



**CITY OF HAMILTON**  
**CORPORATE SERVICES DEPARTMENT**  
**Legal and Risk Management Services Division**

<b>TO:</b>	Mayor and Members General Issues Committee
<b>COMMITTEE DATE:</b>	August 8, 2022
<b>SUBJECT/REPORT NO:</b>	Red Hill Valley Parkway Inquiry Update (LS19036 (m)) (City Wide)
<b>WARD(S) AFFECTED:</b>	City Wide
<b>PREPARED BY:</b>	Patricia D'Souza (905) 546-2424 Ext. 4637
<b>SUBMITTED BY:</b>	Susan Nicholson, Acting Deputy City Solicitor, Legal & Risk Management Services
<b>SIGNATURE:</b>	

## RECOMMENDATIONS

- a) That Council approve the revised estimated total cost of the Red Hill Valley Parkway Judicial Inquiry of up to \$26,000,000, to be funded through the Tax Stabilization Reserve (110046)

## EXECUTIVE SUMMARY

On April 24, 2019 Council directed staff to provide regular updates on the costs to date of the Red Hill Valley Parkway ("RHVP") Judicial Inquiry, to be paid from the Tax Stabilization Reserve.

This report provides both an update on the status of the Inquiry from the City's external legal counsel and the costs to date of the Inquiry. Steps the City is taking to continue to monitor the costs of the Inquiry and particularly Commission Counsel's legal fees are also outlined.

To date, the City has incurred approximately \$18 million in costs associated with the Inquiry, and based on the estimate of costs provided by Commission Counsel and the City's external legal counsel ("Inquiry Counsel"), the City expects to incur an additional \$7.8 million to \$8.3 million in costs between July 2022 and March 2023, resulting in a total estimated cost to the City for the Inquiry of between \$26 million and \$28 million (including taxes), plus additional disbursement costs yet to be provided by Commission Counsel.

The increase in costs is primarily due to Commission Counsel's rescheduling of several witnesses scheduled to be heard in July and August 2022 to September and October 2022 (described below), additional interviews requested by Commission Counsel and the privilege dispute process.

The City has limited visibility into the breakdown of Commission Counsel fees as it only receives a general description of Commission Counsel's work.

The City has requested that Commission Counsel provide additional details, while maintaining its solicitor-client privilege with the Commissioner, so the City can better monitor the increasing costs of the Inquiry.

**Alternatives for Consideration** – Not Applicable

### **FINANCIAL – STAFFING – LEGAL IMPLICATIONS**

**Financial:** The costs associated with the advancement of the RHVP Judicial Inquiry through the hearing and report stage are estimated to be in the range of \$26 million and \$28 million.

These costs are based upon current status, anticipated effort required and the current forecasted schedule, which are subject to change based upon the availability of individuals, documents and procedural decisions which may be outside the control of the City.

These costs will be recovered from the Tax Stabilization Fund.

**Staffing:** Not Applicable

**Legal:** As outlined in this Report

### **POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS**

As outlined in this Report.

### **RELEVANT CONSULTATION**

- Mike Zegarac – General Manager, Finance and Corporate Services Department
- Janette Smith – City Manager
- Eli Lederman and Delna Contractor, Lenczner Slaght LLP

### **ANALYSIS AND RATIONALE FOR RECOMMENDATION**

**STATUS OF INQUIRY**

As of July 31, 2022, the Inquiry has heard from the following witnesses:

<b>No. of witnesses</b>	<b>Party</b>	<b>Description</b>
2	Commission Counsel Expert witness	Dr. Gerardo Flintsch's and Russell Brownlee provided evidence regarding pavement design and friction.
15	Current and former City employees	The City witnesses gave evidence on their involvement on various topics related to the Red Hill, including the design and construction, friction testing, safety reviews and the resurfacing of the Red Hill.
10	Current and former employees of the Ministry of Transportation (MTO)	The MTO witnesses gave evidence on the friction testing completed on the Red Hill between 2007 and 2014 and the Province's friction management practices and policies.
4	Dufferin Construction	Dufferin Construction was engaged to pave the mainline of the Red Hill. These witnesses gave evidence regarding their involvement in the construction of the Red Hill
1	Highway 407 ETR	Craig White, the Vice President of Highway Operations for Highway 407 ETR, gave evidence regarding the friction management practises on Highway 407
1	NorJohn Contracting	NorJohn Contracting, a consultant engaged during the resurfacing of the Red Hill, gave evidence regarding their consultations with the City
4	Golder & Associates Ltd	Golder & Associates Ltd, the paving consultant for the Red Hill and the consultant engaged to conduct friction and other performance testing on the Red Hill, gave evidence regarding the testing and their consultations with the City.
2	CIMA	CIMA, engaged by the City to conduct safety reviews of the Red Hill, gave evidence regarding these safety reviews and their consultations with the City.

<b>No. of witnesses</b>	<b>Party</b>	<b>Description</b>
1	Tradewind Scientific Ltd	Tradewind Scientific Ltd, the subcontractor engaged to complete the friction testing on the Red Hill in 2013, gave evidence regarding the friction testing and the subsequent report.
<b>40</b>	<b>Total</b>	

The Inquiry was initially scheduled to hear from the remaining witnesses in July and August. In or around June 23, 2022, Commission Counsel advised Inquiry Counsel that it intended to reschedule the majority of these witnesses to September and October 2022. The hearings were also adjourned unexpectedly from July 4 through July 12, 2022 due to the Commissioner's unavailability.

Based on the revised schedule, Phase One of the Inquiry, which involved hearing from fact witnesses, is now scheduled to be completed by October 31, 2022.

Phase Two of the Inquiry involves hearing from expert witnesses. The City has not received any details from Commission Counsel on the timing or process of Phase Two.

### **Costs of the Inquiry**

The costs of the Inquiry to date are outlined in the following chart, representing external legal fees for the Commissioner and external legal fees for the City, as well as Deloitte services for data hosting, reviewing and producing documents and other associated expenses, including the digitizing of paper files, website hosting and consultants. These expenses are being funded from the Tax Stabilization reserve.

<b>To June 30, 2022</b>	
City's Expenses (e.g. data collection, hosting)	\$1,535,268.05
City's External Legal Counsel Fees and Disbursements	\$6,337,943.80
Commission Counsel Fees and Disbursements	\$9,396,847.51
Other Expenses (e.g. consultants, website hosting)	\$784,598.11
<b>Total (inclusive of HST)</b>	<b>\$18,054,657.47</b>

The Inquiry was previously estimated to cost between \$18 million and \$20 million. This estimate was based on the estimate of costs previously provided to the City by Commission Counsel.

The City asked Commission Counsel for a revised estimate of costs after Commission Counsel exceeded their estimate of legal fees by approximately \$1 million from January to June 2022.

Commission Counsel's original estimate contemplated \$690,000 in legal fees between July 1, 2022 and the conclusion of the Inquiry (excluding taxes). The new estimate contemplates \$3.16 million from July 1, 2022 to the end of the Inquiry (excluding taxes).

Based on the revised estimate of Commission Counsel's legal fees, we expect the costs of the Inquiry to fall between \$26 million and \$28 million. This does not include the costs associated with all of Commission Counsel's disbursements, including the cost of expert witnesses. Inquiry Counsel has requested these costs from Commission Counsel but has not yet received them.

As Commission Counsel has not yet provided the requested information regarding process and timelines for Phase Two, Inquiry Counsel cannot provide an updated estimate of the City's costs for its own expert witness for Phase Two.

### **Monitoring the Costs of the Inquiry**

The City receives detailed dockets from Inquiry Counsel which allows it to monitor and assess counsel's fees. However, as Commission Counsel stands in a solicitor-client relationship with the Commissioner, Commission Counsel does not provide the City with details in support of their invoices for legal fees. Commission Counsel does provide in general terms the topics their work focuses on, such as preparing for public hearing or collecting or reviewing documents.

To allow the City to better monitor the increasing costs of the Inquiry, the City will request that Commission Counsel provide an estimate of the hours and associated legal fees for specific categories of tasks, including:

- Communication and meetings with Expert Witnesses
- Preparation of Expert Reports (excluding communication with expert witnesses)
- Privilege Motion
- Additional Interviews
- Preparation for examinations at the hearing
- Hearing attendance
- Report preparation
- Communications with Media or the Public
- Website maintenance
- Hearing logistics
- Discussions with Participants' Counsel

The City will request that Commission Counsel alert the City if they expect to exceed their estimated legal fees.

The City will further request that Commission Counsel consider discounting their legal fees arising from any duplication of work resulting from the appointment of the lead Commission Counsel to the judiciary in May 2022.

**ALTERNATIVES FOR CONSIDERATION**

Not Applicable.

**ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN**

**Our People and Performance**

Hamiltonians have a high level of trust and confidence in their City government.

**APPENDICES AND SCHEDULES ATTACHED**

Not Applicable.