ROBERTS: Yes.

1 JUSTICE WILTON-SIEGEL: I want
2 to focus on the latter for a second. Obviously
3 you're not challenging the actual test result of
4 45.

5 MS. JENNIFER ROBERTS: That
6 would be awkward since it's my client's --

7 JUSTICE WILTON-SIEGEL:
8 Exactly. And are you -- your client's evidence,
9 as I understand it, is aligned with Dr. Flintsch's
10 in a prospective sense that 45 is too low for any
11 new laying down of asphalt, and that if this
12 proceeded in the context of the hot in-place, but
13 if hot in-place or resurfacing was contemplated
14 then you would have to build up the quality by
15 introducing much higher performing aggregate to
16 balance out the existing aggregate having the PSV
17 value of 45.

18 MS. JENNIFER ROBERTS: That's
19 correct.

20 JUSTICE WILTON-SIEGEL: And
21 that seems to be consistent with -- I say only
22 seems to be consistent because we haven't had that
23 conversation, but first blush seems to be
24 consistent with Dr. Flintsch's view that as of
25 2017 the aggregate in place could be demonstrating

1 low micro friction.

2 MS. JENNIFER ROBERTS:

3 Dr. Flintsch says -- his language is relatively
4 low. I think Dr. Uzarowski said that that value
5 was moderate. But you're absolutely correct, the
6 outcome of that analysis was that Dr. Uzarowski
7 did not think the aggregate from in service --
8 that had been in service on the Red Hill Valley
9 Parkway could be used without augment as a new
10 surface.

11 JUSTICE WILTON-SIEGEL: And
12 Dr. Flintsch's report goes a little further and
13 suggests to the extent that were friction problems
14 on the highway at that time that are attributable
15 to the asphalt, that would be attributable to the
16 state of polishing of the aggregate.

17 MS. JENNIFER ROBERTS: Yes.

18 JUSTICE WILTON-SIEGEL: And I
19 don't think your client is taking exception to
20 that; is that correct? Your client is really
21 taking exception to the use of the testing results
22 in 2017 as an indication of what the aggregate
23 quality might in fact have been in 2007,
24 notwithstanding testing that we just addressed.

25 MS. JENNIFER ROBERTS: That's

1 correct. That's absolutely correct. And the
2 other thing that -- the other part of this is
3 though -- is that Dr. Flintsch seems to use that
4 2017 testing as an indicator of a decline in
5 friction on the asphalt.

6 He says that -- and perhaps
7 maybe I'm jumping forward too quickly here, but
8 one of the issues in Dr. Flintsch's -- one of the
9 findings he makes is essentially a correlation
10 here or connection between what he describes as a
11 relatively low PSV of 45 obtained from the
12 in-service aggregate and he says that's consistent
13 with the significant drop in friction of
14 approximately 20 percent observed between 2008 and
15 2014. And he notes an aggregate susceptible to
16 polishing loses its microtexture because of the
17 abrasive effect of traffic.

18 So what he seems to be doing
19 is he's suggesting a relationship between, as he
20 said, the relatively low PSV in 2017 as reflective
21 of a decline in friction on the Red Hill Valley
22 Parkway between 2008 and 2014.

23 I think that's a really
24 interesting question, whether in fact that 2017 is
25 evidence of polishing. And when I raise that as a

1 flag with the materials experts that I consult,
2 including Dr. Baaj, they are doubtful but they are
3 also not aware of research.

4 So when Dr. Flintsch raises
5 this as a connection, some sort of correlation, I
6 say that that deserves some scrutiny. If you're
7 going to say that this shows and reflects
8 polishing let's have -- let's shed some light on
9 that and see whether that is supported by academic
10 research. So I'm anticipating that Dr. Baaj will
11 look at that, and I've not been able to offer a
12 potential opinion because I don't know what that
13 might be and that (indiscernible) right now.

14 JUSTICE WILTON-SIEGEL: That
15 would seem to cross over into the second category.

16 MS. JENNIFER ROBERTS: Yes.

17 JUSTICE WILTON-SIEGEL:
18 Everything else seems to be in the first category.
19 In other words, if I can put in it a different
20 way, your client's position would be that this
21 would -- that most of the report would support the
22 conclusion that whatever the actual experience of
23 this aggregate there was no reason to believe that
24 it would not have performed adequately.

25 MS. JENNIFER ROBERTS:

1 Correct. And then this part of Dr. Flintsch's
2 findings though seem to focus, just as you've
3 identified, on the second part, is what actually
4 happened.

5 JUSTICE WILTON-SIEGEL: Yes.
6 And what was the state of -- there's no real issue
7 about what the actual state, is but you're, in the
8 second part, taking some exception to the
9 suggestion -- potentially to the suggestion that
10 there was actual degradation of the aggregate.

11 MS. JENNIFER ROBERTS: I can
12 hear my client's voice in my ear saying all
13 aggregate polishes.

14 JUSTICE WILTON-SIEGEL: Yes,
15 well, that's where I'm having trouble. But it
16 doesn't seem to me that this is the point at which
17 we have to discuss -- that we have to decide that.
18 I'm simply trying to elucidate the issues that are
19 being raised by the report.

20 MS. JENNIFER ROBERTS:
21 Exactly, sir. But I think -- I think Dr. Flintsch
22 raises real interesting potential theory. I just
23 think the statement can't be left as it is and
24 deserves further focus. Having said it, that it
25 needs to be looked at.

1 JUSTICE WILTON-SIEGEL: Let me
2 just make some notes if you don't mind. I've
3 tried to capture what we've been talking about in
4 the following.

5 I said most of the report is
6 intended to deal with whether the testing in 2007
7 can you used to contradict the evidence that the
8 testing done in -- sorry -- whether the testing in
9 2017 can be used to contradict the evidence that
10 the testing done in 2007 was sufficient to
11 conclude there was no reason to doubt the future
12 performance of the aggregate.

13 The state of the aggregate in
14 2017 is not challenged or the fact that it would
15 be a source of low friction by low microtexture.
16 However, there is some doubt about Dr. Flintsch's
17 suggestion the aggregate PSV declined testing
18 results, declined in line with the observed
19 decline in the friction numbers as tested by the
20 MTO.

21 MS. JENNIFER ROBERTS: Thank
22 you, Commissioner.

23 JUSTICE WILTON-SIEGEL: Is
24 that an adequate representation of what we're
25 talking about?

1 MS. JENNIFER ROBERTS: Yes, I
2 think you captured it perfectly. I realize that
3 in jumping ahead to that last question of the 2017
4 testing I jumped over one of the points which
5 you've covered in your summary, which is whether
6 the -- whether the comparison of the 2017 and the
7 use of that testing in compared to what was found
8 on the PSV testing in 1992 indicates a seam or a
9 consistent -- something about the way the rock was
10 quarried at the Varennes quarry. I think you've
11 captured it with what you've got, but that's
12 something I'm anticipating Dr. Baaj is going to
13 say having significant experience working with
14 aggregates, with LaFarge -- say, no, no, no, that
15 that can't be used, that testing cannot be
16 interpreted in that way. And it's not in fact
17 likely that the scene in 1992 is reflective of
18 what was found from aggregate excavated in 2007.

19 JUSTICE WILTON-SIEGEL: The
20 last point just -- and I just raise it because I
21 guess it will be an issue that someone will have
22 to address. It still leaves the question about
23 how we get from what was observed in 2007 and what
24 was observed in 2017.

25 MS. JENNIFER ROBERTS: Sorry?

1 JUSTICE WILTON-SIEGEL: We're
2 still left with the question of was there not a
3 decline in the quality of the aggregate between
4 2007 and 2017? But perhaps that's picked up by
5 the suggestion that the testing can't be compared.

6 MS. JENNIFER ROBERTS: I think
7 that's right. And if you want to look at the
8 quality of the aggregate resistant to polishing in
9 2007, that the correct test to be looking at is
10 the CPP test, not trying to speculate as to what
11 1992 might have shown you or what 2017 of the --

12 JUSTICE WILTON-SIEGEL: That's
13 fine. Thank you. I don't have any other
14 questions.

15 MS. JENNIFER ROBERTS: Thank
16 you. Then that's what I'm anticipating Dr. Baaj
17 will address, and I submit that the importance of
18 that testimony in relation to establishing the
19 aggregate was resistance to polishing and would
20 provide good frictional properties is important to
21 the terms of reference.

22 JUSTICE WILTON-SIEGEL: Thank
23 you. I'm going to reserve comment until the end
24 of the submissions today.

25 Just before we proceed, I

1 think I'm going to need another pen, so bear with
2 me for a second, I'm going to get one on my desk.
3 Okay.

4 MR. LEWIS: Now, Mr. John
5 Chen, Counsel for the City of Hamilton, has
6 submissions for the City of Hamilton and two
7 responding reports that the City is seeking to
8 help leave to file.

9 JUSTICE WILTON-SIEGEL: Mr.
10 Chen.

11 SUBMISSIONS BY MR. CHEN:

12 MR. CHEN: Thank you,
13 Mr. Commissioner and Commission counsel.

14 So as we've set out in our
15 written materials the City is seeking leave to put
16 forward evidence from two experts, David Hein on
17 the friction related topics, and Dewan Karim on
18 the road safety and design aspects.

19 You have their CVs,
20 Mr. Commissioner. Both Mr. Hein and Mr. Karim
21 have significant expertise in their fields. Their
22 expertise, as I understand it, is not in dispute.

23 Very briefly, Mr. Karim is
24 practice lead of the transportation engineering
25 and safety group at 30 Forensics and he

1 specializes in transportation engineering, planned
2 and traffic safety issues and he has over two
3 decades of experience in this area.

4 Mr. Hein is a principal
5 engineer at Applied Research Associates and his
6 expertise includes pavement design, evaluation,
7 pavement construction materials and he has actual
8 experience in friction testing and analysis on
9 various highways, including the 407, York region.
10 In that case it's very (sic) intersections, worked
11 on rehabilitation project as well.

12 I would just say Mr. Hein is
13 the only Canadian-based friction expert testifying
14 more broadly in this inquiry. Of course you just
15 heard from Ms. Roberts and Professor Baaj will be
16 speaking on a more limited issue.

17 So both Dr. Flintsch and
18 Mr. Brownlee address a number of topics in the
19 reports, spans 30 pages or so. The City
20 appreciates that this is not your typical
21 litigation responding report. To that end,
22 Mr. Hein and Mr. Karim come at this with a focused
23 approach. I appreciate that they touch on a
24 number topics but at the end of the day we say
25 it's on particular issues in that regard.

1 So the City's view is that
2 leave should be granted because Mr. Hein and
3 Mr. Karim will, one, on certain issues be
4 providing an contrary perspective from those
5 raised by Dr. Flintsch and Mr. Brownlee and, two,
6 they will also be opining on issues that are
7 unaddressed by those two experts. So we say in
8 our view each of those criteria should be
9 sufficient for leave to be granted so that the
10 inquiry can proceed on fulsome evidence.

11 This approach we say would be
12 consistent with the rules of procedure for this
13 inquiry, which is focused on evidence that is
14 helpful to fulfilling the mandate of an inquiry.
15 And I'm simply referring here to rule 3, which is
16 the general principle for receipt of evidence and
17 testimony of witnesses.

18 What falls into the helpful
19 category is broad. And again, taking guidance
20 from the rules, the experts would be witnesses
21 that are holding a contrary view, as I mentioned,
22 or challenging a view or commenting or
23 supplementing a particular point.

24 One of the great strikes of an
25 inquiry process is the ability for you,

1 Mr. Commissioner, to hear multiple and different
2 viewpoints. This strength is emphasized in a case
3 where we are dealing with not just a single, but a
4 plethora of technical concepts that are not well
5 established and deserve to be debated.

6 Of course at the forefront is
7 the analysis of roadway friction but even that, I
8 think as you've just heard from Ms. Roberts, can
9 devolve into a number of other technical-related
10 questions. Road safety and design are not any
11 simpler.

12 But beyond the responses that
13 Mr. Hein and Mr. Karim will make there is a
14 further reason that we would ask you to bear in
15 mind which we flagged in our written material. Of
16 course outside this inquiry there are a number of
17 other active legal presentation respecting the Red
18 Hill Valley Parkway. Part of this inquiry we of
19 course expect you will make numerous findings as
20 it relates to the terms reference. Those
21 findings, although made in this context, may have
22 influence in those other legal proceedings.
23 Obviously they can't say for sure it will happen
24 but as a lawyer I think that's something we can
25 predict with reasonable confidence. For that

1 reason, again bearing -- being open to hearing
2 different viewpoints and receiving a balanced
3 response especially technical issues, which is
4 where they're mostly desired -- elsewhere, is
5 important in our view.

6 Just as final opening point,
7 the City appreciates that there are competing
8 interests at play and that the Commission is not
9 looking for duplicative evidence and would like to
10 expert phase to be efficient. This is top of mind
11 for us. And as I say Mr. Hein and Mr. Karim will
12 be efficient in providing pointed responses. We
13 expect these pointed responses will be insightful
14 and helpful and will get into the issues that
15 we've raised, and we don't expect them to add
16 significantly to any schedule. I think they have
17 been allotted about two days or less, so in our
18 view there is lots to be gained there.

19 So just with those opening
20 remarks what I propose to do is go through the
21 categories and the materials that we have filed
22 and explain its significance.

23 JUSTICE WILTON-SIEGEL: Sure.
24 Just before we begin can I raise one question in
25 respect of the three reasons, three general

1 reasons that you raised in your covering letter?

2 MR. CHEN: Yes.

3 JUSTICE WILTON-SIEGEL: Item
4 one seems to suggest that the terms of reference
5 include finding whether or not the collisions on
6 the Red Hill Valley Parkway are higher than on
7 other roadways with similar characteristics. I'm
8 not aware of any provision in the terms of
9 reference that require such a finding.

10 MR. CHEN: In our view that
11 particular point is particularly important because
12 it deals with the terms of reference that address
13 whether there is any misconduct or negligence in
14 failing to disclose the report and its
15 recommendations, and it goes to impact, as I say,
16 of not disclosing the report.

17 The comment about high, wet
18 road collisions is often assessed in totality with
19 the other evidence, such as the friction level, to
20 understand what, if any, countermeasures should be
21 implemented. So when we consider the effects of
22 not disclosing the report we say there is a
23 corresponding question of what information was
24 known through -- and relevant.

25 So to us to a key point would

1 be whether in fact the Red Hill Valley Parkway had
2 an overrepresentation of collisions, including wet
3 road collisions. We've heard an abundance of
4 evidence not only from the fact of this is being
5 asked about wet road collisions, but also the
6 experts such as Dr. Flintsch includes as part of
7 his conclusion, that drives his conclusion, that
8 there there's a -- I think the wording is
9 something to the effect of very high proportion of
10 wet road collisions.

11 So by looking into this
12 particular point and doing it properly, because we
13 say that it hasn't been done properly and we can
14 talk about Brian Malone's evidence to that effect
15 where he makes the comparison to provincial
16 averages but acknowledges that is not an apples to
17 apples comparison because what you need to look at
18 is --

19 JUSTICE WILTON-SIEGEL: Let's
20 just stop for a second.

21 There are two very different
22 issues. The proportion of wet weather accidents
23 on the highway, and that came to be assessed at
24 particular locations, and then the much more
25 general question of collisions on the Red Hill

1 Valley being higher than other roadways. This
2 refers to the latter and I don't see how that is
3 within the terms of reference.

4 MR. CHEN: So the analysis
5 will be segmented, and obviously this will be -- I
6 hope I'm doing justice to the experts -- will be
7 segmented, so there will be an overall comparison.
8 And as it relates to ramps or the wet road areas,
9 I understand there will be a comparison based on
10 proxies. So it's going to be, as I understand it,
11 an apples to apples comparison.

12 JUSTICE WILTON-SIEGEL: Let's
13 proceed through these. I wanted to understand
14 what the thinking was, because I'm not at all
15 convinced at the present time that the terms of
16 reference require that I make any finding with
17 respect to whether the collisions -- and I'm
18 talking now collisions on the highway,
19 expressway -- are higher than other roadways with
20 similar characteristics, beyond what we have in
21 front of us. But let's proceed with --

22 MR. CHEN: If I could just
23 clarify. You used the term roadways. It would be
24 of course the highway to highway --

25 JUSTICE WILTON-SIEGEL: I

1 didn't use the term roadways; you used the term
2 roadways.

3 MR. CHEN: I apologize if I
4 did.

5 JUSTICE WILTON-SIEGEL: Why
6 don't you proceed through what you want to say
7 with respect to Mr. Hein's report.

8 MR. CHEN: 1A. If we go to
9 appendix A of our written material,
10 characterization of friction levels. Talking
11 about characterization of friction levels. So in
12 his report Dr. Flintsch goes through the friction
13 data from locked wheel to the grip tester
14 measurements, and in numerous places Dr. Flintsch
15 concludes that the friction results are relatively
16 low.

17 So Mr. Hein will provide a
18 contrary review here. He doesn't accept
19 Dr. Flintsch's conclusion that the results are
20 relatively low and his anticipated view is that
21 the friction results are reasonable based on --

22 JUSTICE WILTON-SIEGEL: And I
23 can help you a little bit on this one. This seems
24 to me to be an example of a category that should
25 be relatively straightforward. As I understand it

1 there would be no new evidence adduced. It would
2 simply be his opinion based on the evidence that
3 is already before the commission; is that correct?

4 MR. CHEN: Yes, that is
5 correct. He won't be bringing comparator friction
6 results.

7 JUSTICE WILTON-SIEGEL: Right.
8 And I would understand to be the same with respect
9 to B.

10 MR. CHEN: To B, that's
11 correct. Obviously with the caveat that he may be
12 referring to any studies or papers that he is
13 aware of. Especially with respect to the friction
14 value conversion. I think he has a view on that
15 and the availability of papers that support his
16 position.

17 JUSTICE WILTON-SIEGEL: Let me
18 just make some notes here. Correct me if I'm
19 wrong, but I would assume the same is true with C.

20 MR. CHEN: Same is true with
21 C, that's right. Again, with the caveat he may
22 include reference to papers or studies and
23 whatnot.

24 JUSTICE WILTON-SIEGEL: Right,
25 in the same way as Dr. Baaj might refer to the

1 scientific basis for his opinion.

2 MR. CHEN: So that takes us to
3 D, which the applicability of the UK --

4 JUSTICE WILTON-SIEGEL: My
5 question here is to what extent is he intending to
6 provide additional fact evidence?

7 MR. CHEN: So my understanding
8 is -- just set up the position he is -- his view
9 is that the (indiscernible) development and
10 different criteria, so to the extent that him
11 referring to studies in how the UK guidelines are
12 developed and what conditions and whether they can
13 be applied in the Canadian context, I think that
14 would be the extent of the research or discussion
15 that he would be providing.

16 It's a point that Dr. Flintsch
17 urges, the application of UK guidelines, but
18 there's, on our read and Mr. Hein's read, little
19 substantive discussion on why we should be
20 applying the UK guidelines whether they can be
21 appropriately applied.

22 JUSTICE WILTON-SIEGEL: Well,
23 it's one thing to give an opinion as to whether
24 they can be appropriately applied. It's another
25 to provide a whole lot of new evidence that might

1 have been adduced a long time ago.

2 MR. CHEN: Mr. Hein will come
3 at it with his broad experience and expertise with
4 respect to the standards he has seen.

5 JUSTICE WILTON-SIEGEL: His
6 experience is in Canada, correct?

7 MR. CHEN: His experience is
8 in Canada, but beyond that as well he's worked in
9 the US, as an example.

10 JUSTICE WILTON-SIEGEL: That's
11 not the UK. I'm trying understand how he is going
12 to be able to adduce any new factual evidence, and
13 indeed why he should be allowed to -- as opposed
14 to providing his opinion for his conceptual
15 reasons he doesn't believe it should be relied
16 upon.

17 MR. CHEN: And perhaps we may
18 be saying the same thing and I'm perhaps
19 misunderstanding the question.

20 JUSTICE WILTON-SIEGEL: But
21 we're going to end up having to say the same
22 thing.

23 MR. CHEN: I appreciate that.
24 But I think the majority of his analysis will be
25 based on the differences, which frankly he has

1 cited to me without reference to papers. One of
2 the comments that Commission counsel had raised to
3 us is whether there's a potential that he will be
4 relying on new evidence, and I frankly took that
5 to mean papers as well, and I was just -- that was
6 my additional input. He is going to focus on his
7 experience and why the guideline is different and
8 he'll put forward the red flags that should be
9 considered before -- so that you have that to
10 consider on the question of the applicability of
11 the UK guidelines.

12 I'm content, though, that we
13 are saying the same thing, Mr. Commissioner.

14 JUSTICE WILTON-SIEGEL: In
15 other words, no new factual evidence.

16 MR. CHEN: No new factual
17 evidence.

18 JUSTICE WILTON-SIEGEL: His
19 comment or his opinion based on his personal
20 experience.

21 MR. CHEN: Understood.

22 JUSTICE WILTON-SIEGEL: Okay.

23 Let's turn to E. What is contemplated by E?

24 MR. CHEN: So --

25 JUSTICE WILTON-SIEGEL: I'm

1 sure the MTO would be pleased to know that he
2 regards their use of FN30 as reasonable, but I'm
3 not sure anyone is objecting to it.

4 MR. CHEN: So we think there
5 is value.

6 JUSTICE WILTON-SIEGEL: What
7 exactly is contemplated by this?

8 MR. CHEN: So Mr. Hein's
9 anticipated evidence will be the FN30 guideline is
10 a reasonable one to apply to municipalities, that
11 it's a conservative threshold suitability for
12 municipalities, and he will base that opinion on
13 his previous experience.

14 We have Dr. Flintsch, who
15 although goes through an expensive analysis of
16 friction, he explicitly avoids opining on the
17 application of the FN30 guideline, but we also
18 know the FN30 guideline is really the only
19 (indiscernible) or Ontario-based guideline that we
20 have, and I think there's value in at least having
21 the Canadian friction expert speak to the FN30
22 threshold and whether that is one that should
23 apply to the City of Hamilton.

24 JUSTICE WILTON-SIEGEL: Again,
25 that's without any new factual evidence, simply

1 his views with respect to that; is that correct?
2 He's not actually acted -- he's not been a member
3 of the -- or an MTO employee; is that correct?

4 MR. CHEN: I don't believe
5 he's been an MTO employee. I guess that's a
6 problem with having an extensive resume. I can
7 confirm that, but my instinct is that he has not
8 been employed. That's not to say he hasn't
9 provide some services as a consultant throughout
10 the years.

11 JUSTICE WILTON-SIEGEL: I
12 guess my reaction is if he wants to say it's a
13 reasonable number it may not be objectionable but
14 it's not really going to have any influence
15 because of two things.

16 One, the MTO's evidence was a
17 little bit more refined. It was up and down
18 depending upon the circumstances in which one was
19 analyzing matters. Secondly, whether it is or is
20 not a reasonable standard is ultimately. If there
21 is such a thing, a scientific question, not a
22 question of practice. There's no suggestion that
23 the practice is improper. There's no suggestion
24 at the present time that there is any issue with
25 any scientific basis of 30. In fact, there is no

1 scientific 30 basis, it's a rough and ready guide.

2 So with those qualifications

3 what exactly is Mr. Hein going to add?

4 MR. CHEN: With respect, I
5 appreciate MTO's evidence was refined, but at the
6 end of the day it wasn't expert evidence from
7 someone who has worked in the --

8 JUSTICE WILTON-SIEGEL: How is
9 his expert evidence -- where is the expertise --
10 as opposed to experience he's observed something,
11 but where is the expertise in this evidence?

12 MR. CHEN: So --

13 JUSTICE WILTON-SIEGEL: Where
14 is the scientific basis for something he's going
15 to say?

16 MR. CHEN: And I understand
17 your point on that. Our discussions with him
18 specifically on this point, having been as refined
19 as I think questions you're asking me in the
20 limited time, but when he talks about the
21 conservative -- as I mentioned he thinks that it's
22 conservative threshold suitable for
23 municipalities, he can draw on his experience as
24 to what other jurisdictions I think he has seen
25 and can make a comment on that.

1 JUSTICE WILTON-SIEGEL: You
2 see, that seems to me to be more in the nature new
3 evidence of a factual nature.

4 MR. CHEN: And I don't think
5 I completely agree with that. I do think in the
6 Brownlee reports and the Flintsch report there is
7 some new material in there and --

8 JUSTICE WILTON-SIEGEL: What's
9 the new -- what you just described -- I'll repeat
10 your words. He can describe what he has seen done
11 by other municipalities. That doesn't strike me
12 as anything more than factual evidence.

13 But incidentally, that seems
14 to relate to the next category of question, not to
15 this category of question which is about the MTO's
16 use of FN30.

17 MR. CHEN: That's correct, and
18 the majority of the discussion in this section by
19 Mr. Hein will be, as I say, that the guideline is
20 a reasonable one for municipalities to apply, and
21 again that is a perspective from an expert I think
22 we do not have on the record and would benefit
23 from so that we have a well-rounded discussion.

24 JUSTICE WILTON-SIEGEL: So
25 this is really -- your issue is not so much E as

1 in F.

2 MR. CHEN: E as in?

3 JUSTICE WILTON-SIEGEL: Rather
4 F. That the standard of FN30 is a reasonable one
5 for municipalities. Isn't F the --

6 MR. CHEN: Are you referring
7 to --

8 JUSTICE WILTON-SIEGEL: Oh,
9 I'm sorry no, there's no F. It's number 2. E is
10 -- I apologize. Assuming if I flipped page I
11 would find F. E is just a lead up to number 2.

12 MR. CHEN: I agree with that
13 the -- yes.

14 JUSTICE WILTON-SIEGEL: So I'm
15 not sure that you've yet identified why E is
16 useful or indeed why E is expertised. That's
17 dealing with the MTO's use of FN30. Perhaps it's
18 a word choice of mine, but it's the municipalities
19 -- the application of the MTO's FN30 to
20 municipalities. That's what that heading is meant
21 to convey.

22 But both E and 2, in my
23 submission, falls under the category of Mr. Hein
24 is the only Ontario-based expert that has this
25 expertise and can provide a unique perspective

1 based on his experience.

2 JUSTICE WILTON-SIEGEL: So
3 you're saying E is supposed to be the use by
4 municipalities of FN30.

5 MR. CHEN: Correct. 2 is a
6 bit more general just in the sense of friction
7 management programs and whether those existed in
8 Ontario.

9 JUSTICE WILTON-SIEGEL: Well
10 -- so let's just deal for a second with F (sic).

11 MR. CHEN: 2?

12 JUSTICE WILTON-SIEGEL: No.
13 E, not F. Why in the context of this inquiry
14 where there was no friction management program,
15 would it be helpful to the inquiry to be told that
16 FN30 is a useful standard for municipalities that
17 have a friction management program?

18 MR. CHEN: The --

19 JUSTICE WILTON-SIEGEL: Are
20 you thinking that the inquiry should recommend
21 that municipalities have a friction management
22 program?

23 MR. CHEN: No, I'm not going
24 that far. The point about the FN30 is to provide
25 a framework under which we can assess the friction

1 test results that were obtained and from that draw
2 various conclusions as to -- of course with other
3 evidence, as to the safety of the roadway, whether
4 investigations are needed, countermeasures, and
5 so. That's the intent of E, so that there is
6 something to measure the friction results against
7 and to keep in mind that Dr. Flintsch is unclear
8 what his views are about the FN30 but as he seems
9 to be pushing the UK guidelines for the -- for you
10 to measure the friction test results based on the
11 UK guidelines.

12 So the simple point we're
13 making is that the FN30 is the guideline or
14 threshold that we should be looking at because
15 it's the one that was developed here. And going
16 back to the other point about whether the UK
17 guidelines are applicable, Dr. Hein will raise the
18 red flags so that you can consider when you're
19 trying to balance, assuming you have to go through
20 that analysis, when you're trying to balance
21 between well is it -- how can I look at these
22 numbers, is it the MTO's FN30, is it the UK
23 guidelines. It strikes me if we don't have a
24 guideline that we can say we go on then the
25 number, the friction numbers have little meaning

1 --

2 JUSTICE WILTON-SIEGEL: But
3 I'm now confused. Obviously in assessing
4 friction, or the traffic safety generally, the
5 City never had the MTO numbers.

6 MR. CHEN: Right.

7 JUSTICE WILTON-SIEGEL: So all
8 they had was the Tradewind report, and Dr.
9 Flintsch's evidence is that they shouldn't have
10 ignored it -- oversimplifying, I appreciate -- and
11 for much of the terms of references that all we
12 have.

13 Now, what's the context in
14 which you think that it is useful for the inquiry
15 to be told that the MTO numbers are credible and
16 should be preferred to those of the Tradewind
17 report. I think that's where you're headed.

18 MR. CHEN: That is where we're
19 headed. Of course there's the reference to the
20 2007 that there was knowledge of.

21 JUSTICE WILTON-SIEGEL: But
22 that's not really relevant for that. That's got
23 to do with a different problem all together.

24 MR. CHEN: We still see that
25 as a dataset that's --

1 JUSTICE WILTON-SIEGEL: Fine.

2 MR. CHEN: -- and I think --

3 JUSTICE WILTON-SIEGEL:

4 Believe me, that's not going to be determinative.

5 So deal with the bigger question.

6 MR. CHEN: Fair enough.

7 JUSTICE WILTON-SIEGEL: What's
8 the context in which -- apparently you want the
9 inquiry to disregard the Tradewind report and
10 prefer the MTO results. I'll stop there.

11 MR. CHEN: Well, the Tradewind
12 report, obviously it references the grip tester
13 numbers, and by accepting the MTO's FN30 I think
14 it puts the grip tester, Tradewind numbers, in
15 context, which is always that how do we understand
16 these numbers and what do they mean.

17 JUSTICE WILTON-SIEGEL: I'm
18 asking what's the context in the sense of what are
19 the questions under the terms of reference that
20 the inquiry has to address where you say the
21 inquiry is going to be urged to disregard the
22 Tradewind report and consider the MTO numbers are
23 somehow determinative.

24 MR. CHEN: I think a number of
25 terms of reference go to that point, and the ones

1 talk about what's the impact of not disclosing the
2 report and whether that would have led to --
3 whether that contributed to accidents, whether
4 that contributed to -- whether that would have
5 lead to other road safety changes.

6 I should be clear that we're
7 not asking you to completely disregard the UK
8 guidelines. It's more of a Dr. Hein, as I said
9 before, will put red flags up but it's also to
10 look at it from the lens of the FN30.

11 I think both of those
12 thresholds, and what they mean, address a number
13 of these terms of reference that -- you know,
14 whether they are the users of the Red Hill were
15 put at risk as a result of failing to disclose the
16 report, because we need the standard to understand
17 the friction numbers and what they are suggesting.

18 JUSTICE WILTON-SIEGEL: I'm
19 not sure that I fully understand then what E is
20 all about but....

21 MR. CHEN: Perhaps there's
22 something I can clarify that exists with that
23 point.

24 Dr. Flintsch I think was --
25 stepping back. Dr. Flintsch puts forward the UK

1 guidelines said we should look at the numbers
2 through that lens. We say we should look at it
3 through the MTO's FN30. Dr. Flintsch does not
4 offer an opinion on why we should use the FN30.
5 Mr. Hein comes in and does exactly that.

6 So frankly whichever --
7 whatever purpose the UK guideline discussion goes
8 through in the terms the reference we say the
9 discussion under FN30 point would go to the same
10 terms of reference. It's just a matter of which
11 road you go down or which standard you follow.

12 JUSTICE WILTON-SIEGEL: Okay.
13 I think -- there's a certain air of unreality to
14 this, or level of generality which I think really
15 misses the evidence, which is that from 2013 to
16 2018 there was a terrific evolution, as according
17 to the evidence, in terms of what people -- what
18 the traffic safety consultants, like CIMA, and the
19 staff themselves came to concentrate on, and these
20 aggregate numbers really cease to have any
21 significance. As the concentration came to be
22 about certain locations, northbound and
23 southbound, under certain environmental
24 conditions.

25 So speaking for myself, I

1 think the evidence of the MTO that's most useful
2 and nuanced is about how they looked at accident
3 locations and how they factored friction in as one
4 of a number of matters.

5 But if the exercise here is
6 simply again to provide an opinion without any
7 additional factual evidence, an opinion that FN30
8 is a reasonable standard, I suppose it's
9 innocuous.

10 MR. CHEN: I think the
11 analysis is one that takes into account a number
12 of factors, and I appreciate the point you've made
13 about friction being one aspect of the analysis,
14 and of course the wet road collision is another
15 one. That said, there needs to be some foundation
16 set, and obviously the MTO has done a lot of that
17 and I have to go back to the point of Dr. Hein
18 being the only one who can provide the expert
19 evidence on that point.

20 JUSTICE WILTON-SIEGEL: Let's
21 turn to the more difficult (ph) one in number 2.

22 MR. CHEN: Friction management
23 programs.

24 JUSTICE WILTON-SIEGEL: Right.
25 So the evidence before the inquiry right now is

1 that no municipality in Ontario has a friction
2 management program.

3 MR. CHEN: I think that's
4 correct, and it's come out in, for example, the
5 agreement between counsel. I certainly don't
6 think it's well developed. I did go back --

7 JUSTICE WILTON-SIEGEL: I
8 think the evidence -- I'm not sure how you can
9 develop a negative. The evidence of Mr. McGuire
10 was that he attempted to ascertain whether any
11 municipality had a friction management program.
12 He had conversations with a counterpart or someone
13 in Ottawa, was told they did not. Mr. Moore was
14 very emphatic, I believe, that there was no
15 friction management programs in any Ontario
16 municipality. So what exactly is this intended to
17 speak to?

18 MR. CHEN: Of course one of
19 the distinguishing features is that Mr. Hein is an
20 expert and he provides the expert perspective and
21 he's obviously brought expertise, decades of
22 experience, worked with many municipalities, so he
23 will speak to --

24 JUSTICE WILTON-SIEGEL: I
25 think you're treading water.

1 MR. CHEN: And just be a bit
2 more nuanced on the point, he will speak to
3 Ontario municipalities not having friction
4 management programs, but also, as I understand it
5 from him, why that is the case.

6 JUSTICE WILTON-SIEGEL: He's
7 not -- this is not a matter in which he's an
8 expert. At best this is his view based on his
9 experience, whatever it may have been, with
10 municipalities over the years.

11 MR. CHEN: I think his
12 experience can be categorized, specialized
13 experience, in the sense he's done this work for
14 decades and has a nuanced appreciation much more
15 than some of the fact --

16 JUSTICE WILTON-SIEGEL: What
17 is he going to say?

18 MR. CHEN: So the trouble, and
19 just to be upfront on that, is that the report is
20 not complete and I don't -- I can't summarize what
21 his position is, and of course he's a bit hesitant
22 to provide all the details having not done the
23 work and --

24 JUSTICE WILTON-SIEGEL:
25 Mr. Chen, if your client had wanted to provide

1 this evidence they had three-and-a-half years to
2 provide it, including their own participants. If
3 this is evidence that you think is important I
4 think it would be much more appropriate for
5 representatives of municipalities who are actually
6 knowledgeable in terms of their own experience to
7 come in and to provide that in some way or
8 another, in other words to work up a proposal that
9 gets this evidence in a more balanced way than
10 what you're proposing, which is inevitably
11 dependent entirely upon his experience at certain
12 times in certain places.

13 MR. CHEN: Our understanding
14 was that this sort of evidence from Dr. Hein
15 should be left until the expert phase to deal
16 with.

17 JUSTICE WILTON-SIEGEL: I'm
18 not suggesting if you feel that it's important
19 evidence, it may be that there's a proposal that
20 can be worked out with Commission counsel that
21 involves getting the actual knowledgeable parties
22 of municipalities to provide that evidence. But I
23 don't think Mr. Hein is an expert in this. He's
24 never worked for municipality. It's entirely --
25 it's episodic.

1 MR. CHEN: I just want to be
2 -- just want to ensure that we are giving credence
3 to Mr. Hein's expertise as it relates to friction
4 and his involvement with municipalities. I wasn't
5 aware that his expertise would be in dispute, and
6 if there's any way we can have an opportunity to
7 flush that point out and draw out more
8 experiences, I think that would be helpful for the
9 commission to have. It's not merely fact
10 evidence. We say it's expert evidence.

11 Just up on the point that it's
12 not fully developed -- of course we come at this
13 as a leave motion, not needing to have fully
14 developed a report which may ultimately not be
15 granted.

16 JUSTICE WILTON-SIEGEL: I
17 fully understand their limitations, haven't done
18 the report. I think if this evidence is
19 appropriate it may be necessary to consider
20 another route by which it is -- or another means
21 by which the evidence is adduced. But we'll leave
22 it at that for a moment.

23 MR. CHEN: Thank you,
24 Commissioner.

25 JUSTICE WILTON-SIEGEL: Number

1 3. This may duplicate something of what Golder is
2 doing; is that right?

3 MR. CHEN: That's correct,
4 Mr. Commissioner, it's about aggregate quality,
5 which you had in extensive discussion with Ms.
6 Roberts. So Dr. Flintsch draws various
7 conclusions about the aggregate quality and
8 frictional values based on the polished stone
9 values obtained in 2017 on the Red Hill. In
10 particular, Dr. Flintsch makes a connection
11 between the 27 PSV testing and frictional decline,
12 which again you discussed, and we agree with Ms.
13 Roberts it's a really interesting question without
14 an answer.

15 So Mr. Hein's focus is going
16 to be I think what we categorized the second part
17 of Ms. Roberts analysis. I think the first part
18 is focused on all the existing testing already
19 done and what that shows with respect to the
20 polishing qualities. We're happy to leave that to
21 Professor Baaj.

22 As Ms. Roberts was talking, I
23 was trying to think about a way we can streamline
24 this a little bit to avoid duplication so I -- the
25 beauty of an inquiry is that we can be creative

1 about certain things so if there's collaboration
2 to be had so that -- either the panel or sole
3 voice so be it. But that is the point there.

4 JUSTICE WILTON-SIEGEL: Okay.
5 Just in the interest of time, as well as
6 everyone's cost, it would seem that if the point
7 that Dr. Baaj is addressing is the same as the
8 point that Mr. Hein would be addressing, wouldn't
9 be any need for Dr. Hine's evidence, especially
10 his -- well, I won't say it but -- two people
11 saying the same thing is not going to have any
12 more --

13 MR. CHEN: To the extent that
14 they are going to be analyzing it the same way,
15 what they may come to the same conclusion for
16 different reasons. But as I say that, I will make
17 one distinction which is Ms. Roberts pointed out
18 it would be awkward for her to dispute her own
19 client's findings on the PSV of 45 in 2017.

20 My understanding is that
21 Mr. Hein takes a different view and would like to
22 look into whether PSV testing on the aggregate
23 that's been in service for 10 years is a reliable
24 way of conducting the test.

25 As I understand it, his

1 knowledge is what the PSV testing -- definitely
2 done on virgin aggregates.

3 Ms. Roberts has jumped on.

4 MS. JENNIFER ROBERTS: I don't
5 mean to intrude, but it just occurs to me there is
6 an opportunity to have a dialogue with counsel on
7 this to make sure that we're (skipped audio) and I
8 will make sure we do that.

9 JUSTICE WILTON-SIEGEL: Thank
10 you. So that takes us to number 4.

11 MR. CHEN: Number 4, tire
12 measures. Dr. Flintsch concludes that resurfacing
13 or microsurfacing is a treatment that could have
14 resulted from a detailed safety analysis. So Mr.
15 Hein will provide a different view on what
16 countermeasures he believes was necessary to
17 implement based on the available information, and
18 you'll see in Mr. Hein's resume that he has
19 significant expertise on pavement management and
20 rehabilitation. (Indiscernible) career in Ontario
21 so he can offer a unique perspective in that, on
22 that front. And his anticipated opinion will
23 discuss the factors that are considered before
24 implementing a particular countermeasure.
25 Previous engagements about that. And in respect

1 of the 2014, his anticipated opinion is that it
2 was not unreasonable for the City to focus on
3 other countermeasures.

4 JUSTICE WILTON-SIEGEL: And
5 that's fair. That seems to be a relatively
6 straightforward question of giving us his opinion
7 based on the facts that are in the record.

8 MR. CHEN: That's a fair
9 assessment.

10 JUSTICE WILTON-SIEGEL: So
11 that takes us to number 5. What are you saying
12 here?

13 MR. CHEN: Also the last
14 topic. This is talking about the identification
15 and categorization of factors that are proposed as
16 contributing to wet road collisions, which is
17 detailed in (indiscernible).

18 So the conclusion that Dr.
19 Flintsch draws here is that he just doesn't have
20 enough scientific evidence to do the analysis.
21 It's not clear to me what that means, but Mr. Hein
22 intends to build on that point. His point of view
23 is that every accident, whether wet road or not,
24 has its own factors that may have contributed to
25 the accident and the idea of being able to

1 pinpoint or rank one factor over another in
2 generality or a vacuum just doesn't work based on
3 his experience. So to actually draw a conclusion
4 about factors and rank there needs to be an
5 analysis of each accident. So again here he's
6 going to be relying on his experience, but he's
7 mentioned to me some previous work that he's done
8 in this area.

9 JUSTICE WILTON-SIEGEL: So,
10 Mr. Chen, these paragraphs and comparable
11 paragraphs in respect of Mr. Karim appear to throw
12 together several different possible issues. The
13 first and easiest to deal with is the question of
14 whether having identified contributing factors to
15 accidents on the road -- again I say under certain
16 conditions at certain location -- it is possible
17 to rank one as more significant than another or
18 rank them in order.

19 I accept that that's a
20 legitimate question of opinion and that there
21 appears to be a difference between Mr. Brownlee,
22 who says he's comfortable doing that, and Dr.
23 Flintsch, who says in the absence of any
24 scientific explanation, he's not comfortable doing
25 that -- not comfortable in doing that.

1 But then there is the more
2 fundamental question about whether it is
3 meaningful to talk in terms of contributory
4 factors in the absence of accident
5 reconstructions.

6 Now, what I'm not sure of is
7 whether that is what you're suggesting Mr. Hein is
8 of the opinion because there are some significant
9 consequences to that kind of approach. I'm not
10 saying that he couldn't have that opinion, but I
11 want to know first whether that's what the City's
12 expert is proposing.

13 MR. CHEN: Mr. Hein is
14 proposing to speak to why it's not possible to
15 rank them in the absence of an accident
16 reconstruction.

17 JUSTICE WILTON-SIEGEL: He's
18 not taking exception to the conclusions of CIMA
19 and the staff that there were contributory factors
20 that were enumerated, is that correct? Just the
21 ranking of the contribution in respect of any
22 particular accident.

23 MR. CHEN: So I think Mr. Hein
24 would disagree with being able to immediately
25 identify a set number of factors that could

1 potentially contribute to a collision. You would
2 have to look at the accident itself to say whether
3 --

4 JUSTICE WILTON-SIEGEL: In
5 respect of any particular accident.

6 MR. CHEN: In respect of any
7 particular accident, as I understand the opinion.

8 JUSTICE WILTON-SIEGEL: I want
9 to be very clear about this. I've written down
10 that the opinion would be that you can't rank or
11 even identify particular contributory factors in
12 respect of any particular accident in the absence
13 of an accident reconstruction of that accident.

14 MR. CHEN: That's correct.

15 JUSTICE WILTON-SIEGEL: The
16 question is -- that may be true but that's not the
17 approach to traffic safety, that as underlain the
18 approach of CIMA and the staff. That may be true
19 in respect of particular accidents but they have
20 said on a, if you like, a more aggregate basis it
21 is possible to conclude that there were various
22 identified contributory factors in respect of wet
23 weather accidents at particular locations on the
24 expressway, and that analysis provided the basis
25 for the recommendation that went to counsel. So

1 my question is whether Mr. Hein is challenging
2 that approach.

3 MR. CHEN: Hein is challenging
4 the approach of when you're looking at a
5 particular accident. I think what CIMA is doing
6 is drawing conclusions about what may be
7 contributing, and in Mr. Hein's view that's not
8 helpful in terms of determining in a particular
9 accident what the causes are.

10 JUSTICE WILTON-SIEGEL: But
11 we're not engaged in this inquiry in determining
12 the cause of any particular accident. We're
13 engaged in assessing, in the broadest sense, the
14 safety of this highway, but more particularly the
15 approach to safety on this highway of the City
16 through the City staff in reliance on CIMA's
17 consultancy and their own professional opinion, as
18 we keep being told.

19 And that is that there are
20 various contributory factors -- friction one of
21 them, geometry another, speed, another -- that
22 have contributed to a disproportionate rate of wet
23 weather accidents on this highway.

24 Now my question is, is it your
25 understanding that Mr. Hein's testimony, and for

1 that matter Mr. Karim's, challenges those basic
2 assumptions, if you like, the basic approach to
3 traffic safety.

4 MR. CHEN: To that I would say
5 they both challenge the way that, for example, Mr.
6 Brownlee has ranked the --

7 JUSTICE WILTON-SIEGEL: Set
8 aside ranking. I set aside ranking. If that's
9 all we're talking about we can pass onto something
10 else, but the words that you have written are
11 susceptible of a much more fundamental allegation.

12 MR. CHEN: Just so I
13 understand. I think the interpretation that you
14 are taking from the -- from the materials is that
15 -- does not possible even in a general sense to
16 identify contributing factors to a motor vehicle
17 collision and a curve.

18 JUSTICE WILTON-SIEGEL: Not to
19 a motor vehicle collision. To motor vehicle
20 collisions as they have been collected in
21 accordance with accident collision statistics.

22 MR. CHEN: On that point I
23 think there is likely agreement that at least from
24 Mr. Karim as to the potential factors that may
25 contribute to accidents generally, but if we look

1 at a particular accident then of course they have
2 a much different perspective.

3 JUSTICE WILTON-SIEGEL: Sure.

4 I say again, I'm not aware we are looking at any
5 particular accident.

6 MR. CHEN: When we read the
7 TNS, the Brownlee report, and one of the
8 inferences that can be made and we're -- we want
9 to be alert to, is what is being inferred from
10 those factors. And I think it goes towards the
11 point of one drawing the conclusion we should
12 always assume that if it's friction for a
13 particular accident it's the conclusion that of
14 course we want to avoid.

15 JUSTICE WILTON-SIEGEL: Well,
16 that's fair. That's a matter of opinion.

17 I just want to know how much
18 further the opinion is going because at some
19 level, put it on the table, if there's a more
20 fundamental attack on the way or the approach --
21 let me use that more general term -- that CIMA has
22 adopted and the staff adopted and used as the
23 basis for the recommendations to counsel, then
24 that might raise issues of concern to those small
25 'p' participants in the traffic safety analysis of

1 the City from 2013 to 2018, and they might have
2 some belief they're entitled to respond to that
3 attack on their professional competence.

4 MR. CHEN: Fair enough,
5 Mr. Commissioner.

6 JUSTICE WILTON-SIEGEL: And I
7 say that that would have significant timing and
8 cost consequences to this inquiry that I wonder
9 whether can be justified.

10 But if the opinion is really
11 down to saying that Mr. Hein doesn't think you can
12 rank contributory factors, then that's a much
13 simpler straightforward exercise in judgment.

14 MR. CHEN: I agree.

15 JUSTICE WILTON-SIEGEL: Can I
16 proceed on the basis that that's what was intended
17 by number 5?

18 MR. CHEN: I think that is the
19 majority of it, and I take your point that the
20 inquiry is not about any particular accident,
21 which of course was -- it goes back to the third
22 point I made at the opening with respect to the
23 existence of active legal proceedings beyond this
24 inquiry.

25 JUSTICE WILTON-SIEGEL:

1 Mr. Lewis has joined us for a moment.

2 MR. LEWIS: I simply wanted to
3 observe that neither Dr. Flintsch nor Mr. Brownlee
4 were purporting to opine on any particular
5 accident. It was, I think, as Commissioner you
6 said, it's in the aggregate that that term can be
7 used. There wasn't any intention of adjusting
8 otherwise. Thank you.

9 JUSTICE WILTON-SIEGEL: I note
10 that it's almost 11:15. I think in the course of
11 this we have probably fleshed out all but one of
12 the major issues. I'm in the hands of counsel as
13 to whether they wish to proceed without a break or
14 take a ten minute break.

15 MR. CHEN: I'm happy to take a
16 quick ten minute break if that's okay,
17 Mr. Commissioner.

18 JUSTICE WILTON-SIEGEL: Okay.
19 Then let's adjourn until 25 past 11:00.

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

21 --- Upon resuming at 11:27 a.m.

22 JUSTICE WILTON-SIEGEL: Okay,
23 Mr. Chen, why don't you continue.

24 MR. CHEN: In our previous
25 discussion on the friction management program you

1 had raised what expertise Mr. Hein has in dealing
2 with various municipalities. I just did a quick
3 look at his resume. And just to list a couple for
4 you, and I don't want to belabour that point, it
5 stands from York municipality, Niagara Falls,
6 Halifax, Calgary, Regina, just to name five of
7 them. And he's also been part of this TAC update
8 team in respect of a pavement management guide.
9 Just to emphasis the point that he's worked with
10 diverse municipalities and can offer a perspective
11 different than a lay witness.

12 Of course, the followup of
13 that is he is unlike any witness and has the
14 expertise to opine on that issue.

15 Moving onto appendix B. There
16 are two categories that are left to be discussed,
17 although of course the collision statistics we had
18 a mini discussion at the start. But 1(a) of
19 appendix B, which is the intended use of geometric
20 guidelines. So Mr. Brownlee in his report spends
21 a significant amount of time reviewing the
22 compliance of the Red Hill with the 1985 MTO
23 design guide, and we know he draws various
24 conclusions respecting whether the criteria was
25 met.

1 This section is meant as to
2 provide additional context to kind of understand
3 the analysis of it better. It's to provide an
4 understanding of the purpose of the guideline, how
5 that guideline is to be interpreted and what it
6 might mean if a particular criteria is not met,
7 and it's really of the latter two points, how is
8 it supposed to be interpreted and what it might
9 mean. That will be the focus.

10 As we read it and as Mr. Karim
11 reads it, the Brownlee report appears to treat
12 this topic as somewhat black and white, and that's
13 contrary to Mr. Karim's understanding.

14 Mr. Karim intends to go
15 further though and discuss, as we've set out in
16 our materials, the relationship between the
17 guideline and also the effect of deviation on the
18 general outcomes of roadway safety, because it's
19 important to see what connection, if any, there is
20 between geometric design and safety, and that's
21 related to the last term of reference as to how
22 you look at the different factors that contribute
23 to motor vehicle accidents.

24 So here Mr. Karim is mainly
25 relying on his expertise, on the application of

1 the guidelines, and he will draw I understand from
2 various statements from regulatory bodies, on the
3 purpose of the guidelines and the safety outcomes.

4 JUSTICE WILTON-SIEGEL: That
5 seems to be a matter of opinion, and (b) seems to
6 be essentially a matter of opinion as well; is
7 that right?

8 MR. CHEN: Correct.

9 JUSTICE WILTON-SIEGEL: It
10 raises the same question that we spent some time
11 on before the break about whether Mr. Karim is
12 suggesting that it's not possible to identify
13 contributory factors in the absence of collision
14 reconstruction. I'm not sure whether this is
15 another iteration of the question of simply not
16 being possible to identify the primary cause.

17 MR. CHEN: I think our
18 previous discussion would also apply in this case.

19 JUSTICE WILTON-SIEGEL: What
20 does -- just so that I understand this, minimal --
21 I'm looking down under design speed in (b),
22 "minimal changes in design speed will not result
23 in significant changes to highway geometry and
24 associated safety outcomes." What exactly does
25 that mean?

1 MR. CHEN: So as I understand
2 it, and I hope I'm doing justice to Mr. Karim who
3 is extremely knowledgeable on this topic, the
4 distinction appears to be between the difference
5 of 10 kilometres per hour and 20 kilometres per
6 hour. It's one of the issues, points that Mr.
7 Brownlee raises, is that there is an alleged
8 expectancy violation on the Red Hill, because I
9 think the difference between the design speed and
10 the posted speed is 10 kilometres per hour, and as
11 I understand it if it was 20 kilometres per hour
12 then it would be -- I could think more expected by
13 motorists.

14 But I think there's an
15 interesting question as to, well, what is the
16 material difference really between 10 and 20
17 kilometres per hour. And that's the analysis that
18 Mr. Karim will get into. So is the minimal
19 changes in design speed and whether that has any
20 outcome, impact on the geometry of the highway and
21 also any associated safety incomes -- outcomes.

22 I think it's an important
23 analysis because Mr. Brownlee goes on to say that
24 this is an alleged expectancy violation on the Red
25 Hill and can produce the overrepresentation of wet

1 road collisions. That's his conclusion where he
2 says the interaction between design consistency
3 and motorists' expectations and so on, so on, are
4 contributory factors in the overrepresentation --

5 JUSTICE WILTON-SIEGEL: Might
6 just be I'm stumbling over the words. I'm not
7 sure what change there is to the highway geometry
8 we're talking about.

9 MR. CHEN: I think you're on
10 to exactly what we're on to, is that, well, what
11 really is the difference between a 10 and 20
12 kilometres per hour difference. And we can fairly
13 say that there is this alleged expectancy
14 violation that goes even further and contributes
15 to overrepresentation of a wet road collision.
16 That's the inquiry that we're interested.

17 JUSTICE WILTON-SIEGEL: I'm
18 not sure that you understood my problem, but
19 perhaps we don't have to spend more time on it
20 right now.

21 B, again, would be a matter of
22 opinion. No particular additional evidence that's
23 required. Let's pass to number 2.

24 MR. CHEN: Sure. So collision
25 statistics, which of course we had a discussion

1 about earlier. I guess the second aspect of what
2 we were talking about here, just address the first
3 one.

4 One of Mr. Brownlee's key
5 mandates is to offer an interpretation of certain
6 statistics from the annual citywide collision
7 reports. He draws conclusion based on the data.
8 But Mr. Karim takes issue with certain of
9 conclusions, such as his conclusions respecting
10 the resurfacing.

11 So in illustrating why that
12 conclusion is unreliable, Mr. Karim will provide
13 evidence on standard methodology to interpret
14 collision data and the limitations of drawing
15 conclusions on an incomplete dataset.

16 JUSTICE WILTON-SIEGEL: Let me
17 just explain what my concern is, because again the
18 language in this is certainly susceptible of
19 different interpretations.

20 I'll go to 2018. In
21 connection with the lighting study, interestingly,
22 but then also the road safety assessment, CIMA
23 drew conclusions based on accident statistics that
24 the City of Hamilton published for the five
25 presiding years to the end of 2017, as you're well

1 aware, and the staff adopted those conclusions and
2 that analysis and made recommendations on that
3 basis to the council.

4 Now, is there a suggestion
5 that because of the reference in the first
6 sentence to historical collision trends, is the
7 incomplete dataset that you're referring to that
8 dataset, or is there really limited to saying you
9 can't really draw conclusions about the
10 pre-resurfacing statistics of the highway from the
11 data that was received post resurfacing.

12 MR. CHEN: That's correct.
13 It's the latter.

14 JUSTICE WILTON-SIEGEL: It's
15 the latter?

16 MR. CHEN: Yes.

17 JUSTICE WILTON-SIEGEL: So
18 that's what number 2 is about?

19 MR. CHEN: That is what --
20 there are two parts to 2; one is the drawing of
21 inferences based on incomplete dataset, and then
22 it leads into the second and very critical
23 (indiscernible) Mr. Crews analysis is the
24 assessment or examination of the collision
25 statistics between the highways with the Red Hill

1 Valley Parkway, which is what we had discussed
2 earlier, and I would appreciate the opportunity to
3 speak to that point again, Mr. Commissioner.

4 JUSTICE WILTON-SIEGEL: Okay,
5 then why don't you do that.

6 MR. CHEN: At this point in
7 the record we see references to Red Hill having
8 high rates of wet weather collisions in various
9 places, and we've seen that statement being relied
10 upon. For example, Dr. Flintsch in his concluding
11 paragraph makes reference to there being a very
12 high percentage of collisions during wet
13 conditions.

14 That is troubling to us
15 because it doesn't appear to be substantiated
16 anywhere in the record. Mr. Brownlee makes a
17 similar reference that there's a much higher
18 proportion of wet road surface conditions that
19 occurred on the Red Hill compared to provincial
20 and city averages.

21 But what this Commission has
22 not heard any evidence of that really gets at is
23 whether that statement is true or not. So we
24 appreciate there being comparisons, as I just
25 indicated, to the provincial and city averages,

1 but that's a comparison of all roads, right.

2 We know that, because I think
3 Mr. Malone had explained that during his
4 testimony, and that to understand the collision
5 rates that you were seeing and to contextualize
6 them, there has to be an apples to apples
7 comparison, and an apples to apples comparison
8 allows you to take the rates from the Red Hill
9 Valley Parkway and compare it with a paired
10 facility or proxy site, one that has similar
11 characteristics, and to even break it down further
12 by segments.

13 That is the type of analysis
14 that we have not seen and that Mr. Karim, we would
15 like to do, so that we can get a precise answer
16 rather than relying on these other statements that
17 just aren't substantiated in our view.

18 This approach is well
19 accepted, and obviously Mr. Karim has vast
20 experience on this front, has told us that. Mr.
21 Malone has confirmed that. The idea of
22 overrepresentation is also discussed in Mr.
23 Brownlee's report and he talks about comparison to
24 pair facilities. So similar ones. And that is
25 just not done.

1 So for anyone to accept that
2 the Red Hill has a high rate, it might very well
3 be the case. But that analysis just needs to be
4 done so that we can be sure about that. It's
5 relied upon again in Dr. Flintsch -- as part of
6 his analysis of all the factors. And if we look
7 at his conclusion it's the first one that he
8 raises. And that again troubling us to. Where
9 does he get that from.

10 JUSTICE WILTON-SIEGEL: Let me
11 back up for a second. Are we talking about wet
12 weather accidents now rather than collision rates
13 generally?

14 MR. CHEN: My point is here on
15 wet weather accidents, but of course the intention
16 is for Mr. Karim to do a comparison of both.

17 JUSTICE WILTON-SIEGEL: And
18 all collisions or just serious collisions as
19 defined by --

20 MR. CHEN: I understand it's
21 all collisions.

22 JUSTICE WILTON-SIEGEL: So let
23 me just understand. First of all, what are you
24 referring to in Mr. Brownlee's specifically what
25 are you referring to in Mr. Brownlee's --

1 MR. CHEN: If I can take you
2 to paragraph -- page 27 of his report.

3 JUSTICE WILTON-SIEGEL:
4 Page 27.

5 MR. CHEN: Footnote 58.

6 JUSTICE WILTON-SIEGEL:
7 Footnote 50? Footnote what?

8 MR. CHEN: 58 where he says
9 road safety. "Used to describe (indiscernible
10 reading) when compared to peer transportation
11 facilities."

12 JUSTICE WILTON-SIEGEL: No,
13 what is it that you object to in -- you say he
14 assumes that there's a disproportionate wet
15 weather accident experience without evidence.
16 What are you?

17 MR. CHEN: He's simply
18 referring to the CIMA reports, page 23 --

19 JUSTICE WILTON-SIEGEL: -- the
20 CIMA report.

21 MR. CHEN: Yep, is a much --

22 JUSTICE WILTON-SIEGEL: Refers
23 to the CIMA report, relied on the CIMA report.
24 Essentially rely on the 2017 annual collision
25 report, among other things. Is the view here that

1 they were all wrong? There was no -- are you
2 challenging what the City has done for the last
3 five -- for last five years?

4 MR. CHEN: I think it's a bit
5 more nuanced than that, and what we intend to do
6 is provide more precision.

7 JUSTICE WILTON-SIEGEL: No,
8 no, I'm not going there.

9 We've got wet weather
10 collision rates that form the basis of everyone's
11 approach. Now, are you taking the position that
12 -- is the City now taking the position that its
13 own staff was all wrong both in terms of the
14 actual experience on the highway and with respect
15 to the appropriate comparators?

16 MR. CHEN: All -- the purpose
17 of the exercise --

18 JUSTICE WILTON-SIEGEL: No,
19 I'm asking. I understand what the purpose is but
20 the implication is what I'm asking about.

21 MR. CHEN: The answer to that
22 question is no, just to be direct, but --

23 JUSTICE WILTON-SIEGEL: How
24 can it --

25 MR. CHEN: A no with an

1 asterisk.

2 JUSTICE WILTON-SIEGEL: How
3 can it be no when the City -- to take one issue
4 here. The City has already identified what it
5 regarded as appropriate comparators. CIMA had
6 some and then you recall Mr. Soldo said I (skipped
7 audio) another one. Now you're saying no, those
8 aren't appropriate comparators, you want a
9 complete analysis done of other comparators that
10 you think are more appropriate.

11 MR. CHEN: I think the City's
12 consultant provided that analysis and again --

13 JUSTICE WILTON-SIEGEL: Mr.
14 Soldo added one, and the City -- and the City's
15 consultant provided that.

16 MR. CHEN: Sorry, I missed
17 that point.

18 JUSTICE WILTON-SIEGEL: I said
19 I think Mr. Soldo, when he came on board, asked
20 for an analysis of another highway and the City
21 provided that and the latest collision report.

22 MR. CHEN: So as I recall that
23 analysis was not done by segment. Based on our
24 discussions with the experts a more refined way to
25 do the analysis, more comprehensive analysis to

1 assess whether there is a high degree or not of
2 collisions. I'm not disputing there are other
3 ways, but we're in this context where there's a
4 lot that I think goes to this point and we now are
5 at that expert phase.

6 Our expert and others have
7 proposed a method that's more refined, more
8 precise, and I think there's value in that
9 evidence being given, at least looked at, to the
10 Commission.

11 Again, it does -- again, we
12 had this discussion at the start -- tie back to
13 the term of reference because it plays into the
14 called it the factorial analysis. It's not just
15 friction it's what the rates of collisions are,
16 and here we're talking about wet road collisions.
17 And we have a pathway forward to get more precise
18 evidence to assist in answering the terms of
19 reference.

20 JUSTICE WILTON-SIEGEL:

21 Mr. Chen, here's my problem. If the City wants
22 this evidence it seems to me that it's a very --
23 it requires a very extensive review and
24 considerable judgment as to which highways and
25 which segments of those highways are appropriate

1 comparators.

2 If this is -- I would say that
3 this, in the first instance, is well beyond I
4 would have thought was appropriate at this stage
5 because we've had three-and-a-half years of this
6 inquiry and we've had plenty of evidence as to how
7 the City proceeded, how the City's consultant
8 proceeded, how the City proceeded, what they
9 regarded as comparators, what they regarded as the
10 appropriate analysis.

11 You're coming in and saying,
12 well, that really wasn't good enough, because for
13 future litigation purposes what you want is a much
14 better finding that says there never was a problem
15 here in the first place.

16 I get all that, and it may be
17 that that analysis is appropriate, but not on the
18 very selective basis that a particular expert of
19 the City provides. If there is such an analysis
20 to be undertaken I think we need a proposal from
21 the City that involves a much more independent
22 approach to looking at this.

23 And I say this for a couple
24 reasons. One is, it is inevitable, as I'm sure
25 you know from your many years of experience, that

1 experts provide the evidence that their clients
2 want, and this just carries with it serious
3 concern for selective provision of evidence. And
4 then the question becomes, well, how do the
5 parties whose reputations are challenged in one
6 way or another by this approach respond. And
7 that's really not the most efficient way of
8 dealing with this. It has significant time
9 consequences and cost consequences, and I'm not
10 sure that at the end of the day it really develops
11 the evidence the way anyone would want it to be.
12 It's much more confrontational.

13 If the City believes this is
14 necessary with the timing and cost consequences
15 that that entails, then I think the City should
16 propose something of a much more independent
17 nature on this issue.

18 MR. CHEN: So my first
19 response, Mr. Commissioner, is that it seems to me
20 Mr. Karim's objectiveness is being challenged when
21 there really is no evidence for us to conclude
22 that there is an issue with his impartiality.
23 He's independent. I appreciate has been retained
24 by the City, but he is not just looking at one
25 highway. That's a DVP. He's also requested a

1 variety of other data for a variety of other
2 highways from the MTO, which he hasn't yet
3 received, and he's undertaking an analysis that I
4 think is well accepted in the industry. And of
5 course the inquiry process has built into it
6 certain mechanisms to explore impartiality through
7 cross-examination, seeing Mr. Lewis conduct a
8 number quality cross-examinations.

9 I just want to make sure we're
10 being fair to Mr. Karim that we're not
11 unintentionally sending any messages with respect
12 to his skill and --

13 JUSTICE WILTON-SIEGEL: I'm
14 not sending any message that --

15 MR. CHEN: -- having concern
16 about --

17 JUSTICE WILTON-SIEGEL: - at
18 all, but I will be a little bit more specific.
19 This is as much a matter of judgment as it is of
20 technical expertise. Choosing which highways and
21 which segments are apples to apples, bearing in
22 mind there never can be, as the evidence
23 demonstrates, real apples to apples.

24 So that judgment has already
25 been made by CIMA and by the City staff. And for

1 litigation reasons the City apparently now wants
2 to have that reassessed. And if that's what the
3 City wants it's entitled to have that I think, but
4 in a process in which I think it's fair both to
5 Mr. Karim but also to CIMA and the City staff who
6 have already taken a position on these issues.
7 That seems to me to require some kind of more
8 entirely independent joint instruction with some
9 process that involves a joint assessment of which
10 road segments -- which roads and which road
11 segments are going to be analyzed.

12 MR. CHEN: The first point is
13 then, of course, Mr. Karim's analysis will detail
14 why he thinks a particular highway is an apples to
15 apples comparison and certainly Mr. Brownlee, who
16 has expertise, can tell us whether it's a citrus
17 fruit or not. This analysis isn't focused on the
18 outside litigation. Of course, it may have an
19 expect as I indicated at the start, but --

20 JUSTICE WILTON-SIEGEL: I
21 think you made very clear that that's the context
22 in which you are concerned about that.

23 MR. CHEN: That is part, but I
24 want to be clear. I think this goes directly to
25 the terms of reference. It is certainly not

1 solely for the purpose of litigation, but it's
2 been raised square and centre in this inquiry, and
3 again it goes with the terms of reference which
4 we've discussed and this analysis is what will
5 provide -- we say will provide a more refined
6 analysis, so I hope I've clarified that point.

7 If the proposal is joint one
8 the City -- there is value to undertaking this
9 analysis and -- I will say something is better
10 than nothing, but Mr. Karim has started the
11 analysis knowing that it will take some -- it will
12 take some --

13 JUSTICE WILTON-SIEGEL: I'm
14 aware of that. I'm sure he would be happy to turn
15 over what he's received from the MTO thus far, if
16 that's what's that's necessary.

17 MR. CHEN: As I said, he's
18 still waiting for MTO to provide him with --

19 JUSTICE WILTON-SIEGEL: So I
20 understand.

21 MR. CHEN: -- additional data.

22 JUSTICE WILTON-SIEGEL:
23 Anything else?

24 MR. CHEN: I think takes us to
25 the end, as we've addressed the wet road

1 collisions point. So that concludes my
2 submissions, Mr. Commissioner.

3 JUSTICE WILTON-SIEGEL: The
4 wet road -- okay.

5 MR. CHEN: I can belabour you
6 with one of those fancy lawyer closings that sum
7 up everything, but I will refrain from doing that.

8 JUSTICE WILTON-SIEGEL: Thank
9 you. Sparing us both.

10 All right. I think Ms. McIvor
11 is on the call as well. Do you have anything you
12 want to submit at this stage?

13 MS. MCIVOR: Thank you,
14 Mr. Commissioner. I just wanted to confirm that
15 our position remains as we've previously stated in
16 terms of it not being necessary to explore on
17 specific Ontario roadways and make findings about
18 the reliability or the safety of these roadways in
19 order to decide the terms of reference. And so
20 whether that's done in a comparative manner or
21 not, it is and remains our view that that is
22 simply not necessary in the context of this
23 inquiry.

24 Then I'll also note -- I know
25 it's been discussed today, MTO witnesses have

1 testified at length during this inquiry. To the
2 extent that the participants are now suggesting
3 that additional factual information about MTO
4 roadways be canvassed at the inquiry we suggest
5 that is inappropriate. It would lead to
6 inefficiencies, I would say, in terms of
7 potentially giving MTO employees the chance to get
8 their views across on the roadways in question,
9 suitability of the comparisons and whatnot, when
10 really it's in our view outside the parameters of
11 the true issues that need to be decided in this
12 inquiry.

13 So our view remains as set out
14 previously and we would -- we take the view that
15 additional information about specific provincial
16 highways is just not necessary.

17 JUSTICE WILTON-SIEGEL: Can I
18 ask whether that comment means you have a problem
19 with some kind of broader assessment of the
20 accident experience on MTO highways that are
21 regarded as comparators with the Red Hill Valley
22 Parkway?

23 MS. MCIVOR: We do in that we
24 just don't feel it is necessary to go there and
25 get those statistics, and I guess the bigger issue

1 is there can be an analysis of Ontario highways
2 and statistics and collision rates, but to make
3 any findings then about the Red Hill Valley
4 Parkway there needs to be an opinion about what
5 those statistics mean in the provincial context.

6 So my friends appear to be
7 anticipating evidence showing that the collision
8 rates at the Red Hill Valley Parkway are lower
9 than certain Ontario highways and therefore the
10 road is safe. But in order to meet that finding
11 you have to do an assessment of what the collision
12 rates and statistics on the Ontario highways mean,
13 and we just haven't been given an opportunity to
14 call factual evidence about that.

15 And to the extent at this
16 stage we're going to sort of explore those --
17 these new sort of areas, you know, we would just
18 urge a finding that's in keeping with efficiency
19 and costs and proportionality, and in our view
20 respectfully we submit that it's not necessary to
21 go that route at this juncture.

22 JUSTICE WILTON-SIEGEL: So
23 neither necessary, nor proportional.

24 MS. MCIVOR: That's correct,
25 yes.

1 JUSTICE WILTON-SIEGEL: I'll
2 let Mr. Chen speak to that if he wants to.

3 MR. CHEN: I thank Ms. McIvor
4 for highlighting the need for expert evidence on
5 this issue. I agree it is complicated and we have
6 a qualified expert to undertake that analysis and
7 to have the data, or they are going to get the
8 data from the MTO, I presume, to do that analysis.
9 I think Ms. McIvor doesn't speak to how to
10 properly conduct an assessment of whether there is
11 an overrepresentation. I appreciate it will
12 obviously involve comparisons of the DVP and
13 certain 400 highways. I think there are ways to
14 sidestep what the inferences that Ms. McIvor might
15 be concerned about just in terms of how we
16 describe the findings, and that we can obviously
17 work with.

18 But this inquiry has been
19 structured as Phase 1, Phase 2, the fact witnesses
20 going first, and the MTO witnesses that testify --
21 as I recall were all friction-specific. Would be
22 pose questions about collision statistic on
23 particular highway? That just doesn't seem like a
24 fruitful exercise. So what we did of course is
25 leave that to the experts.

1 And just a point about whether
2 it's necessary, I think I've dealt with that. It
3 goes to one of the factors that Dr. Flintsch
4 relies on to draw his conclusions. It's the wet
5 road -- high wet road collisions point, is again
6 sited elsewhere. This is the analysis that we'll
7 get to whether or not that's true or not. So on
8 that front it's both reasonable and necessary.

9 So Ms. McIvor will
10 cross-examine the expert and it appears she has
11 potentially the most ammunition in doing so. So I
12 don't think that would come at a great cost to her
13 of course. I suppose there's the option of
14 putting in a responding report, but I'm not sure
15 that's necessary.

16 JUSTICE WILTON-SIEGEL: I
17 think what this has identified is that apart from
18 I gather province-wide statistics which we've seen
19 and referred to, there are no statistics on
20 highway-by-highway basis, much less on a
21 segment-by-segment basis. Is that correct,
22 Ms. McIvor?

23 MS. MCIVOR: Sorry, in terms
24 of whether those statistics exist before
25 provincial highways?

1 JUSTICE WILTON-SIEGEL: Yes.

2 MS. MCIVOR: I'm actually not
3 certain about that. I haven't seen any to date.

4 JUSTICE WILTON-SIEGEL: As
5 part of this process, whoever is conducting this
6 analysis will be generating statistics for the MTO
7 highways as well in order to have a comparator or
8 comparators with the Red Hill Valley Parkway and
9 the staff that you object to.

10 MS. MCIVOR: That's correct.
11 Mr. Commissioner, I'm not sure what data
12 specifically has been requested and I'm not sure
13 what data will be provided, but from what Mr. Chen
14 has provided us in terms of analysis, it does seem
15 to be focused on a comparison between some
16 specific Ontario highways versus the Red Hill
17 Valley Parkway. And I fail to see how that falls
18 within the scope of the terms of reference, and it
19 could be that some findings in the other expert
20 reports, you know, are also outside of scope. I
21 just don't see how getting into those sort of
22 details and leads are necessary to answer the
23 questions posed in the terms of reference.

24 JUSTICE WILTON-SIEGEL: I'm
25 proceeding, although I confess I haven't looked at

1 this point specifically, that insofar as
2 comparisons were made they were made with respect
3 to publicly available statistics relating to MTO
4 highways.

5 MS. MCIVOR: I believe that is
6 the case, or based on the record that's before you
7 already in terms of findings that have been
8 established to date, the report scenario in the
9 record --

10 JUSTICE WILTON-SIEGEL: I was
11 thinking those reports that made comparisons.
12 Presumably they were made with respect to, or on
13 the basis of publicly available statistics but
14 what you're concerned with what Mr. Chen is
15 proposing his expert do might involve generation
16 of statistics that have not yet been developed,
17 are not public and, by implication, cast -- raise
18 issues with respect to the safety of MTO highways
19 which you say are beyond the issues in the terms
20 of reference. Is that an accurate way of
21 describing your concern?

22 MS. MCIVOR: That is correct,
23 Mr. Commissioner, yes.

24 MR. CHEN: If I could very
25 quickly respond to that. There's no creation of

1 the statistics. To be blunt, Mr. Karim's team has
2 put in an FOI request a while ago to obtain the
3 data and I don't believe there should be any
4 obstacles to obtaining the set of data that they
5 will need. And as our understanding is, it's a
6 routine exercise for them to do so and there's no
7 restrictions, subject to timing of course, which
8 we could use some assistance with.

9 JUSTICE WILTON-SIEGEL: You're
10 saying there should be no restrictions on them
11 performing whatever analysis they want on the data
12 released by the MTO.

13 MR. CHEN: That's correct, and
14 it's not confidential by any means.

15 JUSTICE WILTON-SIEGEL: Okay.
16 If no one else has anything further to say let me
17 just review where we are, because I think it's
18 very important we move forward on this as much as
19 we can as quickly as possible.

20 There are certain matters that
21 I think are clearly within the scope of what's
22 contemplated for this phase, and I'm thinking in
23 particular of the matters, first of all, that Dr.
24 Baaj is proposed to report on, and I would say
25 again on the basis that the extent of any evidence

1 that Dr. Baaj is introducing beyond what's already
2 in the record that would be limited to evidence
3 that is his scientific basis for the conclusions
4 that he reaches in his report.

5 With respect then to Mr. Hein.
6 The same principle would apply with respect to
7 1A, B and C, as opinion evidence plus any evidence
8 in addition limited to the scientific basis for
9 his conclusions. I'm going to reserve on E. I'm
10 going to reserve on 2.

11 MR. CHEN: Did you skip D?

12 JUSTICE WILTON-SIEGEL: Well,
13 on this enumeration it appears we have. D I think
14 is in the same category as A, B, and C. Opinion
15 evidence, and supplemented only by any scientific
16 evidence that he might have to support his
17 conclusions or opinion. So pass on E, pass on 2.

18 Number 3. What I want to do
19 on 3 is reserve pending a discussion between
20 Mr. Chen and Ms. Roberts to see whether you can't
21 come to some kind of conclusion as to -- well,
22 I'll put it positively, whether Dr. Baaj is in
23 fact covering all the ground that is proposed in
24 number 3 or, alternatively, Mr. Chen, defining a
25 little bit more clearly what Mr. Hein would opine

1 on given what we have now had by way of a much
2 more expansive description of what Dr. Baaj will
3 be doing and any discussion you've had with Ms.
4 Roberts. Okay?

5 MR. CHEN: Understood.

6 JUSTICE WILTON-SIEGEL: Sorry,
7 Mr. Chen?

8 MR. CHEN: I said understood.

9 JUSTICE WILTON-SIEGEL: Number
10 4 I understand basically to be opinion evidence
11 and -- fine. If there is anything scientific that
12 supports its conclusion, fine, or technical.

13 Number 5, going to pass on
14 this, complex of issues that we will...

15 Now A. I'm now passing to
16 Mr. Karim 1A, 1B, 1C. I think is in the category
17 of opinion evidence. I don't think it relies on
18 anything more other than if there are industry
19 statements upon which Mr. Karim relies that
20 support his position, that can be included.

21 Number 2, collision
22 statistics, is part of the discussion we've just
23 had. Reserving on that. And number 3 is in the
24 same category.

25 We will get you a decision

1 with respect to the matters on which we reserved
2 apart from -- be specific about the number.
3 Number 3 under Mr. Hein's appendix A, for which we
4 await further communication from Mr. Chen and Ms.
5 Roberts or -- collectively, or Mr. Chen.

6 MR. CHEN: We will do that.
7 Thank you, Mr. Commissioner.

8 JUSTICE WILTON-SIEGEL: We'll
9 stand adjourned if there's nothing further that we
10 have to deal with today.

11 MR. CHEN: I don't believe so.

12 JUSTICE WILTON-SIEGEL: Okay.
13 Thank you very much.

14 --- Whereupon the proceedings were adjourned
15 at 12:20 p.m.

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