

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

REPLY FACTUM OF THE CITY OF HAMILTON

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Commission Counsel

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PART I - OVERVIEW

1. Commission Counsel's summons for information protected by legal privilege ought to be quashed for the following reasons:

- (a) Commission Counsel's assertion that the City implicitly waived privilege in commencing this Inquiry is inconsistent with section 33(13) of the *Public Inquiries Act*, 2009 (the "*PIA*"), which provides that information or documents that are relevant in an inquiry are not admissible where they are protected by legal privilege;
- (b) 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;
- (c) Commission Counsel has adopted a narrow view of the scope of solicitor-client privilege to justify its demand for privileged documents. Solicitor-client privilege attaches not only to the advice itself, but to all communications passing between client and solicitor relating to the provision of legal advice;
- (d) Commission Counsel has mischaracterized the test for litigation privilege. [REDACTED]
[REDACTED]
[REDACTED]
- (e) Commission Counsel has not met the stringent legal test required to summons information protected by legal privilege. When seeking production of privileged information, it is not enough that the information sought be reasonably relevant.

PART II - THE DISPUTED DOCUMENTS ARE NOT ADMISSIBLE

A. No Implied Waiver of Privilege

i. Commission Counsel's position does not give effect to the PIA

2. Commission Counsel's assertion that the City implicitly waived privilege in adopting the Terms of Reference is based on an impermissibly broad interpretation of the Terms of Reference that is inconsistent with the plain language chosen by City Council and the preamble to the Terms of Reference.

3. In their Factum, Commission Counsel argues: "What is telling is that" the City refers to the preamble of the Terms of Reference to narrow the scope of the Inquiry but ignores the plain language. On the contrary, the City's Factum, in the section entitled "The Terms of Reference must be given their plain meaning", expressly states that the plain language of the Terms of Reference and the principles of interpretation do not support Commission Counsel's expansive reading of the Terms.¹ Moreover, in the Cornwall Inquiry, Justice Moldaver confirmed that the preamble of the terms of reference of an inquiry can be used to "circumscribe the scope of the inquiry".²

4. Commission Counsel's interpretation gives no effect to the express language in s. 33(13) of the *PIA*, which provides that information or documents that are relevant in an inquiry are not admissible where they are protected by legal privilege.

ii. City Council Did Not Need to Expressly Exclude Privileged Documents in the Terms of Reference

5. Commission Counsel contends that the Disputed Documents are admissible because the Terms of Reference do not suggest that the "City's Legal department and staff are exempt from

¹ City Factum, paras. 63-74.

² *Ontario Provincial Police v. The Cornwall Public Inquiry*, 2008 ONCA 33 at paras. 24, 45-48.

this inquiry”.³ The City has not taken this position and has in fact produced over [REDACTED] documents from the City’s legal department and the City’s external counsel in the Inquiry. The City does seek, however, to not produce documents protected by legal privilege, consistent with s. 33(13) of the *PIA*.⁴

6. Commission Counsel’s assertion that the City must expressly exclude privileged information from the inquiry in the Terms of Reference in order to maintain privilege fails to give effect to s. 33(13) of the *PIA*. As stated by the Divisional Court in *McQueen et al. v. Mitchell et al.*,

Solicitor-client privilege can be implicitly waived by a client “where the voluntary conduct of that person indicates an implied or objective intention to waive it”...though it will only yield in the clearest of cases, and does not involve a balancing of interests.⁵

7. Similarly, in *Lizotte c. Aviva Cie d'assurance du Canada*, the Supreme Court of Canada confirmed that clear, explicit and unequivocal language is required to abrogate litigation privilege.⁶

8. Moreover, prior to commencing this Inquiry, City Council was advised by counsel that privileged information is not admissible in a public inquiry⁷ and that calling an inquiry does not amount to a waiver of privilege.⁸ As such, there was no need for Council to expressly exclude privileged documents or information from the purview of the Inquiry.

³ Commission Counsel Factum, para. 164.

⁴ *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6, s. 33(13) (“*PIA*”).

⁵ *McQueen et al. v. Mitchell et al.*, 2022 ONSC 649 at [para. 59](#) (“*McQueen*”).

⁶ *Lizotte v. Aviva Cie d'assurance du Canada*, 2016 SCC 52 at [paras. 1 to 5](#).

⁷ Transcript of Council Meeting, March 20, 2019, p. 49, RHVPI Compendium, Tab 46, p. 451.

⁸ Transcript of Council Meeting, March 20, 2019, p. 135, RHVPI Compendium, Tab 46, p. 537.

9. Specifically, City Council was advised the following:
- (a) “The powers that are conferred upon the commissioner are enumerated under the *Public Inquiries Act*, which allows for a commissioner to summon witnesses and documents relevant to the inquiry, of course with the exception of privileged documents or privileged evidence”;⁹
 - (b) “...the way this provision works under the *Municipal Act* is that when a auditor general or an ombudsman compels the production of documents -- and equally would be the case for the compulsion of documents by a commissioner under a judicial inquiry -- what that means is it can access documents and compel the production of documents, but if there are privileged components of that document, it does not amount to a waiver of privilege. So they cannot necessarily get access to documents that are subject to privilege, and that would be the case in both a[n] inquiry and a auditor general’s investigation”;¹⁰ and
 - (c) “... the ability to obtain evidence is always going to be subject to the caveat that there may be certain information that is protected by privilege.”¹¹

⁹ Transcript of Council Meeting, March 20, 2019, p. 49, RHVPI Compendium, Tab 46, p. 451.

¹⁰ Transcript of Council Meeting, March 20, 2019, p. 135, RHVPI Compendium, Tab 46, p. 537 (emphasis added).

¹¹ Transcript of Council Meeting, March 20, 2019, p. 135, RHVPI Compendium, Tab 46, p. 537.

B. Fairness and Consistency Do Not Require Disclosure

10. In their Factum, Commission Counsel references vague scenarios whereby the City’s Public Works staff and its safety consultants may be criticized in the final report unfairly if not all of the relevant documents are produced without any substantiation.¹²

11. The City disputes that there would be a material risk that the conduct of the City’s Public Works staff and its safety consultants would be cast in an “entirely different light” absent the disclosure of the Disputed Documents. In any event, specific issues can be dealt with on a case-by-case basis that would impair the City’s solicitor-client or litigation privilege no more than reasonably necessary.

C. The Category One Documents [REDACTED] are Not Admissible

i. The Category One Documents are Subject to Solicitor Client Privileged

12. Commission Counsel concedes that the Category One Documents are *prima facie* protected by solicitor client privilege [REDACTED]

[REDACTED]

[REDACTED] No authority for this proposition is put forward by Commission Counsel.

13. [REDACTED]

[REDACTED]

[REDACTED]

¹² Commission Counsel Factum, para. 166.
¹³ Commission Counsel Factum, para. 175.

(b) [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

14. These documents clearly meet the three conditions necessary for solicitor-client privilege: (i) they are communications between a solicitor and a client; (ii) regarding the receipt of legal advice; and (iii) were intended to be confidential.

15. [REDACTED]
[REDACTED]
[REDACTED]

ii. The Category One Documents are Protected by Litigation Privilege

16. Commission Counsel asserts that the Category One Documents are not protected by litigation privilege [REDACTED]
[REDACTED].

17. In [REDACTED]
[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

18. [REDACTED]

19. [REDACTED]

15 [REDACTED]

17 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

21. On May 9, 2019, a putative class action was brought against the City alleging that, among other things, negligent design, construction and maintenance of the RHVP (the “**Class Action**”).¹⁹ The proposed class was defined as “all persons who drove a motor vehicle on the RHVP after November 1, 2007, and who were involved in a motor vehicle collision”.²⁰ Section 28 of Ontario’s *Class Proceedings Act, 1992*²¹ suspends limitation periods for causes of action asserted in a class action. This provision continues to suspend a limitation period even after a certification of the class action is refused.²²

22. The *Hansen et al.* (Court File No. 17-61728), *Bernat and Bernat* (Court File No. 17-62352), and *Bernat* (17-63217) litigation matters remain active and are ongoing.

¹⁸ *Hagedorn v. Helios I (Ship)*, 2013 FC 101 (“*Hagedorn*”); *Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429 (“*Air Canada*”).

¹⁹ *Klassen v. City of Hamilton*, 2022 ONSC 3660 at [para. 33](#).

²⁰ *Klassen*, *supra* note 19 at [para. 44](#).

²¹ *Class Proceedings Act, 1992*, S.O. 1992, c. 6 s. 28.

²² *R.G. v. The Hospital for Sick Children*, 2019 ONSC 5696 at [para. 57](#), *aff’d R.G. v. The Hospital for Sick Children*, 2020 ONCA 414 at [para. 22](#). Section 28 of the *Class Proceedings Act, 1992* was subsequently amended to add the refusal to certify a class claim as an instance in which a limitation period will resume. However, this amendment only applies to class actions started on or after October 1, 2020.

iii. The City did Not Waive Privilege over the Category One Documents

23. Commission Counsel contends that the Category One Documents are admissible because these documents are highly relevant to four Terms of Reference: (vii), (viii), (iv) and (xiii).²³ On the contrary, these documents are not highly material or necessary to the Terms of Reference, when these Terms are interpreted correctly.

24. **Term vii** asks the Commissioner to identify who received the Tradewind Report. The City agrees that the fact that Mr. Boghosian was provided a copy of the Tradewind Report is relevant to this Term, however, the Category One Documents are not necessary to obtain this information. Rather, this information can be obtained from Ms. Auty or through an agreed statement of facts, as previously provided to the Inquiry with other witnesses.

25. **Term viii** asks the Commissioner to identify if “appropriate steps [were] taken to disclose the Report...once discovered in 2018”. In *British Columbia (Attorney General) v. Davies*, Justice Melnick found that the terms of references constituted an implied waiver based on a plain reading of a particular term, noting that there was no other interpretation of what the impugned term could have meant.²⁴

26. In this case, the plain language of Term viii must be taken to limit the Commissioner’s inquiry to the disclosure of the Tradewind Report to Council and not an investigation into the legal advice obtained by the City with respect to the Report. The receipt of legal advice and, particularly the content of the legal advice, has no bearing on the disclosure of the Tradewind Report in 2018.²⁵

²³ Commission Counsel Factum, fn. 201.

²⁴ *British Columbia (Attorney General) v. Davies*, 2008 BCSC 817 at paras. 53, 58 (

27. If City Council intended Commission Counsel to inquire into all steps taken by City staff upon learning of the Tradewind Report leading up to the disclosure of the Report to City Council, Term viii would have been drafted to reflect that. To the extent that there is any ambiguity, Term viii cannot be read to mean that the City intended to waive privilege. Privilege, and particularly solicitor-client privilege, must be as close to absolute as possible and will only yield to implied waiver in the clearest of cases.²⁶ This is not such a case.

28. **Term iv** asks the Commissioner to identify “who, if anyone, was responsible for the failure to disclose a copy of the Report in 2014”. The Category One documents have no bearing on this issue.

29. **Term xiii** states “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”. The Category One documents have no bearing on this issue.

D. The Category Two Documents Involving [REDACTED]

30. [REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

(b) [Redacted]
[Redacted]
[Redacted]

■ [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

■ [Redacted]
[Redacted]

■ [Redacted]

■ [Redacted]

31. As detailed below, the Category Two documents are privileged and not admissible.

i. The Category Two Documents are Subject to Litigation Privilege

32. [Redacted]
[Redacted]
[Redacted]

■ [Redacted]
[Redacted]

■ [Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

36. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁸ See also *Hamalainen v. Sippola*, 1991 CanLII 440 (B.C. C.A.), where the Court of Appeal for British Columbia noted that the “reasonable prospect” of litigation bar is not a particularly difficult one to meet.

²⁹ *Hagedorn*, *supra* note 18; *Air Canada*, *supra* note 18.

[REDACTED]

38. [REDACTED]

ii. The Category Two Documents are Subject to Solicitor Client Privilege

39. [REDACTED]

40. There is no longer a distinction in the case law between privileged “communications” and unprivileged “facts.” The Supreme Court of Canada rejected such a category-based approach, instead holding that there is a rebuttable presumption that “all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature.”³³

41. For example, in *Slansky v. Canada (Attorney General)*, the Federal Court quashed the decision of a Prothonotary who decided that only the “legal recommendation portion” of a report prepared by a law professor at the request of the Canadian Judicial Council (the “CJC”) in the course of the CJC’s investigation into a sitting judge.³⁴ In the report, the law professor reviewed

³² Overview Document, Chapter 9, pages 303 - 304, paras 742-743.

³³ *Canada (Procureur général) v. Chambre des notaires du Québec*, 2016 SCC 20 at [para. 40](#), [2016] 1 S.C.R. 336. Facts connected with the solicitor-client relationship must therefore be presumed to be privileged, absent evidence to the contrary, see *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at [para. 19](#), [2016] 1 S.C.R. 381, citing *Maranda v. Richer*, 2003 SCC 67 at [paras. 33-34](#), [2003] 3 S.C.R. 193.

³⁴ *Slansky v. Canada (Attorney General)*, 2011 FC 1467 (“*Slansky*”).

the material evidence, made recommendations and provided legal advice to the Chairperson with respect to his adjudicative functions and with respect to the CJC's mandate regarding judicial conduct generally. In discussing the Prothonotary's decision to sever the fact section from the law section, the Court stated:

... [The Prothonotary] based her conclusion on the assumption that the "facts are separate and distinct from the advice given on legal issues that is privileged" (*Slansky*, above at para 30). Such an assumption is not only unwarranted and without any foundation in the jurisprudence, but it is completely at odds with the "as close to absolute as possible" protection to be afforded to the solicitor-client privilege. This is to say nothing of the practical difficulties one would encounter, in many instances, if an opinion had to be parsed to distinguish between its factual and legal components.

One must start from the premise that once the solicitor-client privilege is established, the extent of its coverage is extremely broad and encompasses the factual information upon which the legal analysis is based. As stated by the Supreme Court in *Pritchard*, above at 16:

Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing ...

...

There is simply no authority for the proposition that facts can be severed from a communication that is protected as a result of the solicitor-client privilege. The decision of the Supreme Court in *Pritchard*, above, is quite significant in that regard. Having refused the appellant's request for production of a legal opinion as part of the record of the proceedings on the basis that the legal opinion was protected by solicitor-client privilege, the Court refrained from ordering that the factual parts of the opinion be severed from the legal analysis and disclosed as part of the record of the proceedings. Rather, the Court implicitly ruled that the privilege extended to the entire legal opinion including the factual material. While courts have sometimes accepted to sever public documents attached as exhibits from the legal advice that is covered by the solicitor-client privilege (see, for example: *Murchison v Export Development Canada*, 2009 FC 77 at para 45, 354 FTR 18) there is no precedent for what the Prothonotary has ordered in the present case.

There are good principles and practical reasons for such an approach. Due to the importance of the privilege for the administration and quality of justice in this country, every attempt to restrict or curtail it must be resisted. What may appear as insignificant information of a factual nature may sometimes reveal the nature or the content of the legal advice sought. As Bryant, Lederman and Fuerst state in their treatise, "[T]he distinction between "fact" and "communication" is often a difficult one

and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated” (at p 734, s. 14.53).³⁵ [Emphasis added.]

42. Solicitor-client privilege attaches not only to the advice itself, but to all communications passing between client and solicitor relating to the provision of legal advice.³⁶ Documents, information, and communications shared or created in a “continuum of communication” for the purpose of obtaining legal advice are privileged.³⁷ This includes documents that are a “necessary step” in the process of receiving legal advice, that are “incidental” to the obtaining and giving advice, and/or which, if produced, would tend to reveal that advice.³⁸

43. [REDACTED]

44. Moreover, courts have repeatedly held that communications between a lawyer and a third party are protected by solicitor client privilege where the purpose of that communication is “essential to the existence or operation of the client-solicitor relationship”.³⁹

³⁵ *Slansky*, *supra* note 34 at [paras. 60-61, 64-65](#).

³⁶ *Archean Energy Ltd v. Minister of National Revenue*, 1997 CanLII 14953 (A.B. Q.B.) at [para. 5](#) (“*Archean Energy*”), citing to *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at [p. 892-93](#).

³⁷ *Cusson v. Quan*, 2004 CanLII 7351 (Ont. S.C.) at [para. 8](#), citing *Balabel v. Air India*, [1988] 2 All E.R. 246 (C.A.); *578115 Ontario Inc o/a McKee’s Carpet Zone v. Sears Canada Inc.*, 2013 ONSC 4135 at [paras. 27-30](#) (“*McKee’s Carpet Zone*”); *Nguyen v. O’Donnell*, 2013 CarswellOnt 13730 at [pp.2-3](#).

³⁸ *McKee’s Carpet Zone*, *supra* note 37 at [paras. 27-30](#); *Concord Pacific Acquisitions Inc. v. Oei*, 2016 BCSC 2028 at [para. 27](#); *Landry et al. v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1297 at [para. 14](#) citing *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 (Can. Ex. Ct.) at para. 8.

³⁹ *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (Ont. C.A.) at [p. 50](#) (“*Chrusz*”).

45. In *General Accident Assurance Company v. Chrusz*, Doherty J. A confirms that solicitor - client privilege will extend to “communications and circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor” because “in doing so, the third party makes the information relevant to the legal issues on which the solicitor's advice is sought.”⁴⁰

46. As an example of a case where solicitor client privilege is extended to communications with expert third party intermediaries, Justice Doherty references *Susan Hosiery Ltd. v. Minister of National Revenue* in which client’s financial advisers, who were familiar with the client’s business, met with the solicitor to convey information concerning the business affairs of the client. Justice Doherty noted that, given their expertise, “the accountants served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer”.⁴¹

47. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ *Chrusz*, *supra* note 39 at [p. 46](#).

⁴¹ *Chrusz*, *supra* note 39 at [p. 46](#).

⁴² [REDACTED]

(b) [REDACTED]
[REDACTED]
[REDACTED]

48. [REDACTED]
[REDACTED]

iii. The City Did Not Waive Privilege over the Category Two Documents

49. Commission Counsel contends that the Category Two Documents are admissible because these documents are highly relevant to four Terms of Reference: (viii), (ix), (xi), (xiii) and (xiv).⁴⁴ On the contrary, these documents are not highly material or necessary to the Terms of Reference, when these Terms are interpreted correctly.

50. **Term viii** asks the Commissioner to identify if “appropriate steps [were] taken to disclose the Report...once discovered in 2018”. As stated in paragraph 25 above, the only precedent for a finding of an implied waiver in an inquiry setting based on the terms of reference was in *Davies*, where Justice Melnick found that the terms of references constituted an implied waiver based on a plain reading of the term and only after noting that there was no other interpretation of what the impugned term could have meant.⁴⁵ In this case, the plain language of Term viii must be taken to limit the Commissioner’s inquiry to the disclosure of the Tradewind Report to Council, and not an investigation into the steps the City’s external counsel took to assist himself in interpreting technical reports in order to form his liability assessment for the City.

⁴³ [REDACTED]

⁴⁴ Commission Counsel Factum, fns. 219-220.

⁴⁵ *Davies*, supra note 24 at [paras. 53, 58](#).

51. **Term ix** asks the Commissioner to opine on “whether there was any negligence, malfeasance or misconduct in failing to disclose the Report” once it was found in 2018. Commission Counsel contends that this term requires the Commissioner to examine “what happened from the discovery of the Tradewind Report in September 2018 until its disclosure to Council in January and February 2019”. This is incorrect and not supported by the plain language of term ix, the recitals of the Terms of Reference or the surrounding circumstances, including the fact that City Council understood that calling any inquiry did not constitute a waiver of privilege.⁴⁶

52. **Term xi** asks the Commissioner to confirm whether the Tradewind Report contained findings or information that would have triggered Council to make safety changes to the roads or order further studies. [REDACTED]

53. [REDACTED]

⁴⁶ Transcript of Council Meeting, March 20, 2019, pp. 49, 135, RHVPI Compendium, Tab 46, pp. 451, 537.

[REDACTED]

[REDACTED].

54. **Term xiii** states “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”. Notably, this Term was drafted specifically to exclude staff in the City’s legal department, including external counsel. The Category Two documents have no bearing on this issue.

55. **Term xiv** asks the Commissioner to confirm whether subsequent consultant reports provide additional support or rebuttal to the conclusions contained in the Tradewind Report. The Category Two Documents have no bearing on this issue. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

E. The Category Three Documents [REDACTED]

56. Commission Counsel’s arguments with respect to the Category Three Disputed Documents are repetitive and addressed in the sections above. The City has provided responses to the specific Disputed Documents in a revised version of Commission Counsel’s Schedule C.

F. The Category Four Documents “Transcripts of Examinations” are Not Admissible

57. Commission Counsel seeks access to the transcripts from the examination for discovery of [REDACTED] in a civil claim brought against the City following a collision on the LINC (the “Melo Action”) (Tab 83) and from the examination for discovery of [REDACTED] civil claims

brought against the City following a collision on the RHVP (the “**Hansen and Bernat Actions**”) (Tabs 6 and 84). Commission Counsel also seeks [REDACTED]

[REDACTED] The Hansen and Bernat Actions are ongoing.

58. The City offered to provide Commission Counsel a summary of the evidence provided in these examinations regarding the Tradewind Report. Commission Counsel refused and seeks production of the full transcripts, including evidence unrelated to the Terms of Reference.

59. The transcripts are subject to the deemed undertaking rule, which imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled.⁴⁷

60. Commission Counsel relies on *Juman* for the proposition that while discovery transcripts are protected by an implied undertaking, they are not themselves privileged. The Supreme Court in *Juman* goes on to state that the warrant (or summons, as in this case) is not sufficient to override the deemed undertaking rule and, as such, does not authorize the use of the material subject to the deemed undertaking rule in any proceeding:

The appellant’s discovery transcript and documents, while protected by an implied undertaking of the parties to the court, are not themselves privileged, and are not exempt from seizure: *R. v. Serendip Physiotherapy Clinic* (2004), 2004 CanLII 39011 (ON CA), 189 C.C.C. (3d) 417 (Ont. C.A.), at para. 35. **A search warrant, where available, only gives the police access to the material. It does not authorize its use of the material in any proceedings that may be initiated.**⁴⁸ [Emphasis added.]

⁴⁷ *Juman v. Doucette*, 2008 SCC 8 at [para. 27](#), [2008] 1 S.C.R. 157 (“*Juman*”).

⁴⁸ *Juman*, *supra* note 47 at [para. 56](#).

61. The onus is on Commission Counsel to seek leave to vary the deemed undertaking rule for the purposes of the Inquiry.

G. The Category Five Documents [REDACTED] are Not Admissible

62. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

H. The Category Six Documents [REDACTED] are Not Admissible

64. Commission Counsel concedes that emails between Mr. [REDACTED]
[REDACTED]
[REDACTED] are protected by litigation privilege if the litigation is ongoing, as they appear to have been created for the dominant purpose of litigation, but asserts that the City waived privilege over the emails in calling the Inquiry.⁵⁰ For the reasons previously stated, commencing the Inquiry did not result in a waiver of privilege.

⁴⁹ Commission Counsel Factum, para. 225.
⁵⁰ Commission Counsel Factum, paras. 233-34.

65. Commission Counsel further asserts that any applicable litigation privilege is expired because this matter was resolved. On the contrary, a singular piece of litigation does not need to be ongoing for litigation privilege to persist. As outlined the Supreme Court in *Blank*, litigation privilege can continue “where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended”⁵¹ and that “litigation” includes, at minimum, separate proceedings that include the same or related causes of action or proceedings that raise issues common to the initial action and share its essential purpose.⁵²

66. Related RHVP litigation is still ongoing. The City continues to be “locked in what is essentially the same legal combat” and thus the litigation privilege cannot be said to have “terminated”, in any meaningful sense of that term.⁵³

PART III - ORDER REQUESTED

67. 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 4th day of August, 2022.

Per



Eli S. Lederman; Delna Contractor;
Samantha Hale

⁵¹ *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at [para. 38](#), [2006] 2 S.C.R. 319 (“*Blank*”).

⁵² *Blank*, *supra* note 51 at [para. 39](#).

⁵³ *Blank*, *supra* note 51 at [para. 34](#).

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SCHEDULE A

LIST OF AUTHORITIES

1. *578115 Ontario Inc o/a McKee's Carpet Zone v. Sears Canada Inc.*, 2013 ONSC 4135
2. *Archean Energy Ltd. v. Minister of National Revenue*, 1997 CanLII 14953 (A.B. Q.B.)
3. *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319
4. *British Columbia (Criminal Justice Branch) v. Davies*, 2008 BCSC 817
5. *Canada (National Revenue) v. Thompson*, 2016 SCC 21
6. *Canada (Procureur général) v. Chambre des notaires du Québec*, 2016 SCC 20
7. *Concord Pacific Acquisitions Inc. v. Oei*, 2016 BCSC 2028
8. *Cusson v. Quan*, 2004 CanLII 7351 (Ont. S.C.)
9. *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (Ont. C.A.)
10. *Hagedorn v. Helios I (Ship)*, 2013 FC 101
11. *Hamalainen v. Sippola*, 1991 CanLII 440 (B.C. C.A.)
12. *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157
13. *Klassen v. City of Hamilton*, 2022 ONSC 3660
14. *Landry et al. v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1297
15. *Lizotte v. Aviva Cie d'assurance du Canada*, 2016 SCC 52
16. *McComb v. Jones*, 2008 BCSC 157
17. *McQueen et al. v. Mitchell et al.*, 2022 ONSC 649
18. *Nguyen v. O'Donnell*, 2013 CarswellOnt 13730
19. *Ontario Provincial Police v. The Cornwall Public Inquiry*, 2008 ONCA 33
20. *Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429
21. *R.G. v. The Hospital for Sick Children*, 2019 ONSC 5696
22. *R.G. v. The Hospital for Sick Children*, 2020 ONCA 414
23. *Slansky v. Canada (Attorney General)*, 2011 FC 1467

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).

Class Proceedings Act, 1992, S.O. 1992, c. 6

Limitations

Suspension in favour of class member

28 (1) Any limitation period applicable to a cause of action asserted in a proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and, subject to subsection (2), resumes running against the class member when,

(a) the court refuses to certify the proceeding as a class proceeding;

(b) the court makes an order that the cause of action shall not be asserted in the proceeding;

(c) the court makes an order that has the effect of excluding the member from the proceeding;

(d) the member opts out of the class proceeding;

- (e) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (f) a decertification order is made under section 10;
- (g) the proceeding is dismissed without an adjudication on the merits, including for delay under section 29.1 or otherwise;
- (h) the proceeding is abandoned or discontinued with the approval of the court; or
- (i) the proceeding is settled with the approval of the court, unless the settlement provides otherwise. 2020, c. 11, Sched. 4, s. 26.

Effect of appeal

(2) If there is a right of appeal in respect of an event described in subsection (1), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any such appeal has been finally disposed of. 2020, c. 11, Sched. 4, s. 26.

Suspension in favour of defendant

(3) Any limitation period applicable to a claim by a defendant for contribution and indemnity in a proceeding commenced under section 2 is suspended in favour of the defendant on the commencement of the proceeding, and resumes running against the defendant as soon as the time for appeal of the court's decision to certify or refuse to certify the proceeding has expired without an appeal being commenced or as soon as any such appeal has been finally disposed of. 2020, c. 11, Sched. 4, s. 26.

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? | (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? |
| (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? | (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? |
| (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? | |

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 – Revised List of the Unique Disputed Documents

Tabs⁵⁴	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]
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]
19	CIM0022412	01/02/2019	Notes	Untitled	Brian Malone			[REDACTED]
21	HAM0061607_0001	01/16/2019	City of Hamilton Internal Document	Crisis Communications Plan Draft 1.0	Unknown			[REDACTED]

⁵⁴ Tab references are to the Unique Disputed Documents Brief

Tabs⁵⁴	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
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]
30	CIM0017209	1/31/2019	Email	Re: Hamilton re RHVP Council Issues	Brian Malone	David Boghosian	Alireza Hadayeghi	[REDACTED]
37	SPE_04288119_0001	1/31/2019	Email	Re: Meeting with GM Tomorrow morning	Nicole Auty	David Boghosian		[REDACTED]
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]
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]
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]

Tabs⁵⁴	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
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]
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	Jasmine Graham			[REDACTED]

Tabs⁵⁴	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
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]
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	Transcription 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]

Tabs⁵⁴	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
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]
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_04552142_0001	Undated	Notes	R. Sabo annotations on Hamilton re: Red Hill Valley Parkway Legal Opinion	Ron Sabo	David Boghosian		[REDACTED]
91a	Transcription to SPE_04552142_0001	Undated	Transcribed Notes	Untitled	Ron Sabo			[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]

Tabs⁵⁴	DocID	DocDate	DocType	DocTitle	Author	Recipient	CC	Category
94a	Transcription to SPE_04317041_0001	01/08/2019	Transcribed Notes	Untitled	David Boghosian			[REDACTED]
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]
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]

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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