

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

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

**FACTUM OF THE OFFICE OF THE CITY AUDITOR**

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## FACTUM OF THE OFFICE OF THE CITY AUDITOR

### PART I - OVERVIEW

1. On August 10, 2022, Domenic Pellegrini, (“**Mr. Pellegrini**”), being an inspector with the Office of the City Auditor for the City of Hamilton (“**OCA**”), was served with a summons requiring that he appear and give evidence to the Red Hill Judicial Inquiry (the “**Judicial Inquiry**”).
2. The OCA does not agree that an investigator for the OCA can be required to give evidence at the Judicial Inquiry constituted under section 274 of the *Municipal Act*.<sup>1</sup> The OCAs position is that the Commissioner has no choice but to quash the summons for want of jurisdiction.
3. The OCA is appointed by the City of Hamilton as an independent Auditor General for the City of Hamilton and is bound by a statutory duty of secrecy under section 223.22 of the *Municipal Act*.<sup>2</sup> At the point in time when the Auditor General exercises its jurisdiction, it does so independently from the City.
4. This is not a public inquiry ordered by the Lieutenant Governor under the *Public Inquiries Act*<sup>3</sup>. It is a judicial investigation by a judge that was requested by the council for a municipality under the *Municipal Act*. There is a big difference.
5. The summons is beyond the jurisdiction of the commission for the following reasons:
  - (a) The OCA and the Judicial Inquiry are at law equivalents in the exercise of their powers with the result that the summons seeks an examination is an investigation of the investigator;

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<sup>1</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 274.

<sup>2</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.22.

<sup>3</sup> *Public Inquiries Act*, [2009, SO 2009, c 33, Sch 6](#).

- (b) The OCA has no “new” or “originating” evidence because the OCA was exercising powers under the *Public Inquiries Act* to collect the same evidence available to the Judicial Inquiry;
  - (c) The OCA is statutorily independent from the City which independence evaporates if its conduct is subject to subsequent review at the insistence of the same municipal council who appointed the independent Auditor General; and
  - (d) For policy reasons, the statute should be interpreted in a way that will avoid striking at the heart of an Auditor General’s jurisdiction and its right and ability to probe matters willingly and tenaciously, all to ensure that the auditors are not only independent but seen to be independent.
6. Much of the previous jurisprudence considering confidentiality and secrecy provisions is not of assistance. It considered the powers of the Provincial Government and its Lieutenant Governor to inquire into matters under its constitutional jurisdiction to broadly inquire into matters that are subject to provincial law, whereas municipalities are creatures of provincial statute with no powers greater than those given to them in a statute. The authorities do not consider a municipal judicial investigation under the *Municipal Act* where an Auditor General conducts an investigation under nearly identical powers of inquiry.
7. The summons seeks to obtain the equivalent of a judge’s bench notes taken during an inquiry and asking the question: how did the judge conduct this inquiry? This type of approach should not be permitted, and the summons should be set aside.
8. It is of note that the summons requiring the investigator to give evidence relates to extrinsic evidence that is not directly relevant to an issue in the inquiry and is instead hearsay to corroborate – or contradict – evidence given by witnesses otherwise available. While it is likely

admissible hearsay even in a superior court, the summons seeks to look behind the secrecy provisions of the *Municipal Act* in a way not intended by the statute.

9. In the alternative, to the extent the OCA is directed to provide evidence, the OCA asks that the Commissioner give directions limiting the scope of the evidence to a report prepared by the OCA under the *Municipal Act*. In any event, and to the extent that the Commission agrees that Mr. Pellegrini can be summonsed, the OCA asks that its legal counsel be recognized as a counsel with full rights of cross-examination after the completion of the inquiry counsel's questioning.

## PART II - FACTS

10. The OCA was appointed by the City of Hamilton as an Auditor General in accordance with section 223.19 of the *Municipal Act*<sup>4</sup> and City of Hamilton By-law 19-180 (the "**By-law**")<sup>5</sup>.
11. In its role as an Auditor General, the OCA is required to remain independent from the City under section 223.19(1.1) of the *Municipal Act*.<sup>6</sup>
12. The OCA is responsible for, *inter alia*, reporting to City of Hamilton Council (the "**City Council**") and is statutorily responsible for assisting the City Council in holding itself and its administrators accountable for the quality of stewardship over public funds and for achievement of value for money in municipal operations.

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<sup>4</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.19.

<sup>5</sup> [City of Hamilton, by-law No 19-180](#), *To appoint the City Auditor as an Auditor General under Section 223.19 of the Municipal Act, 2001* (12 July 2009) available at <https://www.hamilton.ca/sites/default/files/media/browser/2019-07-15/19-180.pdf>

<sup>6</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.19(1.1).

13. On August 10, 2022, the OCA was served with a summons that requires Mr. Pellegrini, an investigator acting under the direction of the OCA, to appear to give evidence on October 7, 2022.
14. During a routine audit assurance project within the general scope of work as Hamilton's Auditor General, Mr. Pellegrini became aware of a pavement friction testing report for the Red Hill Parkway Public Inquiry (the "**Report**").
15. The OCA obtained a copy of the Report.
16. The OCA reported the content of the report to City Counsel, which is by all accounts the fact that triggered this inquiry.
17. During the investigation, Mr. Pellegrini collected from the City numerous documents, conducted interviews of City staff, and made personal notes. At the time, he was exercising his powers of examination under sections 223.20 and 223.21 of the *Municipal Act*<sup>7</sup> and section 33 of the *Public Inquiries Act*.<sup>8</sup>

### **PART III - ISSUES**

18. It is the OCA's position that the summons issued is beyond the jurisdiction of a judge in a judicial investigation under the *Municipal Act*.

#### **Section 33 of the *Public Inquiries Act***

19. While section 33 governs, it is largely indecisive of the outcome of this motion. The relevant portions of section 33 of the *Public Inquiries Act*, which are sparse, provide as follows:

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

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<sup>7</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), ss 223.20 - 223.21.

<sup>8</sup> *Public Inquiries Act*, [2009, SO 2009, c 33, Sch 6](#), s 33.

(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).

...

(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.<sup>9</sup>

### **Jurisdiction of a Judicial Investigation**

20. Municipalities incorporated by the province hold delegated provincial powers; like school boards or other creatures of provincial statute, and unlike a province, they do not have independent constitutional status.<sup>10</sup>

21. The *Municipal Act* provides at section 274 that:

274 (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

(a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;

(b) inquire into any matter connected with the good government of the municipality; or

(c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors.

(2) Section 33 of the *Public Inquiries Act, 2009* applies to the investigation or inquiry by the judge.

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<sup>99</sup> *Public Inquiries Act*, [2009, SO 2009, c 33, Sch 6](#), s 33.

<sup>10</sup> *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#), para [2](#).



(3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable.<sup>11</sup>

22. While the powers of inquiry and jurisdiction are broad, they are similar to the powers of the OCA under the *Municipal Act*.

### **Jurisdiction of an Auditor General**

23. The OCA's jurisdiction is found beginning at section 223.19 of the *Municipal Act*. The relevant sections provide:

223.19 (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Auditor General who reports to council and is responsible for assisting the council in holding itself and its administrators accountable for the quality of stewardship over public funds and for achievement of value for money in municipal operations.

(1.1) The Auditor General shall perform his or her responsibilities under this Part in an independent manner.

...

(3) Subject to this Part, in carrying out his or her responsibilities, the Auditor General may exercise the powers and shall perform the duties as may be assigned to him or her by the municipality in respect of the municipality, its local boards and such municipally-controlled corporations and grant recipients as the municipality may specify.

...

(7) The Auditor General is not required to be a municipal employee.

...

223.21 (1) The Auditor General may examine any person on oath on any matter pertinent to an audit or examination under this Part.

(2) Section 33 of the Public Inquiries Act, 2009 applies to an examination by the Auditor General.

223.22 (1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

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<sup>11</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 274.

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

(a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

(b) under the Criminal Code (Canada).

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 223.20 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

223.23 Neither the Auditor General nor any person acting under the instructions of the Auditor General is a competent or compellable witness in a civil proceeding in connection with anything done under this Part.<sup>12</sup>

24. It is noteworthy that both an Auditor General and a superior court judge report to the municipal council under the *Municipal Act*. It is beyond debate that a superior court judge can operate independently and perhaps that is the reason why there is no specific representation or statutory requirement for judicial independence. The OCA on the other hand is clearly defined as independent from its municipal master.

25. The OCA's role is required to follow the City Council approved Charter<sup>13</sup>. The Charter states that the OCA's jurisdiction as the Auditor General is to complete the following tasks:

- (a) Compliance Auditing
- (b) Value for Money Auditing
- (c) Special Investigations (Fraud and Waste, Whistleblower).<sup>14</sup>

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<sup>12</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), ss 223.19 – 223.23.

<sup>13</sup> [City of Hamilton, Office of the City Auditor Charter](#), Appendix "A" to Report AUD19005 [Charter].

<sup>14</sup> Charter, pp. 1.

26. The jurisdiction of the OCA is broad and established Council approved Charter as follows:

The Office of the City Auditor is granted full, free and unrestricted access to any and all records, property and personnel relevant to any function under review. Access to personal information is provided for under the Municipal Freedom of Information and Protection of Privacy Act (in particular, Subsections 31(c) and 32(d)).

The OCA has the authority to conduct audits and reviews of all City departments, Members of Council, agencies, boards and commissions, as well as other entities the City is related to or has an interest in. All employees will assist the OCA in fulfilling its objectives.

As an Auditor General, the OCA has the responsibilities, including the powers, duties and protections, under Sections 223.19 to 223.23 of the Municipal Act, 2001 for:

City Departments;  
Members of Council;  
...

These responsibilities under Section 223.19 to 223.23 of the Municipal Act, 2001 include the powers to access information and to examine persons under Section 33 of the Public Inquiries Act, 2009; the duty to preserve secrecy with respect to all matters that come to its knowledge in the course of performing its functions; and the protection of not being a competent or compellable witness in a civil proceeding.<sup>15</sup>

27. The OCAs role is actually broader than the judicial inquiry as it has an ongoing and active duty to investigate matters at its own initiative within its grant of jurisdiction. The City Council has reinforced the auditor's broad scope and independence in the Charter as follows:

Independence is an essential component to maintaining public trust and preserving objectivity and integrity associated with the audit function.

To provide for the independence of Office of the City Auditor, its personnel report to the City Auditor, who reports administratively to the City Manager and functionally to the Audit, Finance and Administration Committee of Council. Audit and other reports are sent directly to the Audit, Finance and Administration Committee for discussion and approval and then to Council. These reporting relationships **help ensure independence**, promote comprehensive audit objectivity and coverage and assure adequate consideration of audit recommendations.

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<sup>15</sup> Charter, pp. 3.

All OCA activities **shall remain free of influence** by any element in the organization, **including matters of audit selection, scope, procedures, frequency, timing or report** content to permit maintenance of an independent and objective attitude necessary in rendering reports. The City Auditor has the authority to revise and extend the scope of any audit or investigation in the course of their examination.

The OCA shall have no direct operational responsibility or authority over any of the activities it reviews. Accordingly, it shall not develop nor install systems or procedures, prepare records or engage in any other activity which would normally be audited.<sup>16</sup> [emphasis added]

28. The terms of reference for this judicial inquiry have not purported to extend the judicial investigation under the *Municipal Act* to a review of OCA specifically. While it is obvious that the OCA was one of the classes of people that came into possession of the Tradewind Scientific Ltd. report referenced in the terms of reference to this inquiry, it does not automatically follow that the City's direction applies to the OCA.

### **Resolving the Jurisdictional Conflict**

29. There is no relevant jurisprudence addressing sections 223.19 – 223.23 of the *Municipal Act* that we were able to locate.<sup>17</sup> As a result, the issue turns on a first principles analysis of the statute.

30. The conflict in the legislation occurs because the City of Hamilton Council is permitted to appoint an Auditor General under the *Municipal Act*. Once appointed, the Auditor General's work is imbued with a cloak of statutory secrecy and independence.

31. The subsequent appointment of a judicial inquiry by the same Council is intended to do the same work with jurisdiction that overlaps the work of the OCA. In other words, the request is to look behind an independent investigation. This should not be possible.

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<sup>16</sup> Charter, pp. 6.

<sup>17</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), ss 223.19 – 223.23.

32. The concept of independence is central to the interpretation of the statutory powers giving the OCA and a judge in a judicial inquiry their respective jurisdiction. If an investigator is subject to being investigated by decision of the same corporation they are charged with investigating, they are not independent – but more importantly, cannot be seen to be independent. If that independence is not permitted to exist after an Auditor General has commenced or completed its work, it can become the subject of political attack and inquiry. While the OCA is not suggesting that happened here, the principle remains, and the integrity of the audit should be paramount.

33. Independence of the judiciary has always been recognized as critical to our legal system.<sup>18</sup>

34. However, more recently, specific attention has been turned to the importance of independence within the government and political bureaucracy. Prior to his appointment, Professor Lorne Sossin, as he then was, wrote:

It is telling that the most independent entities in government - for example, the Auditor General, the Privacy Commissioner - all remain political appointments. However, the fact that they are officers of Parliament and not divisions of particular ministries is sometimes significant. The legitimacy and credibility of these offices depend on the perception that they are not captured by political influence or pressure. Maintaining a similar ethos of independence in the context of the civil service, itself a constitutive element of the executive branch of government, requires both new expressions of political will and, I have suggested, greater clarity of legal obligations.

...

Parliamentary committees, and parliamentary watchdogs such as the provincial auditors and the Auditor General, may play significant roles as well, at least in publicizing bureaucratic or political wrongdoing, particularly in times of crisis, as the Sponsorship Affair has demonstrated. Public inquiries may be a crucial accountability mechanism where internal checks and controls appear to have broken down (the Sponsorship Inquiry, the Arar Inquiry, and the Ipperwash Inquiry are all, to varying

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<sup>18</sup> See *R. v. Beauregard*, [1986] 2 S.C.R. 56 (SCC), paras 21 - 23.

degrees, investigating political interference in administrative decision making).<sup>19</sup>

35. The concept that the Auditor General is independent of the bureaucracy it works within can be seen from the decision in *Professional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature*<sup>20</sup>. In that decision, the court determined that privilege was waived by turning over a document voluntarily to an Auditor General.<sup>21</sup> In other words, even though one could argue that the document was turned over from one staff member to another internally within an organization, the fact that the Auditor General was independent resulted in a loss of privilege. This reinforces the separation between an Auditor General and the organization that appointed it to audit them.

36. While the OCA exercises the statutory power of decision and is therefore subject to oversight under the *Judicial Review Procedure Act*<sup>22</sup>, it is not subject to oversight by the very Council and a judicial inquiry the City has appointed. The OCA should be the one independently investigating the City.

37. The emphasis on independence should not only exist but be seen to exist. This means that the work of the OCA should not be subject to a subsequent municipal by-law, whether it be passed under section 274 of the *Municipal Act* or otherwise.<sup>23</sup>

38. As noted in section 223.22(2), the only information released by the OCA is in a report as decided by the OCA, or in accordance with the Criminal Code.<sup>24</sup>

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<sup>19</sup> Lorne Sossin, "Speaking Truth to Power? The Search for Bureaucratic Independence in Canada" (2005) 55 U. Toronto LJ 1 at 25.

<sup>20</sup> [\[1995\] 3 FC 643](#).

<sup>21</sup> *Professional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature)*, [\[1995\] 3 FC 643](#), paras 12-14.

<sup>22</sup> [R.S.O. 1990, c. J.1](#).

<sup>23</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 274.

<sup>24</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.22(2).

39. Equally important is the concept of secrecy. Our courts have acknowledged that where secrecy is introduced into a statute, that secrecy must be interpreted in context.

40. In the Ipperwash Public Inquiry<sup>25</sup>, the Commissioner emphasized the necessity of looking to the specific language of a statute to interpret its provisions in each case.<sup>26</sup> The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>27</sup>

41. This is the appropriate approach in the circumstances given there is no precedent.

#### **Context of the Auditor General's Powers in Part V.1 of the *Municipal Act***

42. Read in its entire context, the OCA's duty of secrecy is distinguishable from the decisions that have considered matters of confidentiality and secrecy.

43. Public inquiries directed by municipalities are creatures of statutes, and as such, are more narrowly scoped than public inquiries appointed by provincial and federal governments.

44. In this case, the OCA, an independent and objective auditor, has been summonsed to appear at a judicial inquiry commenced by the City. The OCA has no direct operational responsibility or authority over any of the activities it reviews and is therefore subject to a higher degree of confidentiality – notably *secrecy*, a term that is not present in the RHPA confidentiality provisions.

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<sup>25</sup> Report of the Ipperwash Inquiry, *Ipperwash Public Inquiry: Commissioner's Ruling Re Motion by the Ontario Provincial Police and The Ontario Provincial Police Association*, dated August 15, 2005, Honourable Sidney B. Linden Commissioner, vol 3 at pp 162 – 178 [The Ipperwash Report], available at <[https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol\\_3/pdf/E\\_Vol\\_3\\_Full.pdf](https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_3/pdf/E_Vol_3_Full.pdf)>.

<sup>26</sup> The Ipperwash Report, para 34.

<sup>27</sup> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (SCC), para 21.

45. The secrecy provisions of the *Municipal Act* are a critical aspect of investigation for municipal auditors. The legislature has required Auditor Generals to “preserve secrecy” pursuant to section 223.22(1).<sup>28</sup> In its ordinary use, the term secrecy in the *Municipal Act* imposes a greater burden of privacy. While confidentiality denies access to the details of a topic to the unauthorized, secrecy is the concealment of a topic existing.

#### **Nature of powers under Part V.1 of the *Municipal Act***

46. While there are no relevant decisions that address the Auditor General’s investigatory powers or duty of secrecy, there are decisions released under Part V.1 of the *Municipal Act* that address the same issues.

47. In *Michael Di Biase v City of Vaughan*,<sup>29</sup> the court considered the right of a party to demand documents from an integrity commissioner where a municipality no longer had the documents that it provided to the integrity commissioner. In this case, the councillor’s pay was suspended based upon the integrity commissioner’s recommendation to the City. The councillor brought an application for judicial review of the integrity commissioner’s decision, and in doing so, demanded all documentation relied on by the integrity commissioner in reaching the report recommendations, as well as all information that passed between the integrity commissioner and several councillors. The court noted that s. 223.6(2) of the *Municipal Act* gives the integrity commissioner significant autonomy regarding the disclosure of her investigation.<sup>30</sup>

48. Section 223.6(2) provides as follows:

223.6(2) **if** the Commissioner reports to the municipality or to a local board his or her opinion about whether a member of council or of the local board has contravened the applicable code of conduct, the Commissioner **may**

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<sup>28</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.22(1).

<sup>29</sup> [2016 ONSC 5620](#).

<sup>30</sup> *Michael Di Biase v City of Vaughan*, [2016 ONSC 5620](#), para [120](#).



**disclose** in the report such matters as in the Commissioner's opinion are necessary for the purposes of the report.<sup>31</sup> [emphasis added]

49. The integrity commissioner regime is subject to identical secrecy provisions as are applicable to the OCA, which are found in section 223.5(1), and similar disclosure provision in 223.5(2) as follows:

223.5(1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

(2) Despite subsection (1), information may be disclosed in a criminal proceeding as required by law or otherwise in accordance with this Part.<sup>32</sup>

50. The court considered the secrecy provisions applicable to an integrity commissioner. After acknowledging that the Integrity Commissioner is required to preserve secrecy with respect to all matters that come to her knowledge in the course of her duties, the court found that neither the statutory scheme nor the conduct of the integrity commissioner created any legitimate expectation that the applicant would receive the disclosure that he demanded in the context of an investigation into the individual.<sup>33</sup>

51. The content of the investigation is secret and through the process and protocol adopted by the City, there was never any requirement to share any of the content of the investigation beyond the content of the report that went out to the public. The only thing the public sees at the end of an investigation is a report.

52. The OCA is similarly only permitted to disclose information in its possession as part of the exercise of its duties under Part V.1 of the *Municipal Act*, or where required by the Criminal

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<sup>31</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.6(2).

<sup>32</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.5(1).

<sup>33</sup> *Michael Di Biase v City of Vaughan*, [2016 ONSC 5620](#), paras [125-130](#).

Code.<sup>34</sup> None of the exceptions presently permit Mr. Pellegrini to communicate information that came to his knowledge in the course of his duties.

53. The decision in *Michael Di Biase v City of Vaughan* provides useful guidance on what an Auditor General's obligation is to disclose documents generally within its own administrative process, not through the civil litigation process. There is no requirement or even expectation that the Auditor General will produce any documents in his or her possession as a result of a report produced.

54. This is a key distinction between many of the other cases which make a significant distinction between civil litigation and a judicial inquiry where they find that documents that cannot be compelled in civil litigation can nonetheless be compelled in the context of a judicial inquiry. However, in each of those cases, the question asked of the court was whether a judicial inquiry under the *Public Inquiries Act* could override a provision in a provincial statute requiring confidentiality.

55. For instance, in the Inquiry into Pediatric Forensic Pathology in Ontario (the "**Goudge Report**")<sup>35</sup>, the Registrar of the College of Physicians and Surgeons of Ontario (CPSO) was summonsed to attend before the commission to give evidence and produce documents related the complaints filed regarding the forensic evidence of Dr. Charles Smith, who at the time was considered to be a leading pediatric pathologist in Ontario.

56. The Commissioner upheld the summons and disagreed that the Registrar was precluded from complying by the terms of the confidentiality requirements under section 36(1) and (3) of the

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<sup>34</sup> *Municipal Act, 2001*, [SO 2001, c 25](#), s 223.522(2).

<sup>35</sup> Inquiry into Pediatric Forensic Pathology in Ontario, *Ruling on the CPSO Motion for Directions* dated October 10, 2007 [The Goudge Report], available at [http://www.archives.gov.on.ca/en/e\\_records/goudge/li/pdf/RulingonCPSOMotionfordirections-Oct10\\_2007.pdf](http://www.archives.gov.on.ca/en/e_records/goudge/li/pdf/RulingonCPSOMotionfordirections-Oct10_2007.pdf)

*Regulated Health Professions Act* (RHPA)<sup>36</sup>. The Commissioner observed that the list of 10 exceptions to the duty of confidentiality, which was a recent expansion at that time, signalled a general legislative intent to diminish the reach of the provision.<sup>37</sup> The Commissioner also determined that there was no explicit language in the statute putting the documents beyond the reach of a summons.<sup>38</sup>

57. Unlike the RHPA, the *Municipal Act* only contains two narrow exceptions (criminal and report exceptions), which demonstrates that the legislature intended that exceptions to the duty of secrecy are narrow, and that the OCA would have significant control over the documents and information it chooses to release.

58. The *Municipal Act* is also a different statutory regime than the RHPA. The *Municipal Act* allows municipalities to appoint auditors to perform the same duties as the Judicial Inquiry, which is significantly different than the RHPA. As a result, conclusions regarding the duties of confidentiality and secrecy are different under each statutory regime.

59. The Goudge Report is also not of assistance because it was decided in the context of an inquiry directed by the Lieutenant Governor for Ontario under the broad powers of the *Public Inquires Act*. It also did not involve two competing investigatory powers within the scheme of the same Act where the secrecy and confidentiality provisions specifically protect information collected from the very municipal corporation that appointed the investigator.

60. Taking the analysis a step further, the Commissioner in the Goudge Report relied on the decision in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*<sup>39</sup> In

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<sup>36</sup> *Regulated Health Professions Act*, [1991, SO 1991, c 18](#), s 36(1).

<sup>37</sup> The Goudge Report, pp 8.

<sup>38</sup> The Goudge Report, pp 8. At the time of the Goudge Report, s 36(1) of the RHPA included 10 exceptions. Currently, there are 15 exceptions to this provision.

<sup>39</sup> [1995 CanLII 7258](#) (ON SC).

that case, the court considered whether the Office of the Superintendent of Financial Institutions (OSFI) was required to produce documents in light of the statutory confidentiality and secrecy provisions.

61. In concluding that documents must be released, the analysis of the court focused on the statutory promise of confidentiality. The court found that it does not bar the compelled production of documents by summons unless the documents meet the test for privilege, or the legislature has used language specifically prohibiting their introduction into evidence.<sup>40</sup>

62. Justice Sharpe acknowledged the principle that a statutory promise of confidentiality does not constitute an absolute bar to the compelling production of the documents and information in the possession and control of OSFI.<sup>41</sup> However, *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co* was not one of jurisdiction, but rather a case where OSFI was exclusively relying on a confidentiality provision in a statute to avoid disclosure. As such, it is not particularly helpful in determining the ultimate issue in this case.

63. Unlike *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co*, this is a case that involves two competing investigators under the same Act. The Commissioner should recognize and protect these two separate and independent investigatory regimes.

#### **PART IV - ORDER REQUESTED**

64. The OCA requests that the Commissioner:

- (a) quash the summons issued to Mr. Pellegrini.

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<sup>40</sup> The Goudge Report, pp. 8, citing *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co*.

<sup>41</sup> *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1995 CanLII 7258](#) (ON SC), para 25.

- (b) In the alternative, the OCA asks that the Commissioner limit the evidence of Mr. Pellegrini to a report prepared by the OCA based on its partial investigation;
- (c) In the further alternative, if the Commissioner directs Mr. Pellegrini to give evidence, that the law firm of Cassels Brock and Blackwell LLP be provided the right to act as counsel to Mr. Pellegrini with the right to question Mr. Pellegrini after Commission Counsel has questioned the witness.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 18<sup>th</sup> day of August, 2022.



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Lawyers for the Office of the City Auditor for the  
City of Hamilton

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#)
2. *R. v. Beauregard*, [\[1986\] 2 S.C.R. 56](#) (SCC)
3. *Professional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature)*, [\[1995\] 3 FC 643](#)
4. Report of the Ipperwash Inquiry, *Ipperwash Public Inquiry: Commissioner's Ruling Re Motion by the Ontario Provincial Police and The Ontario Provincial Police Association*, dated August 15, 2005, Honourable Sidney B. Linden Commissioner, vol 3 at pp 162 – 178 [The Ipperwash Report], available at [https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol\\_3/pdf/E\\_Vol\\_3\\_Full.pdf](https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_3/pdf/E_Vol_3_Full.pdf)
5. *Rizzo & Rizzo Shoes Ltd. (Re)*, [\[1998\] 1 S.C.R. 27](#) (SCC)
6. *Michael Di Biase v City of Vaughan*, [2016 ONSC 5620](#)
7. Inquiry into Pediatric Forensic Pathology in Ontario, *Ruling on the CPSO Motion for Directions*, dated October 10, 2007 [The Goudge Report], available at [http://www.archives.gov.on.ca/en/e\\_records/goudge/li/pdf/RulingonCPSOMotionfordirections-Oct10\\_2007.pdf](http://www.archives.gov.on.ca/en/e_records/goudge/li/pdf/RulingonCPSOMotionfordirections-Oct10_2007.pdf)
8. *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1995 CanLII 7258](#) (ONSC)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Municipal Act, 2001*, [SO 2001, c 25](#), ss. 223.19 – 222.22, 274

#### **Auditor General**

**223.19** (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Auditor General who reports to council and is responsible for assisting the council in holding itself and its administrators accountable for the quality of stewardship over public funds and for achievement of value for money in municipal operations. 2006, c. 32, Sched. A, s. 98.

(1.1) The Auditor General shall perform his or her responsibilities under this Part in an independent manner. 2009, c. 33, Sched. 21, s. 6 (11).

#### **Powers and duties**

(3) Subject to this Part, in carrying out his or her responsibilities, the Auditor General may exercise the powers and shall perform the duties as may be assigned to him or her by the municipality in respect of the municipality, its local boards and such municipally-controlled corporations and grant recipients as the municipality may specify. 2006, c. 32, Sched. A, s. 98.

#### **Grant recipients**

(4) The authority of the Auditor General to exercise powers and perform duties under this Part in relation to a grant recipient applies only in respect of grants received by the grant recipient directly or indirectly from the municipality, a local board or a municipally-controlled corporation after the date on which this section comes into force. 2006, c. 32, Sched. A, s. 98.

#### **Status**

(7) The Auditor General is not required to be a municipal employee. 2006, c. 32, Sched. A, s. 98.

#### **Powers re examination**

**223.21** (1) The Auditor General may examine any person on oath on any matter pertinent to an audit or examination under this Part. 2006, c. 32, Sched. A, s. 98.

#### **Application of *Public Inquiries Act, 2009***

(2) Section 33 of the *Public Inquiries Act, 2009* applies to an examination by the Auditor General. 2009, c. 33, Sched. 6, s. 72 (3).

### **Duty of confidentiality**

**223.22** (1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part. 2006, c. 32, Sched. A, s. 98.

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

(a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

(b) under the *Criminal Code* (Canada). 2006, c. 32, Sched. A, s. 98.

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 223.20 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege. 2006, c. 32, Sched. A, s. 98.

### **Investigation by judge**

**274** (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

(a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;

(b) inquire into any matter connected with the good government of the municipality; or

(c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors. 2001, c. 25, s. 274 (1).

### **Application of *Public Inquiries Act, 2009***

(2) Section 33 of the *Public Inquiries Act, 2009* applies to the investigation or inquiry by the judge. 2009, c. 33, Sched. 6, s. 72 (5).

### **Report**

(3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable. 2001, c. 25, s. 274 (3).

### **Counsel**



(4) The council may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry. 2001, c. 25, s. 274 (4).

### **Representation by counsel**

(5) Any person whose conduct is called into question in the investigation or inquiry may be represented by counsel. 2001, c. 25, s. 274 (5).

### **Costs**

(6) The judge may engage counsel and other persons to assist in the investigation or inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the municipality. 2001, c. 25, s. 274 (6).

2. *Public Inquiries Act*, 2009, [SO 2009, c 33, Sch 6](#), s 33 (3) (a)(b), (13)

### **Power to summon witnesses, papers, etc.**

(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).

3. *Regulated Health Professions Act*, [1991, SO 1991, c 18](#), s 36 (1), (3)

### **Confidentiality**

**36** (1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* and every member of a Council or committee of a College shall keep confidential all information that comes to his or her knowledge in the course

of his or her duties and shall not communicate any information to any other person except,

- (a) to the extent that the information is available to the public under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*;
- (b) in connection with the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, including, without limiting the generality of this, in connection with anything relating to the registration of members, complaints about members, allegations of members' incapacity, incompetence or acts of professional misconduct or the governing of the profession;
- (c) to a body that governs a profession inside or outside of Ontario;
- (c.1) to the Health and Supportive Care Providers Oversight Authority for the purposes of administering the *Health and Supportive Care Providers Oversight Authority Act, 2021*;
- (d) as may be required for the administration of the *Drug Interchangeability and Dispensing Fee Act*, the *Healing Arts Radiation Protection Act*, the *Health Insurance Act*, the *Health Protection and Promotion Act*, the *Independent Health Facilities Act*, the *Laboratory and Specimen Collection Centre Licensing Act*, the *Fixing Long-Term Care Act, 2021*, the *Retirement Homes Act, 2010*, the *Ontario Drug Benefit Act*, the *Coroners Act*, the *Controlled Drugs and Substances Act (Canada)* and the *Food and Drugs Act (Canada)*;
  - (d.1) for a prescribed purpose, to a public hospital that employs or provides privileges to a member of a College, where the College is investigating a complaint about that member or where the information was obtained by an investigator appointed pursuant to subsection 75 (1) or (2) of the Code, subject to the limitations, if any, provided for in regulations made under section 43;
  - (d.2) for a prescribed purpose, to a person other than a public hospital who belongs to a class provided for in regulations made under section 43, where a College is investigating a complaint about a member of the College or where the information was obtained by an investigator appointed pursuant to subsection 75 (1) or (2) of the Code, subject to the limitations, if any, provided for in the regulations;
- (e) to a police officer to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (f) to the counsel of the person who is required to keep the information confidential under this section;
- (g) to confirm whether the College is investigating a member, if there is a compelling public interest in the disclosure of that information;
- (h) where disclosure of the information is required by an Act of the Legislature or an Act of Parliament;

- (i) if there are reasonable grounds to believe that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons;
- (j) with the written consent of the person to whom the information relates; or
- (k) to the Minister in order to allow the Minister to determine,
  - (i) whether the College is fulfilling its duties and carrying out its objects under this Act, a health profession Act, the *Drug and Pharmacies Regulation Act* or the *Drug Interchangeability and Dispensing Fee Act*, or
  - (ii) whether the Minister should exercise any power of the Minister under this Act, or any Act mentioned in subclause (i). 2007, c. 10, Sched. M, s. 7 (1); 2014, c. 14, Sched. 2, s. 10; 2017, c. 11, Sched. 5, s. 2 (1, 2); 2021, c. 39, Sched. 2, s. 23 (1).

### **Members to provide information**

- (3) A member of a College who receives a request for information for the purpose of subsection (1) shall provide the information to the College within the time period and in the form and manner specified by the College. 2007, c. 10, Sched. M, s. 8.
- 4. City of Hamilton By-law 19-180, being the creation and appointment of the Office of the City Auditor, available at  
<https://www.hamilton.ca/sites/default/files/media/browser/2019-07-15/19-180.pdf>
  - 5. City of Hamilton By-law 19-218, being the City Council approval, including *inter alia*, the City of Hamilton Office of the City Auditor Charter, available at:  
<https://www.hamilton.ca/sites/default/files/media/browser/2019-09-12/19-218v2.pdf>

**SCHEDULE "C"**

**SECONDARY MATERIAL**

1. Lorne Sossin, "Speaking Truth to Power? The Search for Bureaucratic Independence in Canada" (2005) 55 U. Toronto LJ 1 at 25

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

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**FACTUM OF THE OFFICE OF THE CITY AUDITOR**

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