

In the matter of the Public Inquiries Act, 2009, S.O. 2009, c 33, Sch 6

And in the matter of the Resolution of the Council of the City of Hamilton dated April 24, 2019, establishing the Red Hill Valley Parkway Inquiry pursuant to section 274 of the Municipal Act, 2001, S.O. 2001, c 25

FACTUM OF THE CITY OF HAMILTON

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TABLE OF CONTENTS

	Page No.
PART I - INTRODUCTION.....	1
PART II - SUMMARY OF FACTS	1
A. BACKGROUND TO THE INQUIRY	1
B. EVENTS LEADING UP TO THE INQUIRY	3
i. Background to Friction testing on the RHVP	3
ii. Mr. McGuire Becomes Aware of the Tradewind Report	5
iii. [REDACTED]	7
iv. [REDACTED]	10
v. [REDACTED]	10
vi. The January 23, 2019 Report to Council	12
vii. February 6, 2019 Report to City Council.....	14
C. THE TERMS OF REFERENCE.....	15
D. THE DISPUTED DOCUMENTS	16
PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES	18
A. COMMISSION COUNSEL DOES NOT MEET THE STRINGENT TEST TO SUMMONS PRIVILEGED INFORMATION.....	18
1) THE PRIVILEGED INFORMATION IS NOT HIGHLY MATERIAL.....	19
i. The Terms of Reference must be given their plain meaning	19
ii. [REDACTED] are not highly material to the Terms of Reference	23
iii. [REDACTED] are not highly material to the Terms of Reference	25
iv. [REDACTED] are not highly material to the Terms of Reference	25
2) THE PRIVILEGED INFORMATION IS NOT NECESSARY.....	26
3) THE PRIVILEGED INFORMATION IS NOT ADMISSIBLE.....	28
i. The Documents are privileged	28
ii. City Council did not waive privilege	30
iii. City Council expressly voted to maintain privilege.....	30

iv.	Calling an inquiry does not waive privilege	31
v.	<i>British Columbia (Criminal Justice Branch) v. Davies</i> is distinguishable	32
PART IV - ORDER REQUESTED.....		34

PART I - INTRODUCTION

1. Solicitor-client privilege is a sacrosanct foundation of our justice system, elevated by the Supreme Court of Canada from a mere evidentiary rule to a substantive legal and civil right.¹ It is only in exceptional circumstances that a party will be permitted to issue a summons for information protected by legal privilege.²

2. Commission Counsel has not met the stringent legal test required to summons information protected by legal privilege. The privileged information summonsed by Commission Counsel is: (1) not highly material to the Terms of Reference of this Inquiry [REDACTED] [REDACTED] (2) not necessary to the mandate of the Inquiry; and (3) most significantly not admissible at the Inquiry, pursuant to the *Public Inquiries Act, 2009*.³

3. In support of its summons for information protected by legal privilege, Commission Counsel has advanced a broad interpretation of the Terms of Reference in a manner that is inconsistent with the plain language chosen by City Council and contrary to the principles of interpretation applicable in public inquiries.

PART II - SUMMARY OF FACTS

A. Background to the Inquiry

4. On April 24, 2019, the City of Hamilton (the “City”) requested the Chief Justice of the Ontario Superior Court of Justice to appoint a Superior Court judge to investigate the matters listed in the Terms of Reference relating to the Red Hill Valley Parkway (the “RHVP”) pursuant to

¹ *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 839 [*Solosky*]; see also *Lavallee, Rackel & Heintz v. Canada*, [2002] 3 S.C.R. 209 [*Lavallee*]; see also *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at para. 24.

² *R v. 1504413 Ontario Limited*, 2008 ONCA 253 at para. 16 [*1504413 Ontario Ltd.*].

³ *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6, s. 33(13) [the *Public Inquiries Act*].

section 274 of the *Municipal Act, 2001*.⁴ The specific circumstances leading to the calling of the Inquiry are detailed in the Affidavit of Nicole Auty, dated May 17, 2022 and the Supplemental Affidavit of Ms. Auty, dated June 15, 2022.

5. The Honourable Mr. Justice Herman J. Wilton-Siegel was appointed as the Commissioner of the Inquiry and the law firm of Paliare Roland Rosenberg Rothstein LLP was appointed as Counsel to the Commissioner (“**Commission Counsel**”). The law firm of Lenczner Slaght LLP was appointed as the City’s counsel in the Inquiry (the “**City’s Inquiry Counsel**”).⁵

6. In March 2020, Commission Counsel issued a summons to the City to produce documents necessary to answer the questions posed under the Inquiry’s Terms of Reference, pursuant to the summons authority under s. 33(3) of the *Public Inquiries Act*.⁶ To date, the City has produced over 62,500 documents.

7. In February 2021, Commission Counsel advised the City⁷ that it took the position that in requesting the Inquiry, the City implicitly waived legal privilege and sought production of documents that were subject to legal privilege and therefore inadmissible pursuant to s. 33(13) *Public Inquiries Act*.⁸

8. The City provided unredacted copies of all documents over which the City had claimed privilege, as requested by Commission Counsel, on a without prejudice basis in order to facilitate

⁴ Terms of Reference, Exhibit A to the Affidavit of Nicole Auty, dated May 17, 2022, the Affidavit of Nicole Auty, dated May 17, 2022 (the “**First Auty Affidavit**”), Motion Record of the City of Hamilton (“**MR**”), Tab 3A, p. 35.

⁶ Summons to Produce Documents, dated March 19, 2020, Exhibit B to the First Auty Affidavit, MR, Tab 3B, p. 42.

⁷ Commission Counsel’s letter dated February 11, 2021, Exhibit C to the First Auty Affidavit, MR, Tab 3C, p. 48.

⁸ *Public Inquiries Act*, ss. 8(3), 33(13).

discussions between the City and Commission Counsel as to which documents were truly necessary to answer the questions in the Terms of Reference.

9. To date, the City has provided Commission Counsel with over [REDACTED] such documents on a without-prejudice basis and ultimately waived privilege and produced all documents requested by Commission Counsel (referred to as the “**Procded Documents**” or “**Produced Redacted Documents**”), except for the 72 unique documents (the “**Disputed Documents**”) that are the subject of this motion.⁹

10. The City and Inquiry Counsel agreed that the City’s waiver of privilege over the Produced Documents or Produced Redacted Documents would not be taken as a waiver of privilege over any of the City’s remaining privileged documents, including the Disputed Documents.¹⁰

B. Events leading up to the Inquiry

i. Background to Friction testing on the RHVP

11. Construction of the RHVP began in the early 1990s, halted in or around 1999 and restarted in the mid-2000s. The RHVP was opened to the public in November 2007.¹¹ Golder Associates (“**Golder**”) was the City’s paving consultant for the RHVP. Dr. Ludomir Uzarowski, a principal at Golder, was the project lead.

12. The City’s Public Works department (“**Public Works**”) oversees the design and maintenance of the City’s road system, including assessing and implementing solutions to improve

⁹ [REDACTED]

¹⁰ Privilege Process Letter dated November 22, 2021, Exhibit D of First Auty Affidavit, MR, Tab 3D, p. 63; see also [REDACTED]

road safety and operations. Public Works generally included the following departments: Traffic Operations/Engineering, Roads and Maintenance, and Engineering Services.¹²

13. In September 2013, Gary Moore, the Director of Engineering Services asked Golder to arrange for friction testing on the RHVP. At the time, Golder was working on a six- year performance evaluation report of the RHVP.¹³ Golder arranged for Tradewind Scientific Inc (“**Tradewind**”) to conduct friction testing on the RHVP and LINC.¹⁴ The testing was conducted on November 20, 2013, and Tradewind provided its report to Golder on January 26, 2014 (the “**Tradewind Report**”).¹⁵

14. On January 31, 2014, Dr. Uzarowski provided Mr. Moore with a draft copy of Golder’s report on the six-year performance of the RHVP (the “**Draft Golder 6 Year Review of the RHVP**”) and appended a copy of the Tradewind Report (with a draft watermark) to Mr. Moore.¹⁶

15. The Tradewind Report is the central focus of the Terms of Reference, including who received copies of the Tradewind Report, what steps were taken in response to the Report, and why the Tradewind Report was not provided to City Council prior to 2019. The Terms of Reference are described in more detail in Section C, below.

¹² Auty Affidavit at para. 20, MR, Tab 3, p. 18.

¹³ Email exchange between City Staff dated September 23, 2013, Exhibit E of First Auty Affidavit, MR, Tab 3E, p. 68.

¹⁴ The Lincoln M. Alexander Parkway or LINC is another expressway in Hamilton, which links to the RHVP.

¹⁵ Email exchanges between Golder and Tradewind, Exhibit F of the First Auty Affidavit, MR, Tab 3F, p. 77.

¹⁶ Email from L. Uzarowski to G. Moore dated January 31, 2014, Exhibit G of the First Auty Affidavit, MR, Tab 3G, p. 85.

ii. Mr. McGuire Becomes Aware of the Tradewind Report

16. In June 2018, Gord McGuire became the Director of Engineering Services. On or around September 26, 2018, Mr. McGuire located the Tradewind Report in the City's document management program. Shortly thereafter, other members of the City and Public Works's leadership team were made aware of the Tradewind Report, including: Edward Soldo (the Director of Traffic Operations and Maintenance), Dan McKinnon (then the General Manager of Public Works) Mike Zegarac (then Interim City Manager).¹⁷

17. In the Fall of 2018, the City was dealing with a number of issues including:

- (a) **Litigation re the LINC and RHVP:** ongoing claims and civil actions arising from motor vehicle accidents ("MVAs") on the RHVP or LINC in which the City was named as a defendant or a third party.¹⁸
- (b) **The Municipal Election:** the municipal election was held on October 22, 2018, resulting in several new councillors being elected to City Council. Upon their election, the new councillors attended orientation for several weeks and did not hold their first Council meeting until December 6, 2018.¹⁹
- (c) **2018 RHVP Safety Assessment:** CIMA, an engineering firm, was completing the following studies related to the RVHP and LINC: (1) a speed study of the LINC & RHVP; (2) a review of the illumination of the RHVP; and (3) a safety assessment of the RHVP. CIMA had previously completed a safety review of a portion of the

¹⁷ First Auty Affidavit at para. 27, MR, Tab 3, p. 19.

¹⁸ First Auty Affidavit at para. 30, MR, Tab 3, p. 20.

¹⁹ First Auty Affidavit at para. 34, MR, Tab 3, p. 21.

RHVP in 2013 (the “**2013 CIMA Report**”)²⁰ and the complete RHVP in 2015 (the “**2015 CIMA Report**”),²¹

- (d) **Resurfacing of the RHVP:** Discussions regarding the resurfacing of the RHVP began in the Spring of 2016 and continued throughout the Fall of 2018 and the Winter of 2019.²² The RHVP was resurfaced in the Spring – Summer of 2019;
- (e) **The FOI Request:** the FOI Request for access to reports, memos, drafts, correspondence relating to friction testing on the RHVP in the five preceding years and any reports, memos, or correspondence about asphalt and/or pavement testing, assessments, plans on the RHVP in the last two years was submitted to the City on November 8, 2018. Ms. Byrdena MacNeil (now the Honourable Justice MacNeil), then a lawyer in the City’s Legal Services department, was responsible for providing with City Staff members, primarily Mr. McGuire, to identify the responsive records;²³ and
- (f) **The Roads Value for Money Audit:** In the Fall of 2018, the City’s Audit Services group (“**Audit Services**”) was completing a roads value for money audit (the “**Audit**”). As part of this, Audit Services was requesting information regarding, pavement performance and the Tradewind Report in the Fall of 2018.²⁴

²⁰ 2013 CIMA Report, Exhibit I of First Auty Affidavit, MR, Tab 3I, p. 91.

²¹ 2015 CIMA Report, Exhibit J of First Auty Affidavit, MR, Tab 3J, p. 208.

²² First Auty Affidavit at paras. 37-38, MR, Tab 3, p. 22.

²³ First Auty Affidavit at para. 31, MR, Tab 3, p. 20.

²⁴ Email exchange between City Staff dated August 24, 2018, Exhibit H of the First Auty Affidavit, MR, Tab 3H, p. 87.

iii. [REDACTED]

18. As of early December 2018, members of the City’s leadership, including Mr. McKinnon, Mr. Soldo, Mr. McGuire and Mr. Zegarac, as well as members of the City’s Legal Services department, including City Solicitor Nicole Auty, Ron Sabo, and Byrdena MacNeil were engaged in discussions regarding the Tradewind Report and, specifically, regarding the circumstances around the receipt of the Tradewind Report, who at the City was made aware of the Tradewind Report, why the Tradewind Report was not disclosed to Council and how these matters should be presented to Council.²⁵

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁶

20. On December 7, 2018, Ms. Auty and Ms. MacNeil contacted Mr. Boghosian of Boghosian & Allen LLP to discuss a potential retainer. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁸

21. [REDACTED]

[REDACTED]

²⁵ [REDACTED]

[REDACTED]

²⁸ SPE_04317040_0001, Tab 85 of the Unique Disputed Documents Brief.

[REDACTED]

22. [REDACTED]

23. [REDACTED]

[REDACTED]

24. [REDACTED]

29 [REDACTED]

25. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 33

26. [REDACTED]
[REDACTED] 34

27. [REDACTED]
[REDACTED]
[REDACTED]

28. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 36

29. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

33 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

iv. [REDACTED]

30. [REDACTED]

31. [REDACTED]

32. [REDACTED]

v. [REDACTED]

[REDACTED]

38 [REDACTED]

34. [REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
[REDACTED]

- [REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]

- [REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
■ [REDACTED]
■ [REDACTED]

37. [REDACTED]

vi. The January 23, 2019 Report to Council

38. On January 23, 2019, Ms. Auty presented an *in camera* report entitled Potential Litigation Update (LS19007) (the “**January Litigation Update Report LS19007**”) to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

41. [REDACTED]

46 [REDACTED]

[REDACTED]

42. [REDACTED]

43. [REDACTED] The CIMA Memo states that after having reviewed the Tradewind Report, CIMA would not (1) substantively change their previous recommendations regarding safety on the RHVP; (2) add any additional safety measures, recognizing the RHVP was scheduled to be resurfaced in 2019; and (3) recommend that the City close the RHVP pending completion of the resurfacing work.⁵⁵

44. [REDACTED]

⁵⁰ [REDACTED]

⁵⁵ Red Hill Valley Parkway – Pavement Friction Testing Results Review Memo dated February 3, 2019, Exhibit U to First Auty Affidavit at pp. 2-3, MR, Tab 3U, pp. 693-94.

[REDACTED]

45. As detailed in the First Auty Affidavit, staff in the City’s Legal Services Department, including Ms. Auty, Mr. Sabo, and Ms. MacNeil communicated regularly for the purpose of providing and discussing legal advice with respect to the CIMA Memo, the City’s communication plans and the staff report to Council (among other things) during this time period.⁵⁷

vii. February 6, 2019 Report to City Council

46. On February 6, 2019, City staff presented the Tradewind Report to Council during an *in camera* session of the General Issues Committee (“GIC”).⁵⁸

47. [REDACTED]

48. Following the GIC meeting, Council directed that staff release the Tradewind Report and a version of the CIMA Memo that was addressed to the Mayor and City Council (as opposed to Mr. Boghosian) to the public and expressly voted to maintain privilege over the January Litigation

⁵⁶ [REDACTED]
⁵⁷ See e.g. SPE_04312139, Tab 25 of the Unique Disputed Documents Brief; SPE_04288032, Tab 50 of the Unique Disputed Documents Brief; SPE_04312098, Tab 55 of the Unique Disputed Documents Brief; SPE_04312087, Tab 62 of the Unique Disputed Documents Brief; SPE_04312086, Tab 63 of the Unique Disputed Documents Brief; SPE_04312085, Tab 64 of the Unique Disputed Documents Brief, SPE_04312031, Tab 79 of Unique Disputed Documents Brief.

⁵⁸ [REDACTED]

Update Report LS19007, the Boghosian Opinion and the legal advice provided to Council at the February 6, 2019 GIC meeting by Ms. Auty and Mr. Boghosian.

49. [REDACTED]

C. The Terms of Reference

50. The resolution passed by Council in April 2019 requested that a Superior Court judge be appointed to investigate 24 questions detailed in the Terms of Reference, which can be grouped into five general categories, described generally below. **Schedule C** contains a breakdown of the specific questions included in the Terms of Reference by category:

- (a) **Disclosure of the Tradewind Report:** who received the Tradewind Report in 2014 and what they did with it, the circumstances surrounding its discovery in 2018, and any ramifications from the Report not having been disclosed earlier;
- (b) **The MTO Friction Testing:** the friction testing completed by the Ontario Ministry of Transportation (“MTO”), including who received the results, why they were not provided to City Council or made public, whether the testing supported or rebutted the Tradewind Report’s conclusions, and any ramifications from the MTO’s results not having been disclosed;

- (c) **Additional Friction Testing:** whether the MTO or the City conducted any other friction tests, asphalt assessments, or safety reviews or assessments of the RHVP, and whether these supported or rebutted the 2007 and 2013 friction testing results;
- (d) **Friction Standards:** the standards in Ontario, if any, respecting acceptable friction levels and how the test results conducted on the RHVP compare with those standards; and
- (e) **Role of Non-Friction Factors in MVAs:** the extent to which factors other than friction, including driver behaviour, lighting, and weather conditions contribute to motor vehicle accidents on the RHVP as compared to the impact of friction levels.

D. The Disputed Documents

51. To date, there are 72 unique Disputed Documents. A list of the Disputed Documents is set out in **Schedule D**. The Documents can be divided into three categories: [REDACTED]

52. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

⁶¹ See Tabs 5, 9 of the Unique Disputed Documents Brief.
⁶² See Tabs 2, 19, 26, 27, 30, 46, 47, 61, 87, 92, 94, 100 of the Unique Disputed Documents Brief.

(c) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

53. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ See Tabs 72, 85-86, 96-98 of the Unique Disputed Documents Brief.

⁶⁴ See Tabs 15, 56, 57, 75, 90-91 of the Unique Disputed Documents Brief.

⁶⁵ See Tabs 23, 37, 48, 51, 54, 60, 66, 70-71, 77, 79-80 of the Unique Disputed Documents Brief.

⁶⁶ See Tabs 22, 25, 55, 78, 88, 93, 99 of the Unique Disputed Documents Brief.

⁶⁷ See Tabs 21, 62, 63, 64 of the Unique Disputed Documents Brief.

⁶⁸ See Tabs 3, 89, 95, 101 of the Unique Disputed Documents Brief.

⁶⁹ See Tabs 1, 50, 73, 76, 104, 105 of the Unique Disputed Documents Brief.

⁷⁰ See Tabs 6, 83, 84 of the Unique Disputed Documents Brief.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Commission Counsel does not meet the stringent test to summons privileged information

55. Pursuant to the *Public Inquiries Act*, Commission Counsel can summons any person to give evidence at the inquiry and produce documents if the information sought is relevant to the subject matter of the inquiry and not protected by legal privilege.⁷¹

56. The summons power in a judicial inquiry is expressly made subject to section 33(13) of the *Public Inquiries Act, 2009*, which provides that “nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence”. This section gives effect to a fundamental substantive principle essential to the proper functioning of our legal system.

57. If the summons to witness is challenged, the party that issued the summons must demonstrate that the evidence is relevant to the proceeding and that the summonsed party is able to provide the evidence.⁷² Where the challenged summons seeks evidence from a party’s legal counsel, a far more stringent test is applied.

58. The Court of Appeal for Ontario has confirmed that such a summons must be quashed absent “exceptional circumstances” where, at minimum, the information sought must be highly material and necessary and otherwise admissible. The Court of Appeal for Ontario further noted that solicitor/client privilege will figure significantly on the issue of admissibility.⁷³

⁷¹ *Public Inquiries Act*, ss. 33(3) and 33(13).

⁷² *Konstan v. Berkovits*, 2013 ONSC 6169 at paras. 17-18.

⁷³ *1504413 Ontario Ltd.*, *supra* note 2 at paras. 13-17

59. This is not one of the “exceptional circumstances” that would justify summoning information clearly protected by privilege. Commission Counsel has not met the stringent legal test set out by the Court of Appeal for Ontario: in particular, the privileged information Commission Counsel seeks to obtain by way of summons is not highly material, not necessary, and – most significantly – is not admissible.

1) THE PRIVILEGED INFORMATION IS NOT HIGHLY MATERIAL

60. A party who wishes to summons information that is protected by legal privilege must first establish that the information sought is highly material to the issues raised in the proceeding.⁷⁴

61. Commission Counsel must first establish that the privileged information contained in the Disputed Documents is highly material, and not merely relevant, to answering the questions raised in the Terms of Reference, based on a plain reading of these Terms.⁷⁵

62. As detailed below, none of the Disputed Documents contain information that is highly material to the issues raised in the Terms of Reference.

i. The Terms of Reference must be given their plain meaning

63. To assess whether the Disputed Documents are highly material to the Terms of Reference, it is important to first ensure that the Terms of Reference are properly interpreted. In support of its position that the Disputed Documents are not protected by privilege, Commission Counsel has broadly interpreted the Terms of Reference in a manner that is inconsistent with the plain language chosen by City Council and contrary to the principles of legal interpretation.

⁷⁴ 1504413 Ontario Ltd., *supra* note 2 at para. 17.

⁷⁵ 1504413 Ontario Ltd., *supra* note 2 at para. 17.

64. It is a fundamental principle that a commissioner's jurisdiction in a public inquiry is circumscribed by the terms of reference of the inquiry.⁷⁶ As noted in the Vaudreuil Inquiry, even where a commissioner "...has the noblest of motives, a commissioner has no discretion to exceed or extend those terms of reference."⁷⁷

65. For example, in the course of the Cornwall Inquiry, Justice Moldaver, as he then was, concluded that Commissioner Glaude misconstrued the Order-in-Council ("OIC"), thereby enlarging the subject matter of the Inquiry and conferring a much wider jurisdiction than the legislature contemplated:

[23] In my respectful view, the majority erred in taking a deferential approach. No deference is owed to the Commissioner on the issue of the definition of the subject matter of the Inquiry. The Commissioner's jurisdiction is limited to that subject matter, which is prescribed by the legislature in the OIC creating the Commission. If the Commissioner defines the subject matter too broadly or too narrowly, he or she will have rewritten the OIC and redefined the terms of reference. That, of course, is impermissible and constitutes jurisdictional error.⁷⁸

66. In interpreting the terms of reference of an inquiry, normal rules of legal interpretation apply.⁷⁹ As stated by the Supreme Court, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense."⁸⁰

67. Justice Moldaver provided the following additional guidance in interpreting terms of reference in public inquiries:

⁷⁶ *Rigaux v. British Columbia (Commission of Inquiry into death of Vaudreuil)*, 1998 CanLII 1974 (B.C. Sup. Ct.) at para. 25 [*Rigaux*].

⁷⁷ *Rigaux*, *supra* note 7676 at para. 25.

⁷⁸ *Ontario Provincial Police v. The Cornwall Public Inquiry*, 2008 ONCA 33 at para. 23 [*Cornwall Public Inquiry*].

⁷⁹ Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters, 2010) at p. 19.

⁸⁰ Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983), cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

- (a) the preamble of the order in council may be used to circumscribe the scope of the inquiry;⁸¹
- (b) the terms of reference should be considered as a whole and portions of the mandate of an inquiry should not be read in isolation;⁸² and
- (c) The terms of reference should be given the benefit of a reasonable interpretation.⁸³

68. Commission Counsel has taken an expansive view of the Terms of Reference that is inconsistent with the plain language of the Terms, as chosen by City Council and the preamble to the Terms of Reference.

69. For example, Commission Counsel contends that the Terms of Reference in the “Disclosure of the Tradewind Report” category should be interpreted broadly to enable Commission Counsel to investigate the conduct of staff generally in the fall of 2018. Specifically, Commission Counsel alleges that the Terms of Reference require an investigation into “the questions City staff asked of its legal department, the information shared with the legal department, and the advice provided by the legal department and external counsel.”⁸⁴

70. On the contrary, none of the Terms of Reference contemplate an investigation into the legal advice that was provided to Council or indeed make any reference to the legal advice. [REDACTED]

[REDACTED]

[REDACTED]

⁸¹ *Cornwall Public Inquiry, supra* note 7878 at paras. 24, 45-48.

⁸² *Cornwall Public Inquiry, supra* note 7878 at paras. 24, 49-56.

⁸³ *Cornwall Public Inquiry, supra* note 7878 at paras. 57-61.

⁸⁴ Commission Counsel’s letter dated February 11, 2021, Exhibit C to the First Auty Affidavit, MR, Tab 3C, p. 48.

[REDACTED]

[REDACTED]

71. City Council’s intent to limit the scope of the Inquiry to the disclosure of the Tradewind Report is further supported by the preamble:

AND WHEREAS on February 6, 2019, Council of the City of Hamilton (“Council”) was advised that a draft report by Tradewind Scientific Ltd. with respect to friction on the Red Hill Valley Parkway (the “RHVP”), dated November 20, 2013 (the “Report”), was not disclosed to Council;

AND WHEREAS the Report was provided to the City of Hamilton's Department of Engineering Services in January, 2014 by Golder Associates Ltd; AND

WHEREAS the Ontario Ministry of Transportation (the “MTO”) conducted friction testing on the RHVP in 2007, but did not disclose the results of the testing (the “MTO Report”) to Council or to the public;

AND WHEREAS concerns have been raised about why the Report, or the information and recommendations in the Report, were not disclosed to Council;

72. The preamble to the Terms of Reference were drafted narrowly to focus the inquiry on the disclosure of the Tradewind Report and make no mention of the legal advice that was received by the City in the Fall of 2018.

73. Expanding the scope of the Terms of Reference to inquire into the “questions City staff asked of its legal department, the information shared with the legal department, and the advice provided by the legal department and external counsel” is not consistent with the narrow language of the preamble or a plain reading of the Terms of Reference.

74. Prohibiting an interpretation of the terms of reference broader than that contemplated by City Council is also important from a policy perspective. An expansive view of a mandate “runs

the risk of standing the so-called “main focus” of the Inquiry on its head and creating an unwieldy, if not unmanageable, mega-inquiry that could go on for years at great public expense.”⁸⁵

ii. [REDACTED]

75. [REDACTED]

[REDACTED]

[REDACTED]

76. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

77. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ *Cornwall Public Inquiry, supra* note 7878 at para. 61.

⁸⁶ Terms of Reference: (i), (v), (vi), (vii), (viii), (ix), (x), (xii), and (xiv)

⁸⁷ Term of Reference: (xxii)

⁸⁸ Term of Reference: (xxiv)

⁸⁹ [REDACTED]

(b) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

80. [REDACTED]

81. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

iii. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

iv. Documents Related to [REDACTED] are not highly material to the

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹¹ Terms of Reference: (i), (vi), (vii), (viii), (xiv)

⁹² Term of Reference: (xiii)

⁹³ Term of Reference: (xxiv)

⁹⁴ See paragraph 56 for a detailed summary of the Sabo Documents.

⁹⁵ Terms of Reference: (i), (iv), (v), (vi), (vii), (viii), and (x).

[REDACTED]

[REDACTED]

[REDACTED]

2) THE PRIVILEGED INFORMATION IS NOT NECESSARY

86. In addition to demonstrating that the disputed information is “highly material”, Commission Counsel must also demonstrate that the information is necessary to answer the questions in the Terms of Reference such that the evidence cannot come from some other source.⁹⁷

87. The jurisprudence requires a consideration of the following factors when considering the “necessary” requirement:

- (a) the availability of other witnesses to give the evidence;
- (b) the importance of the issue for which the testimony is sought;
- (c) the degree of controversy surrounding the issue;
- (d) the potential disruption of the trial process; and
- (e) the overall integrity of the administration of justice.⁹⁸

88. Any one or more of these considerations may justify quashing a summons.⁹⁹

⁹⁶ The City offered to produce some of the documents in this Category with redactions over the information that is not relevant to the Inquiry, but Commission Counsel refused and seeks production of all the documents in these categories without redactions.

⁹⁷ *Mohtashami v. Toronto (City)*, 2018 ONSC 5460 at para. 18.

⁹⁸ *1504413 Ontario Ltd.*, *supra* note 2 at para. 17.

⁹⁹ *Windsor Family Credit Union Ltd v. Barat Estate*, 2014 ONSC 5898 at para. 17.

89. The Disputed Documents are not necessary to answer the questions raised in the Terms of Reference in that any information that may be relevant can be obtained through other sources of evidence, including documents that have been produced or *viva voce* evidence from witnesses that have or will give evidence at the Inquiry.¹⁰⁰ Additionally, the City’s Inquiry Counsel has offered to produce certain Disputed Documents with redactions,¹⁰¹ but Commission Counsel has rejected those proposals.

90. To the contrary, these factors militate against any finding that the Disputed Documents are necessary. The notion that either the direct testimony or documents reflecting legal advice prepared by a lawyer could be used against their client strikes at the core of the lawyer client relationship and invariably has serious implications for the proper administration of justice.

91. This situation creates an untenable conflict between the duties of loyalty and candour owed by a lawyer to his or her clients and the lawyer’s duties as an independent officer of the court.¹⁰²

[REDACTED]

[REDACTED]

[REDACTED] A

lawyer’s ability to provide candid legal advice would be severely undermined if, as a matter of course, this advice could be summonsed and used against a client.

¹⁰⁰ In *Maesbury v. 15390006 Ontario Inc.*, 2011 ONSC 2829, the summons to witness required the plaintiff’s lawyer, Mr. Shiller, to produce documents relating to a Florida proceeding commenced by the plaintiffs, documents related to a Law Society investigation, and “any other documents related to the plaintiffs’ failure to make full and frank disclosure” in the Ontario proceeding. The Court concluded that Mr. Shiller’s testimony was not necessary: it “too is readily available from another and more directly involved source” (para. 21), an affiant who made the relevant Law Society complaint and therefore could provide the evidence himself.

¹⁰¹ See e.g., SPE_04552155, Tab 97 of the Unique Disputed Documents Brief and SPE_04552163, Tab 93 of the Unique Disputed Documents Brief.

¹⁰² *Rice v. Smith et al.*, 2013 ONSC 1200 at para. 19.

3) THE PRIVILEGED INFORMATION IS NOT ADMISSIBLE

92. The requirement to show high materiality and necessity underlies a core assumption: the proposed evidence is otherwise admissible. As the Court of Appeal noted in *1504413 Ontario Ltd.*, “[m]anifestly, solicitor/client privilege will figure significantly on the issue of admissibility.”¹⁰³

i. The Documents are privileged

93. The Disputed Documents are subject to solicitor-client and/or litigation privilege and are therefore inadmissible.

94. [REDACTED]

95. Solicitor-client privilege is more than a rule of evidence; it is a rule of substantive law and a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*.¹⁰⁴ According to the Supreme Court of Canada, solicitor-client privilege must be as close to absolute as possible.”¹⁰⁵

96. Solicitor-client privilege applies where three conditions are satisfied: (1) the communication was between a solicitor and a client; (2) the communication entailed the seeking or the receiving of legal advice; and (3) the client intended the communication to be confidential.¹⁰⁶

97. [REDACTED]

¹⁰³ *1504413 Ontario Ltd.*, *supra* note 2 at note 1.

¹⁰⁴ *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 893; *Lavallee*, *supra* note 1 at para. 21.

¹⁰⁵ *R v. McClure*, 2001 SCC 14 at para. 35.

¹⁰⁶ *Solosky*, *supra* note 1 at pp. 835, 837; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 15.

[REDACTED]

98. [REDACTED]

[REDACTED]

[REDACTED]

¹⁰⁷ *Moore v. Getahun et al.*, 2015 ONCA 55 at para. 78; *Vander Laan v. LSMR Developments Inc.*, 2012 BCSC 1936 at paras. 15, 17.

¹⁰⁸ *Pritchard*, *supra* note 106106 at para. 21.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ii. City Council did not waive privilege

101. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege.¹¹⁰ The onus to prove waiver is on the party seeking to displace it.¹¹¹

iii. City Council expressly voted to maintain privilege

102. At no time has City Council expressed an intention to waive privilege over the Disputed Documents.

103. As set out above at paragraph 52, above, Council voted expressly to keep privileged information, [REDACTED] and the January Litigation Update Report, confidential. This is especially significant in light of the fact that Council chose to publicly release other documents, including the CIMA Memo addressed to the Mayor and City Council as well as the Tradewind Report.

104. The City's decision to waive privilege over the CIMA Memo cannot be construed as a waiver over [REDACTED] and the January Litigation Update Report. As held by Justice

¹⁰⁹ See *Blank*, *supra* note 1 at note 1.

¹¹⁰ *S&K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CanLII 407 (B.C. Sup. Ct.) at para. 6, McLachlin J. (as she then was).

¹¹¹ *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 at para. 22.

Sharpe (as he then was) in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, “[i]t is plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file.”¹¹²

iv. *Calling an inquiry does not waive privilege*

105. Waiver may also occur in the absence of any intention to waive the privilege where the principles of fairness and consistency so require. For example, where a party relies on legal advice as a substantive element of their legal position, they cannot then assert privilege in order to prevent an opposing party from exploring the validity of their claims.¹¹³

106. Commission Counsel argues that by calling the Inquiry, and pursuant to the Inquiry’s Terms of Reference, the City has waived privilege over all documents relevant to the Inquiry. In other words, they allege that the calling of the Inquiry constituted an “implied” or “deemed” waiver of privilege.

107. This is inconsistent with the express provisions of the *Public Inquiries Act*, which enshrine the municipalities’ right to maintain privilege and not produce such documents even if they are relevant to the issues in an inquiry proceeding.¹¹⁴ Section 33(13) expressly provides that “[n]othing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.”

108. Section 33(13) indicates that in drafting the *Public Inquiries Act*, the Ontario legislature specifically decided to preserve a party’s right to assert privilege during the course of a public

¹¹² *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1995 CanLII 7258 (Ont. Sup. Ct.) at p. 20.

¹¹³ *Soprema Inc v. Wolridge Mahon LLP*, 2016 BCCA 471 at para. 30.

¹¹⁴ *Public Inquiries Act*, s. 33(13).

inquiry, and therefore contemplated that privilege would not be automatically waived by virtue of a party's decision to call an inquiry.

109. Commission Counsel's argument – that the City's right to claim privilege over the Disputed Documents was waived through the very act of calling the Inquiry – would render section 33(13) meaningless.

110. As well, when dealing with implied waiver, the decision-maker must take into account the special status afforded to solicitor-client privilege. Solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield to implied waiver in the clearest of cases.¹¹⁵

v. British Columbia (Criminal Justice Branch) v. Davies is distinguishable

111. In support of their argument on waiver, Commission Counsel cites *British Columbia (Criminal Justice Branch) v. Davies* (“**Davies**”).¹¹⁶ As detailed below, this case is distinguishable from the facts at hand.

112. *Davies* arose out of the Frank Paul Inquiry, convened under the *Public Inquiries Act* to investigate the circumstances surrounding the death of Mr. Frank Paul, a Mi'Kmaq man who was found dead in a Vancouver Downtown Eastside alley in December 1998 after being released from police custody.

113. The Terms of Reference for this inquiry included the following:

(b) to make findings of fact regarding circumstances relating to Mr. Paul's death, including findings of fact respecting the **response of** British

¹¹⁵ *McQueen et al. v. Mitchell et al.*, 2022 ONSC 649 at para. 73.

¹¹⁶ *British Columbia (Criminal Justice Branch) v. Davies*, 2008 BCSC 817 [*Davies*].

Columbia Ambulance Service, the Vancouver Police Department, the BC Coroners Service, the Office of the Police Complaints Commissioner and the **Criminal Justice Branch of the Ministry of Attorney General** to the death of Mr. Paul;

(e) to examine the rules, policies and procedures of the BC Coroners Service, the Office of the Police Complaints Commissioner and the Criminal Justice Branch of the Ministry of Attorney General related to the role and response of each of those offices where an individual dies in circumstances similar to the circumstances of Mr. Paul's death... [Emphasis in original.]

114. The Criminal Justice Branch of the Ministry of the Attorney General (“**CJB**”) applied to the Commissioner seeking a declaration that the CJB was not compellable to provide documentary and *viva voce* evidence as to its response to the death of Mr. Paul, relying on the principles of Crown immunity and solicitor-client privilege. The CJB took the position that the Commissioner could not inquire into the legal advice that was given or received by Crown counsel and therefore could not summons counsel to testify about why a charge was laid or not laid.

115. The Commissioner disagreed with the CJB's position and on judicial review, Justice Melnick found that the CJB was entitled to claim solicitor-client privilege over these matters, but that the Inquiry's Terms of Reference constituted an effective waiver of solicitor-client privilege.

116. The specific wording of the Terms of Reference, and in particular, the two terms detailed above were critical to Justice Melnick's decision regarding waiver. These Terms expressly directed the Commissioner to make findings about the “response of” the CJB to Mr. Paul's death.

117. Justice Melnick found that inquiring into the “response of” the CJB necessarily included considering the CJB’s exercise of charge assessment authority, the precise evidence over which the CJB was attempting to claim privilege.¹¹⁷

118. In interpreting the Terms of Reference, Justice Melnick’s looked at the plain reading of language of the terms and considered whether there was any other interpretation of what “response of” the CJB could mean in the circumstances.¹¹⁸

119. When read in their plain language, there are no Terms of Reference that specifically refer to or inquire into the precise information over which the City is claiming privilege. The specific wording of the above-noted Terms of Reference do not evince any intention to waive privilege over the Boghosian Documents, Sabo Documents, nor the Documents Related to Other Legal Proceedings.

PART IV - ORDER REQUESTED

120. The City of Hamilton respectfully requests an Order declaring that all the Disputed Documents are privileged and inadmissible in the Inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July, 2022.

Per



Eli S. Lederman; Delna Contractor;
Samantha Hale

¹¹⁷ *Davies, supra* note 116116 at para. 50.

¹¹⁸ *Davies, supra* note 116116 at para. 58.

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Lawyers for the City of Hamilton

SCHEDULE A

LIST OF AUTHORITIES

1. *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319
2. *British Columbia (Criminal Justice Branch) v. Davies*, 2008 BCSC 817
3. *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860
4. *Konstan v. Berkovits*, 2013 ONSC 6169
5. *Lavallee, Rackel & Heintz v. Canada*, [2002] 3 S.C.R. 209
6. *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420
7. *Maesbury v. 15390006 Ontario Inc.*, 2011 ONSC 2829
8. *McQueen et al. v. Mitchell et al.*, 2022 ONSC 649
9. *Mohtashami v. Toronto (City)*, 2018 ONSC 5460
10. *Moore v. Getahun et al.*, 2015 ONCA 55
11. *Ontario Provincial Police v. The Cornwall Public Inquiry*, 2008 ONCA 33
12. *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809
13. *R v. 1504413 Ontario Limited*, 2008 ONCA 253
14. *R v. McClure*, 2001 SCC 14
15. *Rice v. Smith et al.*, 2013 ONSC 1200
16. *Rigaux v. British Columbia (Commission of Inquiry into death of Vaudreuil)*, 1998 CanLII 1974 (B.C. Sup. Ct.)
17. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27
18. Ruel, Simon, *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters, 2010)
19. *S&K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CanLII 407 (B.C. Sup. Ct.)
20. *Solosky v. The Queen*, [1980] 1 S.C.R. 821
21. *Soprema Inc v. Wolridge Mahon LLP*, 2016 BCCA 471

22. *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1995 CanLII 7258 (Ont. Sup. Ct.)
23. *Vander Laan v. LSMR Developments Inc.*, 2012 BCSC 1936
24. *Windsor Family Credit Union Ltd v. Barat Estate*, 2014 ONSC 5898

SCHEDULE B

RELEVANT STATUTORY PROVISIONS

Public Inquiries Act, 2009, S.O. 2009, c. 33, Sched. 6

Privilege preserved

8 (3) Despite subsection (1), no information may be received and accepted by a commission that would be inadmissible in a court by reason of any privilege under the law of evidence. 2009, c. 33, Sched. 6, s. 8 (3).

Power to summon witnesses, papers, etc.

33 (3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13). 2009, c. 33, Sched. 6, s. 33 (3).

Privilege

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence. 2009, c. 33, Sched. 6, s. 33 (13).

SCHEDULE C – Terms of Reference Categories

The terms of reference of the Inquiry, broken down thematically are as follows:

Disclosure of the Tradewind Report: Issues around friction testing conducted in late 2013 on the RHVP and the Lincoln Alexander Parkway, the subsequent report about it, circumstances surrounding the report coming to light in 2018 and the ramifications, if any, of this report not being disclosed before 2018

- | | | | |
|-------|---|--------|--|
| (i) | Identify all individuals who received a copy of the Report or were advised of the Report or the information and recommendations contained therein after it was provided to the City's Department of Engineering Services in January, 2014; | (viii) | Were appropriate steps taken to disclose the Report, or the information and recommendations contained therein, once it was discovered in 2018? |
| (ii) | Based on the City's by-laws, policies and procedures, as they were in 2014, should Council have been made aware of the Report, or the information and recommendations contained therein, once the Report was submitted to the Department of Engineering Services in 2014? | (ix) | Was there any negligence, malfeasance or misconduct in failing to disclose the Report, or the information and recommendations contained therein, once the Report was discovered in 2018? |
| (iii) | Why was the information in the Report, or the information and recommendations contained therein, not provided to Council or the public once the Report was submitted to the Department of Engineering Services in 2014? | (x) | Were users of the RHVP put at risk as a result of the failure to disclose the Report's findings? |
| (iv) | Who, if anyone, was responsible for the failure to disclose a copy of the Report, or the information and recommendations contained therein, to Council in 2014? | (xi) | Did the Report contain findings or information that would have triggered Council to make safety changes to the roads or order further studies? |
| (v) | Was there any negligence, malfeasance or misconduct in failing to provide the Report, or the information and recommendations contained therein, to Council or the public? | (xii) | Did the failure to disclose the Report, or the information and recommendations contained therein, contribute to accidents, injuries or fatalities on the RHVP since January, 2014? |
| (vi) | How was the Report discovered in 2018? | (xiv) | Did subsequent consultant reports provide additional support or rebuttal to the conclusions contained in the Report? |
| (vii) | Identify all individuals who received a copy of the Report or were advised of the Report or the information and recommendations contained therein, in 2018; | (xv) | Identify any changes to the City's bylaws, policies and procedures to prevent any such future incidents of non-disclosure of significant information to Council; |

The MTO Friction Testing: Issues around the Ministry of Transportation of Ontario friction testing on the RHVP, conducted in 2007

- (xvi) Did the MTO Report provide additional support or rebuttal to the conclusions contained in the Report?
- (xvii) Why was the MTO Report not provided to Council or made publicly available?
- (xviii) Who was briefed within the MTO's office about the MTO Report?
- (xix) Did the MTO Report contain findings or information that would have triggered Council to make safety changes to the roads or order further studies?
- (xx) Did the failure to disclose the MTO Report, or the information and recommendations contained therein, contribute to accidents, injuries or fatalities on the RHVP since January, 2014?
- (xxi) Did the MTO request, direct or conduct any friction tests, asphalt assessments, or general road safety reviews or assessments on the RHVP other than the MTO Report?

Additional Friction Testing: Issues surrounding any additional friction testing by the City or MTO

- (xiii) Did anyone in the Public Works Office or Roads Department request, direct or conduct any other friction test, asphalt assessment, or general road safety reviews or assessments on the RHVP?

Friction Standards: Acceptable friction standards in Ontario and friction levels on the RHVP

- (xxii) What is the standard in Ontario, if any, with respect to the acceptable levels of friction on a roadway?
- (xxiii) Is information with respect to the friction levels of the roadways in Ontario publicly available?

Role of Non-Friction Factors in MVAs: Factors other than friction which contribute to collisions on the RHVP

- (xxiv) To what extent do other factors, including, but not limited to, driver behaviour, lighting and weather conditions, contribute to motor vehicle accidents when compared to the impact of friction levels on motor vehicle accidents on the RHVP?

SCHEDULE D – List of the Unique Disputed Documents

Tab¹¹⁹	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
1	SPE_04332112_0001	1/31/2018	Correspondence	Shillingtons LLP memo re: civil claims against Hamilton	David S. Thompson	Diana Swaby	Ian McLellan	[REDACTED]
2	CIM0022413	03/05/2018	Notes	Untitled	Brian Malone			[REDACTED]
3	SPE_04289386_0001	11/20/2018	Email	Re: PW Red Hill Matter	Nicole Auty	Ron Sabo		[REDACTED]
5	SPE_04288940_0001	12/07/2018	Correspondence	Re: Red Hill Valley Expressway friction issues, possible litigation	Nicole Auty	David Boghosian		[REDACTED]
5a	SPE_04288939_0001	12/07/2018	Email	Re: Retainer Letter	Nicole Auty	David Boghosian		[REDACTED]
6	SPE_04332689_0001	12/07/2018	Transcript	Examination for Discovery of Marco Oddi in <i>Hansen v. Bernat</i>	Court Reporter			[REDACTED]
9	SPE_04288885_0001	12/11/2018	Email Chain	Re: Privileged and Confidential - RHVE	Nicole Auty	David Boghosian		[REDACTED]
15	SPE_04288799_0001	12/13/2018	Letter	Re: Hamilton re: RED HILL VALLEY PARKWAY LEGAL OPINION	David Boghosian	Nicole Auty		[REDACTED]
15a	SPE_04288798_0001	12/13/2018	Email	Re: Draft Hamilton re: Red Hill Valley Parkway Opinion Letter	David Boghosian	Nicole Auty		[REDACTED]
19	CIM0022412	01/02/2019	Notes	Untitled	Brian Malone			[REDACTED]

¹¹⁹ Tab references are to the Unique Disputed Documents Brief

Tabs 119	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
21	HAM0061607_0001	01/16/2019	City of Hamilton Internal Document	Crisis Communications Plan Draft 1.0	Unknown			[REDACTED]
22	SPE_04288359	01/17/2019	Email	Re: Latest Cima Report	Ron Sabo	Nicole Auty		[REDACTED]
23	HAM0062071_0001	01/19/2019	Email	Re: RHVE Report Draft	David Boghosian	Gord McGuire & Ron Sabo	Nicole Auty	[REDACTED]
25	SPE_04312139_0001	01/31/2019	Email	Re: Approach to Reporting	Ron Sabo	Nicole Auty		[REDACTED]
26	SPE_04288129_0001	01/31/2019	Email	Re: Email to CIMA	Nicole Auty	David Boghosian		[REDACTED]
27	CIM0017212	01/31/2019	Email	Re: Hamilton Re: RHVP Council Issues	David Boghosian	Brian Malone		[REDACTED]
27a	CIM0017212.0001	12/17/2018	Letter	Evaluation of Pavement Surface and Aggregates Red Hill Valley Parkway City of Hamilton	Ludomir Uzarowski	Gord McGuire		[REDACTED]
27b	CIM0017212.0002	11/20/2013	Report	Friction Testing Survey Summary Report	Leonard Taylor (Tradewind Scientific)	Golder Associates		[REDACTED]
30	CIM0017209	1/31/2019	Email	Re: Hamilton re RHVP Council Issues	Brian Malone	David Boghosian	Alireza Hadayeghi	[REDACTED]
30a	CIM0017209.0001	11/20/2013	Report	Friction Testing Survey Summary Report	Leonard Taylor (Tradewind Scientific)	Golder Associates		[REDACTED]
30b	CIM0017209.0002	12/17/2018	Letter	Evaluation of Pavement Surface and Aggregates Red Hill Valley Parkway City of Hamilton	Ludomir Uzarowski	Gord McGuire		[REDACTED]
37	SPE_04288119_0001	1/31/2019	Email	Re: Meeting with GM Tomorrow morning	Nicole Auty	David Boghosian		[REDACTED]

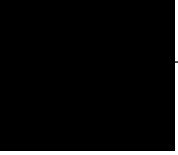
Tabs 119	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
46	CIM0017171.0001	02/03/2019	Memorandum	Red Hill Valley Parkway – Pavement friction Testing Results Review, with D. Boghosian comments	David Boghosian	Brian Malone		[REDACTED]
46a	CIM0017171	02/04/2019	Email	CIMA – Malone Draft Response to Questions	David Boghosian	Brian Malone		[REDACTED]
47	SPE_04315841_0001	02/04/2019	Email	Re: GIC Wednesday	David Boghosian	Nicole Auty		[REDACTED]
48	SPE_04310197_0001	02/04/2019	City of Hamilton Internal Document	Crisis Communications Plan, Draft 1.1 with D. Boghosian annotations	Unknown / David Boghosian	Nicole Auty		[REDACTED]
48a	SPE_04310196_0001	02/04/2019	Email	Re: Confidential Comms Docs: For your advice	David Boghosian	Nicole Auty		[REDACTED]
50	SPE_04288032_0001	02/04/2019	Email	Re: Red Hill Files and claims / draft comments	Ron Sabo	Nicole Auty		[REDACTED]
51	SPE_00468889_0001	02/04/2019	Email	Re: Confidential Comms Docs: For you advice	Nicole Auty	Jasmine Graham	Dan McKinnon, John Hertel & Ron Sabo	[REDACTED]
54	SPE_04315831_0001	02/04/2019	Memorandum	Speaking Points Re: Legal Liability Analysis David G. Boghosian	David Boghosian	Nicole Auty		[REDACTED]
54a	SPE_04315830_0001	02/04/2019	Email	RE: Hamilton RHVP Council issues – strictly privileged and confidential	David Boghosian	Nicole Auty		[REDACTED]
55	SPE_04312098_0001	02/04/2019	Email	Re: Comments on communications drafts	Ron Sabo	Nicole Auty		[REDACTED]
56	SPE_04301891_0001	02/04/2019	Email	Re: Hamilton re: Red Hill Valley Parkway Legal Opinion	David Boghosian	Nicole Auty		[REDACTED]

Tabs 119	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
57	SPE_04301892_0001	02/04/2019	Memorandum	Re: Hamilton re: Red Hill Valley Parkway Legal Opinion	David Boghosian	Nicole Auty		[REDACTED]
60	SPE_04315822_0001	02/04/2019	Email	Re: Hamilton re: RHVP Council Issues – Strictly Privileged and confidential	David Boghosian	Nicole Auty		[REDACTED]
61	SPE_04310168_0001	02/05/2019	Email	Re: Hamilton re: RHVP Council Issues – Strictly Privileged and Confidential	David Boghosian	Ron Sabo	Nicole Auty	[REDACTED]
62	SPE_04312087_0001	02/05/2019	Email	Re: Confidential comments on draft	Ron Sabo	Nicole Auty		[REDACTED]
63	SPE_04312086_0001	02/05/2019	Email	Re: CONFIDENTIAL	Ron Sabo	Nicole Auty		[REDACTED]
64	SPE_04312085_0001	02/05/2019	Email	Re: CONFIDENTIAL	Ron Sabo	Nicole Auty		[REDACTED]
66	SPE_04310162_0001	02/05/2019	Email	Re: CONFIDENTIAL	David Boghosian	Nicole Auty		[REDACTED]
70	SPE_04315806_0001	02/05/2019	Email	Re: Hamilton re: RHVP Council Issues – Strictly Privileged and Confidential	David Boghosian	Nicole Auty		[REDACTED]
71	SPE_04287914_0001	02/06/2019	Email	Re: RHVE Motions	Nicole Auty	David Boghosian	Ron Sabo	[REDACTED]
72	SPE_04247468_0001	Undated	Notes	Untitled	Nicole Auty			[REDACTED]
73	SPE_04312041_0001	02/07/20	Email	Re: Carbone, Kristian – PON 8421902B – April 2 nd Judicial Pre-Trial	Ron Sabo	Geoffrey Tennant	Linda Clayton	[REDACTED]
75	HAM0054450_001	12/13/2018	Memorandum	Re: Hamilton re: Red Hill Valley Parkway Legal Opinion	David Boghosian	Nicole Auty		[REDACTED]
75a	HAM0054449_0001	02/07/2019	Email	Re: FYI continued	John McLennan	Kirk C. Boggs		[REDACTED]

Tabs 119	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
76	SPE_04310089_0001	02/07/2019	Email	Re: RHVP	Linda Clayton	Ron Sabo		[REDACTED]
77	SPE_04287842_0001	02/08/2019	Email	Re: Outstanding Spec Questions	Nicole Auty	David Boghosian	Ron Sabo	[REDACTED]
78	HAM0061901_0001	02/08/2019	Email	Re: Outstanding Spec Questions	Ron Sabo	Nicole Auty	David Boghosian	[REDACTED]
79	SPE_04312031_0001	02/08/2019	Email	Re: Outstanding Spec Questions	Ron Sabo	David Boghosian	Nicole Auty	[REDACTED]
80	SPE_04315898_0001	02/12/2019	Email	Re: Outstanding questions - Spec	David Boghosian	Nicole Auty, Ron Sabo		[REDACTED]
83	SPE_04552112_0001	06/23/2021	Transcript	Examination of Stephen Cooper in <i>Melo v. Vanderburgh et al.</i>	Court Reporter			[REDACTED]
84	SPE_04332690_0001	10/26/2021	Transcript	Examination for Discovery of Marco Oddi in <i>Hansen v. Bernat</i>	Court Reporter			[REDACTED]
85	SPE_04317040_0001	12/07/2018	Notes	Untitled	David Boghosian			[REDACTED]
85a	Transcriptio to SPE_04317040_0001	12/07/2018	Transcribed Notes	Untitled	David Boghosian			[REDACTED]
86	SPE_04552171_0001	12/11/2018 12/14/2018 Undated	Notes	Untitled	Nicole Auty			[REDACTED]
86a	Transcription to SPE_04552171_0001	12/11/2018 12/14/2018 Undated	Transcribed Notes	Untitled	Nicole Auty			[REDACTED]
87	SPE_04317039_0001	12/11/2018	Notes	Untitled	David Boghosian			[REDACTED]
87a	Transcription to SPE_04317039_0001	12/11/2018	Transcribed Notes	Untitled	David Boghosian			[REDACTED]

Tabs 119	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
88	SPE_04552141_0001	12/11/2018	Notes	Untitled	Ron Sabo			[REDACTED]
88a	Transcription to SPE_04552141_0001	12/11/2018	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]
89	SPE_04552166_0001	12/12/2018	Notes	Untitled	Ron Sabo			[REDACTED]
89a	Transcription to SPE_04552166_0001	12/12/2018	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]
90	SPE_04552169_0001	Undated	Notes	N. Auty annotations on Hamilton re: Red Hill Valley Parkway Legal Opinion	Nicole Auty	David Boghosian		[REDACTED]
90a	Transcription to SPE_04552169_0001	Undated	Transcribed Notes	Untitled	Nicole Auty			[REDACTED]
91	SPE_04552169_0001	Undated	Notes	R. Sabo annotations on Hamilton re: Red Hill Valley Parkway Legal Opinion	Ron Sabo	David Boghosian		[REDACTED]
91a	Transcription to SPE_04552169_0001	Undated	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]
92	SPE_04316992_0001	13/12/2018	Email	Re: Safety Analysis of the Red Hill Valley Parkway	David Boghosian	Nicole Auty		[REDACTED]
93	SPE_04552163_0001	Undated	Notes	Untitled	Ron Sabo			[REDACTED]
93a	Transcription to SPE_04552163_0001	Undated	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]
94	SPE_04317041_0001	01/08/2019	Notes	Untitled	David Boghosian			[REDACTED]
94a	Transcription to SPE_04317041_0001	01/08/2019	Transcribed Notes	Untitled	David Boghosian			[REDACTED]
95	SPE_04552153_0001	01/08/2019	Notes	Untitled	Ron Sabo			[REDACTED]
95a	Transcription to SPE_04552153_0001	01/08/2019	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]

Tabs 119	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	[REDACTED] y
96	SPE_04317042_0001	01/30/2019	Notes	Untitled	David Boghosian			[REDACTED]
96a	Transcription to SPE_04317042_0001	01/30/2019	Transcribed Notes	Untitled	David Boghosian			[REDACTED]
97	SPE_04552155_0001	01/30/2019	Notes	Untitled	Ron Sabo			[REDACTED]
97a	Transcription to SPE_04552155_0001	01/30/2019	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]
98	SPE_04317043_0001	01/30/2019	Notes	Untitled	David Boghosian			[REDACTED]
98a	Transcription to SPE_04317043_0001	01/30/2019	Transcribed Notes	Untitled	David Boghosian			[REDACTED]
99	SPE_04552154_0001	01/30/2019 02/01/2019 02/04/2019 02/05/2019 02/06/2019	Notes	Untitled	Ron Sabo			[REDACTED]
99a	Transcription to SPE_04552154_0001	01/30/2019 02/01/2019 02/04/2019 02/05/2019 02/06/2019	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]
100	SPE_04552154_0001	01/31/2019	Email	Re: RHVP	Brian Malone	David Boghosian		[REDACTED]
101	SPE_04552154_0001	Undated	Notes	Untitled	Ron Sabo			[REDACTED]
101a	Transcription of SPE_04552160_0001	Undated	Transcribed Notes	Untitled	Ron Sabo			[REDACTED]
104	SPE_04552290_0001	11/09/2020	Letter	Re: City of Hamilton ats Mark and Rachel Bernat – Court File No. 17 62352	Belinda Bain	Diana Swaby & Anita Putos		[REDACTED]

Tabs 119	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	
105	SPE_04552326	08/04/2017	Letter	Liability Confidential Report	Adam Tolls	City of Hamilton, Diana Sabados		

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FACTUM OF THE CITY OF HAMILTON

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