



City of Hamilton – Motion for Directions

Privilege Dispute Process

April 25, 2022

Materials for use on motion

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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

NOTICE OF MOTION FOR DIRECTIONS

The City of Hamilton will make a Motion for Directions to the Honourable Justice Herman J. Wilton-Siegel, the Commissioner to the Red Hill Valley Parkway Inquiry, in writing or, if directed by the Commissioner by videoconference on a date to be set by the Commissioner.

PROPOSED METHOD OF HEARING: The Motion is to be heard in writing or by video conference.

THE MOTION IS FOR DIRECTIONS:

- (a) Appointing a designate (the “**Designate**”) to determine the claim for legal privilege with respect to the Documents Under Review (defined below), pursuant to Rule 15 of the Rules of Procedure for the Red Hill Valley Parkway’s Investigation and Public Hearings, dated June 25, 2020 (the “**Rules**”);
- (b) Directing that the motion before the Designate be heard *in camera* and any motion materials be filed with redactions so as to protect information that may be subject to legal privilege, including solicitor client or litigation privilege; and
- (c) Directing that the Designate’s decision be made public, subject to redacting any portions of the decision which are necessary to protect privileged information, as deemed necessary by the Designate.

THE GROUNDS FOR THE MOTION ARE

I. Background to the City's Request for Directions:

- (a) On April 24, 2019, the City of Hamilton (the “**City**”) passed a resolution pursuant to section 274 of the *Municipal Act, 2001* requesting 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.
- (b) The Honourable Mr. Justice Herman J. Wilton-Siegel was appointed as the Commissioner of the Red Hill Valley Parkway Inquiry (the “**Inquiry**”) in May 2019. The Commissioner appointed Robert Centa, Emily Lawrence and Andrew C. Lewis at the law firm of Paliare Roland as Commission Counsel;
- (c) Commission Counsel requested that the City produce all documents relevant to the issues in the Inquiry, as defined in the Terms of Reference, pursuant to the summons authority under section 33(3) of the *Public Inquiries Act*.
- (d) Pursuant to section 33(11) of the *Public Inquiries Act*, any information that is protected by legal privilege is inadmissible at the Inquiry. The courts have described solicitor client privilege as a “fundamental civil and legal right” that is essential to our legal system. Privilege is routinely maintained in litigation or other proceedings, including judicial inquiries.
- (e) The City has produced over 62,500 documents that were potentially relevant to the Terms of Reference and responsive to the summons. In addition to these documents, the City identified a number of documents which are subject to legal

privilege, including documents that contain legal advice or are prepared for the purpose of litigation, that may also be relevant to the Terms of Reference and advised Commission Counsel that these privileged documents would either not be produced on the basis of their inadmissibility or, where possible, would be produced in redacted form.

- (f) Initially, the City withheld approximately 1000 relevant documents (the “**Privileged Documents**”) on the basis that these documents were subject to legal privilege and are inadmissible in the hearing stage of the Inquiry pursuant to section 33(13) of the *Public Inquiries Act, 2009*.
- (g) In February 2021, Commission Counsel advised the City that it did not agree with the City’s assertions of privilege over the Privileged Documents, asserting that the City waived privilege over all documents relevant to the Inquiry.
- (h) The City subsequently provided Commission Counsel with unredacted copies of all Privileged Documents requested by Commission Counsel, on a without prejudice basis, to permit Commission Counsel to review and identify the specific Privileged Documents which they deemed relevant to the work of the Inquiry.
- (i) The City worked cooperatively with Commission Counsel to find a balanced approach that would allow Commission Counsel to have access to information that was truly relevant to the Terms of Reference, while protecting the privileged nature of the information.

- (j) Following these discussions, the City agreed to produce the majority of the documents Commission Counsel identified, while maintaining the City's assertions of privilege over 43 unique documents (and a total of 87 documents when document duplicates and partial email chains are accounted for) (the "**Documents Under Review**").

- (k) The City and Commission Counsel have agreed to use the same approach as set out above in respect of any other relevant documents over which the City may claim privilege (the "**Additional Documents Under Review**").

- (l) In light of the City and Commission Counsel's positions regarding the Documents Under Review, the City seeks directions from the Commissioner:
 - (i) To appoint a Designate to determine whether the Documents Under Review and, if necessary, any Additional Documents Under Review, are privileged pursuant to Rule 15 and, if necessary, to waive the requirements under Rule 15(c) regarding the appointment of a current judge of the Superior Court as the Commissioner's designate;

 - (ii) To direct that the motion before the Designate be heard *in camera* and any motion materials filed with redactions to protect any potentially privileged information; and

 - (iii) To direct that the Designate's decision be made public, subject to redacting any portions of the decision to protect privileged information.

II. The Basis for the Motion for Directions:

i. *Appointment of the Designate*

- (l) Rule 15 provides a procedure for the assertion of privilege by Participants to the Inquiry. The City has complied with this process throughout the Inquiry, including providing Commission Counsel with access, on a without prejudice basis, to unredacted copies of all the Privileged Documents, and agreed to produce the majority of the Privileged Documents requested by Commission Counsel. However, there remain 43 unique documents (and a total of 87 Documents Under Review when document duplicates and partial email chains are accounted for), over which a privilege determination must be made at this time.
- (m) Pursuant to Rule 15(c), the Commissioner may appoint a designate to exercise the powers of the Commissioner in respect of the determination of the claims of privilege.
- (n) Appointing a delegate to determine the privilege claims would ensure that any privileged information contained within the Documents Under Review and, if necessary, the Additional Documents Under Review is not reviewed by the Commissioner, in the event that they are deemed inadmissible in the Inquiry, pursuant to section 33(11) of the *Public Inquiries Act, 2009*.
- (o) The practice of appointing a designate to adjudicate privilege claims has been followed by a number of other public inquiries.
- (p) For example, in the Elliot Lake Inquiry, Justice Goudge, a designate of the Commissioner, the Honourable Paul Belanger, adjudicated the privilege claims asserted by two summonsed parties over a number of documents that were relevant

to the Inquiry. Similarly, in the Goudge Inquiry, the Associate Chief Justice of Ontario, a designate of the Commissioner, adjudicated privilege claims asserted by the Kingston Police Service.

- (q) Appointing a designate of the Commissioner to review privilege claims is consistent with Justice Bellamy's recommendation in her report following the TCI Inquiry that issues of solicitor-client privilege be resolved by reference to the Regional Senior Justice of the Superior Court of Justice, or a judge designated by him.

ii. *The protection of potentially privileged information*

- (r) Rule 37 empowers the Commissioner to direct that matters within the Inquiry proceed in the absence of the public where such a direction is in the public interest.
- (s) Directing that the motion be held *in camera* would ensure that any privileged information, including the parties' submissions on the Documents Under Review and, if necessary, the Additional Documents Under Review, would remain confidential, in the event that the Designate determines that some or all of the Documents Under Review contain privileged information.
- (t) Similarly, directing that any written materials be redacted to protect potentially privileged information will ensure that any privileged information which is inadmissible in the Inquiry under s. 33 of the *Public Inquiries Act, 2009* will not be publicly disseminated and will remain confidential.
- (u) Directing that the Designate's decision be made public, subject to any redactions that are made to protect privileged information, as deemed necessary by the Designate, will similarly ensure that any privileged information which may

ultimately be deemed inadmissible in the Inquiry under s. 33 of the *Public Inquiries Act, 2009* will not be publicly disseminated.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The City may submit further written submissions or evidence as Counsel may advise and the Commissioner may permit.

March 25, 2022

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Commission Counsel

*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*

NOTICE OF MOTION

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Document ID	Attached Document IDs	Present Date	Document Date	Author	Recipient	CC	Privilege Description	Privilege Type	Unique Document (Yes or No)	Duplicate Reference
SPE_03607342		1/9/2019 9:12	12/31/2018 14:30	Boghosian, David G.	Auty, Nicole		Opinion Letter Providing Legal Advice From David Boghosian regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	Yes	SPE_04288799
SPE_01590347		1/10/2019 15:26	1/10/2019 15:26	Boghosian, David G.	Auty, Nicole		Opinion Letter Providing Legal Advice from David Boghosian regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	No	SPE_04288799
SPE_01591397		1/10/2019 15:28	1/10/2019 15:26	Boghosian, David G.	Auty, Nicole		Opinion Letter Providing Legal Advice From David Boghosian regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	Yes	SPE_04288799
SPE_01590408		1/10/2019 15:39	1/10/2019 15:26	Boghosian, David G.	Auty, Nicole		Opinion Letter Providing Legal Advice from David Boghosian regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	No	SPE_04288799
SPE_01597381		2/12/2019 14:30	2/7/2019 15:17	Boghosian, David G.	Auty, Nicole		Opinion Letter Providing Legal Advice From David Boghosian regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	Yes	SPE_04288799
SPE_01598442		2/7/2019 15:19	2/7/2019 15:17	Boghosian, David G.	Auty, Nicole		Opinion Letter Providing Legal Advice from David Boghosian regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	No	SPE_04288799
SPE_01598444		2/7/2019 15:17	2/7/2019 15:17	Boghosian, David G.	Auty, Nicole		Opinion Letter Providing Legal Advice From David Boghosian regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	Yes	SPE_04288799
0100036738		2/4/2019 7:39	2/4/2019 7:39	Malone, Brian	Boghosian, David		Draft Document Prepared for Review by Boghosian and Allen regarding Liability Issues.	Solicitor-Client; Litigation	No	SPE_01071764
SPE_04287034		1/20/2019 11:43	1/20/2019 11:41	Auty, Nicole	David Boghosian		Email Chain Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04287942		2/6/2019 15:21	2/6/2019 15:21	Auty, Nicole	David Boghosian	Sabo, Ron	Email Chain Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04287914		2/6/2019 11:49	2/6/2019 11:49	Auty, Nicole	David Boghosian	Sabo, Ron	Email Chain Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04288002		2/4/2019 10:32	2/4/2019 10:32	Auty, Nicole	Sabo, Ron		Email Chain Providing Legal Advice from Nicole Auty regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04288083		2/3/2019 16:01	2/3/2019 16:01	Auty, Nicole	David Boghosian		Email Chain Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	No	SPE_04288341
SPE_04288119		1/31/2019 8:50	1/31/2019 8:50	Auty, Nicole	David Boghosian		Email Chain Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04288129		1/30/2019 20:34	1/30/2019 20:34	Auty, Nicole	David Boghosian		Email Chain Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04288131	SPE_04288132;SPE_04288133	1/30/2019 18:40	1/30/2019 18:40	Auty, Nicole	David Boghosian		Email Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	No	SPE_04288129
SPE_04288359		1/17/2019 18:31	1/17/2019 18:31	Auty, Nicole	Sabo, Ron		Email Chain Seeking Legal Advice from Ron Sabo regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04288799		12/31/2018 16:01	12/31/2018 14:30	Boghosian, David G.	Auty, Nicole		Memorandum Prepared by Counsel from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04288884		12/31/2018 12:04	12/31/2018 12:04	Auty, Nicole	David Boghosian		Email Chain Providing Legal Advice from Nicole Auty regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04288885		12/31/2018 12:00	12/31/2018 12:00	Auty, Nicole	Sabo, Ron; MacNeil, Byrdna		Email Chain Providing Legal Advice from Nicole Auty regarding Liability Issues.	Solicitor-Client	No	SPE_04288884
SPE_04288940		12/7/2018 16:26	12/7/2018 16:26	Auty, Nicole	Boghosian, David		Draft Document Prepared for Review by Boghosian and Allen regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	No	SPE_04288949
SPE_04288943		12/7/2018 16:27	12/7/2018 16:26				Draft Document Prepared for Review by Boghosian and Allen regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	Yes	
SPE_04301893	SPE_04301892	2/4/2019 16:49	2/4/2019 16:49	David Boghosian	Auty, Nicole		Email Chain Providing Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04301892		2/4/2019 16:48	2/4/2019 15:56	Boghosian, David G.	Auty, Nicole		Memorandum Providing Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04301889		2/3/2019 15:29	2/3/2019 15:25	Dayton, Linda	Sabo, Ron		Email Chain Seeking Legal Advice from Ron Sabo regarding Liability Issues.	Solicitor-Client	Yes	
SPE_04301864		2/5/2019 10:25	2/5/2019 10:25	David Boghosian	Auty, Nicole; Sabo, Ron		Email Chain Providing Legal Advice from Boghosian and Allen regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	Yes	
SPE_04301868		2/5/2019 9:15	2/5/2019 9:10	David Boghosian	Sabo, Ron	Auty, Nicole	Email Chain Providing Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client; Litigation	Yes	
SPE_04301876	SPE_04301877	2/4/2019 17:13	2/4/2019 17:13	Auty, Nicole	Sabo, Ron		Email Providing Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client; Litigation	No	SPE_04301891
SPE_04301877		2/4/2019 17:13	2/4/2019 15:25	Boghosian, David G.	Auty, Nicole		Memorandum Prepared by Counsel from Boghosian and Allen regarding Liability Issues.	Solicitor-Client; Litigation	No	SPE_04301892
SPE_04301896	SPE_04301895;SPE_04301896;SPE_04301897	2/3/2019 22:13	2/3/2019 22:13	David Boghosian	Auty, Nicole; Sabo, Ron		Email Chain Providing Legal Advice from Boghosian and Allen regarding Communications.	Solicitor-Client; Litigation	Yes	
SPE_04301897		2/3/2019 22:13	2/3/2019 22:11				Draft Document Prepared for Review by Boghosian and Allen regarding Communications.	Solicitor-Client; Litigation	Yes	
SPE_04301898	SPE_04301899;SPE_04301900;SPE_04301901	2/3/2019 16:52	2/3/2019 16:52	Auty, Nicole	David Boghosian; Sabo, Ron		Email Chain Seeking Legal Advice from Boghosian and Allen regarding Communications.	Solicitor-Client; Litigation	No	SPE_04301896
SPE_04301899		2/3/2019 16:52	2/3/2019 16:00				Draft Document Prepared for Review by Boghosian and Allen regarding Communications.	Solicitor-Client; Litigation	No	SPE_04301897
SPE_04301900		2/3/2019 16:52	2/3/2019 16:01				Draft Presentation Prepared for Review by Boghosian and Allen regarding Communications.	Solicitor-Client; Litigation	Yes	

PE_0431024		2/3/2019 16:57	2/9/2019 17:09					Draft Presentation Prepared for Review by Boghosian and Allen regarding Litigation Communications.	Solicitor-Client; Litigation	Yes	
PE_0431016		2/11/2019 9:39	2/12/2019 9:39	Sabo, Ron	Aufy, Nicole; David Boghosian			Email Chain Providing Legal Advice from Ron Sabo regarding Litigation or Pending Litigation.	Solicitor-Client	Yes	
PE_0431098	PE_0431091&PE_0431093	2/8/2019 17:01	2/9/2019 17:01	Sabo, Ron	David Boghosian	Aufy, Nicole		Email Chain Seeking Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client; Litigation	Yes	
PE_0431041		2/7/2019 12:25	2/7/2019 12:25	Sabo, Ron	Tennant, Geoffrey	Clayton, Linda		Email Chain Providing Legal Advice from Ron Sabo regarding Litigation or Pending Litigation.	Solicitor-Client; Litigation	Yes	
PE_0431085		2/5/2019 11:09	2/5/2019 11:09	Sabo, Ron	Aufy, Nicole			Email Chain Providing Legal Advice from Ron Sabo regarding Presentations to Council.	Solicitor-Client; Litigation	Yes	
PE_0431066		2/5/2019 11:17	2/5/2019 11:17	Sabo, Ron	Aufy, Nicole			Email Chain Providing Legal Advice from Ron Sabo regarding Presentations to Council.	Solicitor-Client; Litigation	Yes	
PE_0431087		2/5/2019 10:29	2/5/2019 10:29	Sabo, Ron	Aufy, Nicole			Email Chain Providing Legal Advice from Ron Sabo regarding Presentations to Council.	Solicitor-Client	Yes	
PE_0431096		2/4/2019 15:42	2/4/2019 15:42	Sabo, Ron	Aufy, Nicole			Email Chain Providing Legal Advice from Ron Sabo regarding Communications.	Solicitor-Client	Yes	
PE_0431039		1/30/2019 19:24	1/30/2019 19:24	Sabo, Ron	Aufy, Nicole			Email Providing Legal Advice from Ron Sabo regarding Presentations to Council.	Solicitor-Client	Yes	
PE_0431506		2/5/2019 16:42	2/5/2019 16:42	David Boghosian	Aufy, Nicole			Email Chain Providing Legal Advice from Boghosian and Allen regarding Litigation or Pending Litigation.	Solicitor-Client	Yes	
PE_0431922		2/4/2019 17:22	2/4/2019 17:22	David Boghosian	Aufy, Nicole			Email Chain Providing Legal Advice from Boghosian and Allen regarding Presentations to Council.	Solicitor-Client	Yes	
PE_0431591		2/4/2019 14:52	2/4/2019 14:50					Draft Presentation Prepared for Review by Boghosian and Allen regarding Presentations to Council.	Solicitor-Client	Yes	
PE_0371164		2/8/2019 20:26	2/9/2019 20:24	Malone, Brian	Boghosian, David			Draft Document Prepared for Review by Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	
PE_0431561		2/3/2019 20:49	2/3/2019 20:49	David Boghosian	Aufy, Nicole			Email Chain Providing Legal Advice from Boghosian and Allen regarding Presentations to Council.	Solicitor-Client	Yes	
PE_0431596		2/12/2019 10:33	2/12/2019 10:32	David Boghosian	Aufy, Nicole; Sabo, Ron			Email Chain Providing Legal Advice from Boghosian and Allen regarding Liability Issues.	Solicitor-Client	Yes	

Document ID	Production Number	Parent Date	Document Date	Author	Recipient	Unique Document (Yes or No)	Duplicate Reference
SPE_00348324	HAM0054347_0001	1/30/2019 20:49	1/30/2019 20:49	Auty, Nicole	Zegarac, Mike; McKinnon, Dan	No	CIM0017209
SPE_00348332	HAM0062071_0001	1/20/2019 13:11	1/20/2019 13:11	Sabo, Ron	David Boghosian; McGuire, Gord	Yes	
SPE_00353676	HAM0062120_0001	1/31/2019 11:56	1/31/2019 11:56	McGuire, Gord	McKinnon, Dan; Auty, Nicole	No	CIM0017209
SPE_00357841	HAM0062117_0001	1/31/2019 11:32	1/31/2019 11:32	McKinnon, Dan	Auty, Nicole	No	CIM0017209
SPE_00468889	HAM0062863_0001	2/4/2019 11:55	2/4/2019 11:55	Auty, Nicole	Graham, Jasmine	Yes	
SPE_00900003	HAM0062202_0001	2/5/2019 15:11	2/5/2019 15:11	Auty, Nicole	Recine, Jen; Graham, Jasmine; Hertel, John	No	SPE_04310162
SPE_02478819	HAM0062210_0001	2/5/2019 15:51	2/5/2019 15:51	Recine, Jen	Auty, Nicole; Graham, Jasmine; Hertel, John	No	SPE_04310162
SPE_03560310	HAM0054350_0001	1/30/2019 20:49	1/30/2019 20:49	Auty, Nicole	Zegarac, Mike; McKinnon, Dan	No	CIM0017209
SPE_03679829	HAM0053987_0001	12/12/2018 10:48	12/12/2018 10:48			No	CIM0017209
SPE_03679850	HAM0054008_0001	12/12/2018 10:48	1/31/2019 8:02			No	CIM0017209
SPE_03679907	HAM0054063_0001	12/12/2018 10:48	12/12/2018 10:48			No	CIM0017209
SPE_03679928	HAM0054084_0001	12/12/2018 10:48	1/31/2019 8:02			No	CIM0017209
CIM0017178		2/1/2019 11:08	2/1/2019 11:08	Brian Malone	Alireza Hadayeghi	No	CIM0017209
CIM0017187		2/1/2019 10:24	2/1/2019 10:24	Alireza Hadayeghi	Brian Malone	No	CIM0017209
CIM0017207		1/30/2019 21:31	1/30/2019 21:31	David Boghosian	Brian Malone	No	CIM0017209
SPE_04247468	HAM0062867_0001	4/14/2021 8:11	4/14/2021 8:11			Yes	
SPE_04247480	HAM0061607_0001	4/14/2021 8:14	4/14/2021 8:14			Yes	
SPE_04287951	HAM0062579_0001	2/5/2019 13:55	2/5/2019 13:55	Auty, Nicole	David Boghosian; Sabo, Ron	No	SPE_04310162
SPE_04287955	HAM0062575_0001	2/5/2019 13:05	2/5/2019 13:05	Auty, Nicole	Sabo, Ron; David Boghosian	No	SPE_04310162
SPE_04288893	HAM0061811_0001	12/11/2018 9:46	12/11/2018 9:46	Auty, Nicole	David Boghosian	No	SPE_04288884
SPE_04288899	HAM0062502_0001	12/11/2018 9:33	12/11/2018 9:33	Auty, Nicole	MacNeil, Byrdena	No	SPE_04288884
SPE_04289386	HAM0062477_0001	11/20/2018 15:54	11/20/2018 15:54	Auty, Nicole	Sabo, Ron; McLennan, John	Yes	
SPE_04310162	HAM0062866_0001	2/5/2019 13:43	2/5/2019 13:43	David Boghosian	Auty, Nicole; Sabo, Ron	Yes	
SPE_04312034	HAM0061901_0001	2/8/2019 17:07	2/8/2019 17:07	Sabo, Ron	Auty, Nicole	Yes	
CIM0017162		2/4/2019 13:28	2/4/2019 13:28	David Boghosian	Brian Malone	No	CIM0017209
CIM0017163		2/4/2019 13:10	2/4/2019 13:10	Brian Malone	David Boghosian	No	CIM0017209
CIM0017192		2/1/2019 6:32	2/1/2019 6:32	Brian Malone	Geoff Petzold	No	CIM0017209
CIM0017193		1/31/2019 22:44	1/31/2019 22:44	Geoff Petzold	Brian Malone	No	CIM0017209
CIM0017194		1/31/2019 22:15	1/31/2019 22:15	Brian Malone	Geoff Petzold	No	CIM0017209
CIM0017197		1/31/2019 6:57	1/31/2019 6:57	Brian Malone	Geoff Petzold	No	CIM0017209
CIM0017198		1/31/2019 6:47	1/31/2019 6:47	Brian Malone	Geoff Petzold	No	CIM0017209
CIM0017199		1/30/2019 22:08	1/30/2019 22:08	Geoff Petzold	Brian Malone	No	CIM0017209
CIM0017206		1/30/2019 21:34	1/30/2019 21:34	Brian Malone	David Boghosian	No	CIM0017209
CIM0017208		1/30/2019 21:18	1/30/2019 21:18	Brian Malone	David Boghosian	No	CIM0017209
CIM0017209		1/30/2019 21:12	1/30/2019 21:12	Brian Malone	Geoff Petzold	Yes	
CIM0017212		1/30/2019 20:46	1/30/2019 20:46	David Boghosian	Brian Malone	No	CIM0017209
CIM0022412		1/2/2019 0:00	1/2/2019 0:00	Malone, Brian		Yes	
CIM0022413		3/5/2018 0:00	3/5/2018 0:00	Malone, Brian		Yes	

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Andrew Lokan
John Monger
Odette Soriano
Andrew C. Lewis
Megan E. Shortreed
Massimo Starnino
Karen Jones
Robert A. Centa
Nini Jones
Jeffrey Larry
Kristian Borg-Olivier
Emily Lawrence
Tina H. Lie
Jean-Claude Killey
Jodi Martin
Michael Fenrick
Ren Bucholz
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November 22, 2021

VIA EMAIL

Eli Lederman and Delna Contractor
Lenczner Slaght
130 Adelaide St W., Suite 2600
Toronto, ON M5H 3P5

Dear Counsel:

Re: RHVPI – Privilege Process

Further to our conversations, I write to confirm the process followed by the City of Hamilton and Commission Counsel to address the City's privilege claims.

1. Pursuant to rule 15(a)(i) of the Rules of Procedure for the Red Hill Valley Parkway Inquiry's Investigation And Public Hearings ("Rules"), the City Of Hamilton delivered a Claimed Privilege List to Commission Counsel. The Claimed Privilege List listed documents that the City objected to producing, in whole, on the grounds of privilege and/or documents of other parties over which the City asserted privilege. The City's Claimed Privilege List did not include the documents that the City had previously produced to the Inquiry with redactions of information over which the City asserted privilege.
2. Pursuant to Rule 15(a)(ii), Commission Counsel requested to review all documents over which the City had asserted a privilege claim in unredacted form, including: (1) City documents that were produced to the Inquiry with redactions; and (2) documents on the City's Claimed Privilege List.
3. Between March and May 2021, the City provided the documents over which it had asserted a privilege claim, as requested by Commission Counsel, for review without waiving privilege, pursuant to Rule 15(a)(ii).
4. After discussions between the City's Counsel and Commission Counsel, the City agreed to produce the majority of:
 - (a) in full, the documents requested by Commission Counsel, which included documents that were previously produced with redactions and documents that were previously withheld on the basis of privilege (the "Produced Documents"); and
 - (b) the documents that were previously produced with redactions on the basis of privilege, with certain redactions ("Produced Redacted Documents").

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RHV0000934

5. The City has provided the Inquiry with a list of the Produced Documents and Produced Redacted Documents (the “List of Produced Documents”), with notations identifying the documents subject to redaction as applicable. Upon receipt of this letter, the City will produce the documents on the List of Produced Documents to the Inquiry for inclusion in the Inquiry Database.
6. Pursuant to rule 15(a)(i), the City has delivered a Revised Claimed Privilege List to Commission Counsel, listing the relevant documents over which the City continues to maintain privilege, in whole or in part. The Produced Documents are not included on the Revised Claimed Privilege List.
7. Commission Counsel has reviewed the Revised Claimed Privilege List, including the City’s proposed redactions, and will recommend to the Commissioner that he accept all of the City’s remaining claims for privilege that are set out in the Revised Claimed Privilege List, except for the following documents (the “Disputed Documents”):
 - (a) See attached Appendix A
8. Other than as listed in paragraph 7, Commission Counsel has no present intention to challenge any of the City’s privilege claims set out in the Revised Claimed Privilege List and will not do so unless circumstances change. In that event, Commission Counsel will discuss the matter with the City and, if it cannot be resolved, deal with the matter pursuant to the process set out in Rule 15.
9. In the event other relevant documents are identified over which the City asserts privilege, the City will follow the process set out in Rule 15. For clarity, the City has produced documents pursuant to rule 15(a)(ii) in Privileged Production 007 and 008 (privileged and redacted items from Production 19 and 20) and may produce additional documents pursuant to 15(a)(ii) on which Commission Counsel has not yet assessed their recommendations to the Commissioner under rule 15(b) and which may be subject to the process set out in rule 15(c).
10. If it is necessary to have a claim of privilege about the Disputed Documents, or any other document, determined under Rule 15:
 - (a) Commission Counsel will not take the position that the City has waived privilege over the document(s) in issue solely because the City produced the Produced Documents or the Produced Redacted Documents; and
 - (b) Commission Counsel may, however, rely on the content of any Produced Documents or Produced Redacted Documents in support of a request for further production and the City will not object to Commission Counsel doing so, even if the City otherwise opposes such production of the document(s) in issue.

11. When the Produced Documents and the Produced Redacted Documents are provided to participants, Commission Counsel will inform the participants that, through the process set out in Rule 15, Commission Counsel has recommended to the Commissioner that he accept the City's claims of privilege as set out in the Revised Claimed Privilege List and that, in the opinion of Commission Counsel, the redactions are consistent with that recommendation. Commission Counsel will also explain this process on the record at the beginning of the public hearings.
12. After the date of delivery of this letter, except where documents form part of the Inquiry database under paragraph 5 or are Disputed Documents, Commission Counsel will not use or access any of the documents provided by the City pursuant to rule 15(a)(ii), or any of the information it obtained by reviewing them, except in respect of further discussions with the City before or during the public hearings about privilege issues or to have a dispute adjudicated pursuant to Rule 15.
13. After the date of delivery of this letter, except where documents form part of the Inquiry database under paragraph 5 or are Disputed Documents, Commission Counsel will store the documents provided by the City pursuant to rule 15(a)(ii) in a separate, secure electronic database that can only be accessed after the City is provided written notification as to: (1) which documents are accessed; (2) the date of the access; and (3) what change in circumstances necessitated the access. Commission Counsel shall delete all documents provided to it pursuant to rule 15(a)(ii), at the conclusion of the public hearings. Where Commission Counsel has stored the documents referenced above in its document management system, Commission Counsel shall provide written notification, as detailed above, in the event these documents are accessed.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP



Robert A. Centa

Encl.

Appendix A: List of Disputed Documents

Doc 4025417 v1

Appendix A to Privilege Process Letter re: Privileged Productions 001-006

Document ID (SPE or PHAM)	Production Document ID (HAM or CIM)
	CIM0016338
SPE_01071764	CIM0017171.0001
SPE_01598444	HAM0054448_0001
SPE_01598442	HAM0054450_0001
SPE_00607942	SPE_00607942_0001
SPE_04247480	HAM0061607_0001
SPE_00468889	HAM0062175_0001
SPE_01590347	SPE_01590347_0001
SPE_01590397	SPE_01590397_0001
SPE_01590408	SPE_01590408_0001
SPE_01597955	SPE_01597955_0001
SPE_02175640	HAM0051988_0001
SPE_00603408	SPE_00603408_0001
SPE_00603467	SPE_00603467_0001
SPE_00603871	SPE_00603871_0001
SPE_01582756	SPE_01582756_0001
SPE_01597841	SPE_01597841_0001
SPE_01597844	SPE_01597844_0001
SPE_01598777	SPE_01598777_0001
SPE_01598924	SPE_01598924_0001
SPE_01602010	SPE_01602010_0001
SPE_01602020	SPE_01602020_0001
SPE_01602164	SPE_01602164_0001
SPE_01955503	SPE_01955503_0001
SPE_02175631	SPE_02175631_0001
SPE_02175800	SPE_02175800_0001
SPE_04247468	HAM0062332_0001

THE HAMILTON SPECTATOR

April 7, 2022

To whom it may concern,

The Hamilton Spectator is strongly opposed to the City of Hamilton's motion to claim legal privilege over documents that may be relevant to the work of the Red Hill Valley Parkway Inquiry. The Spectator also opposes a total *in camera* hearing for the motion to determine privilege.

The Spectator investigated community concerns about perceived dangerous, slippery conditions on the Red Hill Valley Parkway for several years – and was repeatedly denied information by the City – before the existence of a buried report on roadway friction was publicly admitted.

The City's top engineering official went so far as to publicly declare there were “no concerns” about parkway safety based on roadway testing – even as families of crash victims tearfully appealed for action. Over the period that the report was buried, more than 200 collisions with injuries occurred on the parkway, including several high-profile fatalities.

That is why The Spectator believes it is in the public interest to release all relevant documents that could shed light on the issues before the Inquiry. Without unfettered access to all relevant documents, resident questions about how and why this happened – and who was aware – will not be publicly answered.

Even the appearance that the City is hiding potentially relevant information will erode public trust and confidence in the Inquiry's process and outcome. As the Supreme Court has repeatedly affirmed, “the administration of justice thrives on exposure to light – and withers under a cloud of secrecy” (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, at para 1).

The Spectator supports the inquiry counsel's assertion that the city waived privilege when it requested a judicial inquiry in the first place. At that time, city council directed the commissioner to obtain "all documents necessary" to answer questions related to the Red Hill Valley Parkway set out in the terms of reference.

Allowing the city to withhold relevant documents on the basis of privilege undermines the stated rationale for a judicial inquiry – as opposed to a less expensive option for taxpayers – which was to ensure the most comprehensive and transparent investigation possible.

As a surrogate of the public interest, the Spectator respectfully urges the Commissioner (or their designate) to reject the City’s request to withhold documents on the basis of privilege.

The Spectator also opposes a total *in camera* hearing for the motion, and proposes that only those portions of the motion where potentially privileged documents are actually being discussed be held *in camera*. Section 2(b) of the *Charter* requires that, when considering restrictions on openness, the least restrictive measure be selected (*Sherman Estate v Donovan*, 2021 SCC 25). Further, any written materials, and any decisions, should be released to the public subject only to minimal redactions that may be justified under the *Sherman Estate* test.

Respectfully,

Cheryl Stepan

Local News Editor
Hamilton Spectator
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