





INFORMATION REPORT

TO:	Mayor and Members General Issues Committee
COMMITTEE DATE:	April 5, 2023
SUBJECT/REPORT NO:	Red Hill Valley Parkway Inquiry Update (LS19036(r)/ PW23029) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Patricia D'Souza (905) 546-2424 Ext. 4637 Jackie Kennedy (905) 546- 2424 Ext. 1611
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SIGNATURE:	

COUNCIL DIRECTION

On April 24, 2019, Council directed staff to provide regular updates on the costs to date of the judicial inquiry concerning the Red Hill Valley Parkway (the “**Inquiry**”), to be paid from the Tax Stabilization Reserve.

This report provides a high level summary of the background and procedural history of the Inquiry as well as a status update since the last report to Council on November 30, 2022 (LS19036(q)) and the conclusion of the hearing stage of the Inquiry on March 23, 2023.

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BACKGROUND

1. Events Leading to Judicial Inquiry

In early 2019, City Council received information regarding a report by Tradewind Scientific Ltd. ("Tradewind") related to friction testing conducted on the Red Hill Valley Parkway (the "Red Hill") dated November 20, 2013 ("Tradewind Report")

The Tradewind Report stated that the friction levels on the Red Hill were below the "investigatory" level based on guidelines from the United Kingdom and recommended further investigation and potential remedial work in the future.

Council was advised that the public and Council may have received inconsistent information regarding the Tradewind Report including in 2015 and 2017 in the face of speculations regarding slippery conditions on the Red Hill and its impact on collisions.

In 2019, Council considered a number of investigative procedures it could commence upon learning of the Tradewind Report under the *Municipal Act, 2001*, S.O. 2001, c. 5, including an investigation by the Ombudsman or the Auditor General and ultimately voted to proceed with a judicial inquiry.

The City chose to proceed with the Inquiry because of the public nature of the hearings and in the interest of accountability and transparency and to maintain the trust of the public. Specifically, the hearing stage of the Inquiry was live streamed on YouTube and all evidence received by the Commissioner, including recordings and transcripts of witness testimony, documentary evidence, and the closing submissions are available on the Inquiry website and readily accessible.

On April 24, 2019, the City passed a resolution requesting the Chief Justice of Ontario to appoint a Superior Court judge to investigate matters related to the disclosure of the friction report. With this resolution, the Inquiry was established.

The Honourable Mr. Justice Herman J. Wilton-Siegel was appointed to preside over the Inquiry in May 2019. The Commissioner retained Emily Lawrence and Andrew Lewis of Paliare Roland Rosenberg Rothstein LLP to act as counsel to the Commission ("Commission Counsel"). The City retained Lenczner Slaght LLP to act as counsel to the City in the Inquiry ("Inquiry Counsel").

2. What is a Judicial Inquiry?

Judicial inquiries or public inquiries are a public investigation into a specific issue or event that is ordered by a governmental body. There are different types of inquiries. This Inquiry was commenced pursuant to section 274(1)(b) of the *Municipal Act, 2001* to investigate “any matter connected with the good government of the municipality or the conduct of any part of its public business” and any related alleged misconduct.

A judicial inquiry does not give rise to criminal or civil liability but can lead to findings of misconduct that can result in significant reputational impacts. They serve a broader purpose – to promote transparency and accountability and to improve policy in areas of public importance.

There are six overlapping stages in the Inquiry: organizing logistics and staffing; document collection and production; witness interviews by Commission Counsel; determining the parties that have standing to appear at the hearing; the public hearing; and preparing and publishing the final report.

Judicial inquiries are governed by its “terms of reference”. A summary of the Terms of Reference in this case are provided below.

3. The Terms of Reference

City Council identified 24 questions in the Terms of Reference, which can be grouped into 5 categories:

Category 1: Disclosure of the Tradewind Report:

- Inquiries regarding the disclosure of the Tradewind Report or the information contained therein in 2014 and 2018, including who it was shared with and whether appropriate steps were taken to share the Tradewind Report once it was discovered.

Category 2: Good Governance/Policies:

- Inquiries regarding whether Council should have been aware of the Tradewind Report and whether any changes should occur to the City’s bylaws, policies and procedures to prevent any future non-disclosure of significant information to Council.

Category 3: Safety of the Red Hill:

- The friction standards in Ontario, if any.
- If the Tradewind Report contained findings or information that would have triggered Council to make safety changes on the Red Hill;

- If the failure to disclose the Tradewind Report put users of the Red Hill at risk and/or contributed to accidents on the road; and
- The extent that 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 Red Hill.

Category 4: Other Studies:

- Inquiries regarding whether any City staff requested, directed, or conducted any other friction test, asphalt assessment or general road safety reviews or assessments on the Red Hill.

Category 5: MTO Friction Testing:

- Inquiries regarding the friction testing conducted by the MTO on the Red Hill in 2007.
- Inquiries regarding the contents and disclosure of the MTO Report, its implications on the safety of the Red Hill, and any friction testing, asphalt testing, and general road safety review and assessments conducted on the Red Hill by the MTO.

4. Standing

The Commissioner held a standing hearing on January 10, 2020 to determine the parties that would have standing at the hearing to, among other things, examine witnesses and making closing submissions.

On February 12, 2020, the Commissioner granted standing to the following participants in addition to the City: Her Majesty the Queen in Right of Ontario (“MTO”), Dufferin Construction Company, and Golder & Associates Ltd. (“Golder”).

5. Document Collection and Production, and Privilege Motion

Once the Inquiry was commenced, the City spent considerable resources to collect, review, and produce documents in response to Commission Counsel’s request for information, which consists of nearly 50 categories of documents involving a timeframe that spans almost two decades and encompasses City operations from a number of divisions and departments. The City’s document production efforts included the following:

- collecting over 4.4 million documents from the City’s network drives, from approximately 140 former and current City employees (the “Custodians”) identified by Commission Counsel;

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- using the services of Deloitte LLP to: (1) host the documents in an electronic database; (2) review the potentially relevant data to identify documents that are responsive to the Commission Counsel's request for information; and, (3) produce the relevant documents in the format specified by Commission Counsel; and
- responding to requests for additional documents and information.

In total, the City submitted over 72,000 relevant documents in full to Commission Counsel and initially withheld or produced in redacted form approximately 1,000 documents on the basis that they are subject to legal privilege (the "Privileged Documents").

Inquiry Counsel worked with Commission Counsel to negotiate a resolution of the privileged issues which would allow Commission Counsel to have access to information relevant to the Terms of Reference.

As part of this process, the City waived privilege and produced the majority of the 1,000 Privileged Documents and maintained legal privilege over 43 documents. Commission Counsel demanded the City produce the remaining 43 documents. Following a privilege motion held in-camera before the Honourable Frank Marrocco, the City produced all except for eight of the 43 documents and produced 5 of these 43 documents in redacted form as Mr. Marrocco confirmed that the remaining documents sought by Commission Counsel were not relevant to the Terms of Inquiry

6. Witness Interviews

As part of the investigation stage, Commission Counsel conducted over 100 interviews, including 54 interviews of current and former City employees regarding matters related to the Terms of Reference, constituting over 300 hours of interview time.

In advance of each interview, Inquiry Counsel met with City witnesses to familiarize them with the documents and assisting with their preparation.

Following each interview, Commission Counsel prepared an interview summary, which City witnesses reviewed, corrected, and confirmed with the assistance of Inquiry Counsel.

Commission Counsel prepared statements of anticipated evidence based on the transcript summaries for the 38 City witnesses that were summonsed to give evidence at the hearing.

Ensuring the accuracy of the interview summaries and the statements of anticipated evidence was a time-consuming process.

7. Costs and Timelines

The initial budget for the Inquiry was forecasted in 2019 to be between \$5,000,000 and \$7,000,000, revised to \$20,000,000 in December 2021.

The increased estimate reflected the time required to respond to the requests for document production from Commission Counsel, as well as the number of witness Commission Counsel wished to interview, further outlined above.

A further increase of the budget of up to \$26 million was approved on August 8, 2022, based on an updated estimate of Commission Counsel's legal fees from July 1, 2022 to the end of the inquiry (excluding taxes). This estimate did not include the costs associated with all of Commission Counsel's disbursements, including the cost of expert witnesses.

At the beginning of the Inquiry, public hearings were expected to begin in 2020. The onset of the COVID-19 pandemic caused a number of delays to the document collection efforts of the City. The realities of the COVID-19 pandemic also necessitated a shift to hosting the Hearing stages virtually, which created cost-savings with respect to renting and renovating a physical hearing space to accommodate the Inquiry.

8. The Hearing

The Hearing was divided into two phases. Phase One focused on fact evidence and was completed in early November 2022. Phase Two related to expert evidence and was completed in February 2023.

During Phase One, the Commissioner received evidence from 71 fact witnesses over the course of 85 hearing days:

No. of witnesses	Party	Description
2	Commission Counsel Expert Witnesses	Dr. Gerardo Flintsch and Russell Brownlee provided evidence regarding pavement design and friction.
43*	Current and former City employees	The City witnesses gave evidence on their involvement on various topics

No. of witnesses	Party	Description
		related to the Red Hill, including the design and construction, friction testing, safety reviews and the resurfacing of the Red Hill. In addition, City witnesses also provided evidence regarding City processes, including the City's IT infrastructure and the improvements made to City policies since the commencement of the Inquiry.
11	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.
3	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	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 its 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

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No. of witnesses	Party	Description
		and other performance testing on the Red Hill, gave evidence regarding the testing and its consultations with the City.
5	CIMA	CIMA, engaged by the City to conduct safety reviews of the Red Hill, gave evidence regarding these safety reviews and its consultations with the City.
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.
71	Total	

*Commission counsel interviewed 54 current and former City employees as part of the investigation stage, while only 42 of these individuals were called as witnesses at the hearing.

STATUS OF INQUIRY

1. Phase Two and Closings

Phase Two of the Hearing stage focused on expert testimony on how friction and other factors contributed to motor vehicle accidents on the RHVP and policy and governance issues.

The City submitted reports from two experts:

- David Hein, an expert on pavement friction and the only witness with expertise on Canadian friction management practices.
- Dewan Karim, an expert in transportation safety and Practice Lead of the Transportation Engineering and Safety Group at 30 Forensic Engineering.

The Inquiry also received evidence from the following experts put forward by Commission Counsel and Golder:

- Dr. Gerardo Flintsch – Commission Counsel Expert on pavement friction;
- Russell Brownlee – Commission Counsel Expert on roadway design and safety;
- Dr. Hassan Baaj – Golder Expert on pavement aggregates; and
- Janice Baker – Commission Counsel Expert on municipal corporate governance.

As part of Phase Two, the City submitted an affidavit on behalf of City Manager Janette Smith outlining changes to the City policies and procedures that were implemented as part of the City's ongoing process improvement and may be relevant to the issues in the Inquiry.

Following the completion of Phase Two, the City and the other Participants to the Inquiry submitted written closing submissions on the key issues on the Inquiry. The parties also delivered oral closing submissions on March 22 and 24, 2023.

2. Costs up to February 28, 2023

The costs of the Inquiry to date are outlined in the following chart, representing external legal fees for the Commissioner, including the costs of the virtual hearing 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 expert witnesses.

To February 28, 2023	
City's Expenses (e.g. data collection, hosting)	\$764,279.85
City's External Legal Counsel Fees and Disbursements	\$9,767,008.48
Commission Counsel Fees and Disbursements	\$11,644,357.66
Other Expenses (e.g. consultants, website hosting)	\$1,418,653.46
Total (exclusive of HST)	\$23,594,299.45

3. Outcome of Inquiry: The Report

The Commissioner will release his report in which he will summarize the evidence, make findings of fact and recommendations in response to the Terms of Reference. It is expected the Commissioner's report will be released by Fall 2023.

SUMMARY OF KEY EVIDENCE

Over the course of the Inquiry, the Commissioner heard evidence on a wide range of issues identified in the Terms of Reference.

Inquiry Counsel summarized the key evidence provided to the Inquiry in its written closing submissions with respect to three key issues: (1) the safety of the Red Hill; (2) the steps taken by the City to improve and maintain the Red Hill between 2007 and 2019; and (3) the various steps the City has taken since the commencement of this Inquiry in 2019 to improve its existing policies and procedures, both at the City-wide and at the Public Works levels, to enhance transparency, accountability, collaboration, and quality improvement.

In their submissions, Inquiry Counsel accepted that there was limited circulation of the Tradewind Report once it was received by the City in 2014, but put forward in their Closing submissions at the Inquiry that the evidence, particularly from the safety consultants at CIMA, indicated that it was unlikely that the Tradewind Report necessitated any additional remedial measures other than what had already been implemented on the Red Hill.

1. Safety of the Red Hill

The Inquiry received the following evidence regarding the design and construction of the Red Hill:

- the Red Hill was designed in accordance with the 1985 MTO Design Guide. No challenge was made to the design choices that were made by the planners involved in the design of the Red Hill.
- the Red Hill was constructed with a surface layer of Stone Mastic Asphalt ("SMA") and the mix design used was consistent with current mix design practices for SMA.
- technical data and testing conducted on the aggregate used on the Red Hill show that the aggregate had good technical properties and functional performance and was suitable for use on the Red Hill.

- Pavement skid resistance depends on macrotexture and microtexture. Generally, macrotexture contributes to skid resistance at higher speeds and microtexture contributes to skid resistance at lower speeds. With respect to macrotexture, the values taken on the Red Hill even before resurfacing were appropriate. With respect to microtexture, the Canadian experts, Mr. Hein and Dr. Baaj, agree that the friction decline, which is expected for any aggregate, was normal. Dr. Flintsch, the American friction expert, opined that the decline in friction values was significant.

The Inquiry Counsel presented the following extensive evidence regarding the friction values on the Red Hill:

- The City shared friction testing information from the Tradewind Report with its safety consultant in 2015.
- The City was not advised of any safety concerns arising from the friction values of the Red Hill by the MTO or Golder. Golder confirmed that they were not safety experts and did not assert that they raised any safety concerns, although they did advise the City of potential ways to improve friction.
- Mr. Hein, the only expert with expertise in Canadian friction management practices, confirmed that the friction values on the Red Hill were consistent with similar roads in Ontario and further confirmed that the City appropriately focused on minimizing the excessive speeding on the Red Hill as opposed to increasing pavement friction. Dr. Flintsch opined that the friction results are relatively low. However, Mr. Hein opined that those guidelines were developed based on the local conditions of the United Kingdom and should not be applied here without further analysis. In his career spanning four decades, Mr. Hein has not seen those guidelines used as a reference to assess the frictional qualities of Canadian roads.
- The uncontested evidence from both friction experts was that friction is seldom the cause of collisions but can contribute to collisions in the face of other contributing factors, such as speeding or curvature. Importantly, because less friction is needed at lower driving speeds, the experts also agree that decreasing the demand for friction through speed enforcement or other countermeasures, would avoid collisions or reduce the severity of collisions.
- Increasing friction is not always necessary because pavement improvements may not reduce the occurrence of collisions and are often associated with significant costs. In Mr. Hein's view, other countermeasures can have a substantially higher impact on collisions than incremental improvements to pavement friction.

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2. The City Took Steps to Maintain and Improve the Red Hill

Inquiry Counsel presented extensive evidence on the various reports and studies completed on the Red Hill between 2013 and 2019, including two safety reviews completed by CIMA, the City's safety consultant, in 2013 and 2015.

As part of the 2013 CIMA Report, CIMA reviewed the operational and safety aspects of a segment of the Red Hill. Inquiry Counsel presented evidence stating that CIMA did not identify any urgent or significant safety issues during this review and concluded that overall the portion of the Red Hill reviewed for the study was operating safely. The City implemented CIMA's recommended countermeasures to improve the safety performance of the Red Hill in a staged manner consistent with industry best practices.

Inquiry counsel presented further evidence showing that, following CIMA's 2013 safety review, City staff monitored the collisions on the Red Hill, particularly as it related to wet weather collisions and by the end of 2014 determined that a review of the entire Red Hill would be prudent. Further, in 2015, CIMA completed a detailed safety review of the Red Hill. CIMA identified potential countermeasures to improve the safety performance of the Red Hill, the majority of which were implemented within a two-year period, notwithstanding that the timeline for completion was 0 to 5 years.

Regarding CIMA's conclusion that a combination of high speeds and wet surface may be the primary contributing factors to collisions on the Red Hill, the City implemented immediate measures to combat the excessive speeding on the Red Hill, including through signage and police enforcement, while investigating potential means to rehabilitate and resurface the Red Hill, which was ultimately done in 2019.

Inquiry Counsel also presented evidence regarding the City's focus on combating speeding. It was widely understood in the traffic safety industry that driver behaviour and speeding was a primary contributor to collisions, and both friction experts agreed that friction is seldom the cause of collisions but can contribute to collisions in the face of other contributing factors, such as speeding or curvature. Importantly, the experts also agree that in these circumstances, increasing the friction values or decreasing the demand for friction, through speed enforcement and/or other countermeasures, would avoid collisions or reduce the severity of collisions.

On the issue of whether CIMA would have changed its assessment regarding the role that pavement surface played in collisions in its 2015 report if CIMA had received a copy of the Tradewind Report, CIMA confirmed that it would not have recommended any changes to its recommendations, other than recommending aggressive speed enforcement as opposed to regular speed enforcement.

Mr. Malone of CIMA presented evidence that "the Tradewind Report is not the smoking

gun of confirmation that pavement surface was the primary cause of collisions on the Red Hill.”

3. The City Took Steps to Improve Policies and Procedures

Inquiry Counsel presented evidence regarding the various steps the City has taken since the commencement of the Inquiry to improve its existing policies and procedures, both at the City-wide and at the Public Works levels, to enhance transparency, accountability, collaboration, and quality improvement.

The improvements are consistent with best practices in municipal governance and designed to achieve the following objectives:

- Consistent and accessible document management:

Creating consistent record and document management practices, enhancing accountability and sharing of information across multiple divisions and departments, including through establishing tracking and retention policies for consultant and staff reports, ensuring continuity and transparency.

- Consistent and transparent communication between City staff:

Ensuring effective communication between City staff, City Council and the public, including through identifying a clear process for the sharing of consultant reports which identify imminent risk to human health or safety with senior leaders and Council.

- Better coordination between groups for efficient project delivery:

Coordinating work across the City and various departments and divisions, including through improved project management processes, to provide leadership on the safe and efficient operation and maintenance of assets as well as address any fragmentation of the structures and systems involved by providing consistent coordination and oversight of roles and responsibilities, including within Public Works.

Janice Baker, Commission Counsel’s expert on municipal corporate governance, confirmed that the improvements are consistent with best practices in municipal governance and are designed to achieve consistent and accessible document management systems and practices, consistent and transparent communications between and among City staff, Council, and the public, and better coordination between groups for efficient project delivery across City departments and divisions.

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RELEVANT CONSULTATION

- Eli Lederman and Delna Contractor – external legal counsel, Lenczner Slaght LLP
- Belinda Bain – external legal counsel, Gowling WLG (Canada) LLP

APPENDICES AND SCHEDULES ATTACHED

Not Applicable.