

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

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

NOTICE OF MOTION FOR DIRECTIONS

The Office of the City Auditor (“OCA”), appointed as an independent Auditor General for the City of Hamilton under section 228.18 of the *Municipal Act, 2001*, as amended, will make a Motion for Directions to the Honourable Justice Herman J. Wilton-Siegel, the Commissioner to the Red Hill Valley Parkway Inquiry, on a date to be determined.

PROPOSED METHOD OF HEARING: The Motion is to be heard in writing.

THE MOTION IS FOR DIRECTIONS:

1. Whether an Auditor General appointed under the *Municipal Act* or an investigator appointed by the Auditor General can appear as a witness before a judicial inquiry to give evidence regarding the content of an investigation conducted pursuant to sections 223.20 and 223.21 and to disclose during the course of that evidence its work product arising from an investigation;
2. In the event that the Auditor General or an investigator appointed by the Auditor General is called to give evidence, the OCA requests confirmation that, in accordance with Rules 49 of the Inquiry’s Rules of Procedure, its independent counsel can be present during questioning with full participatory rights in the examination as provided for in the Inquiry Rules.

THE GROUNDS FOR THE MOTION ARE:

1. The OCA is concerned that the summons issued on August 10, 2022 is beyond the jurisdiction of a judge in a judicial investigation under the *Municipal Act*;

2. The OCA was at all material times appointed under section 223.19 of the *Municipal Act* as an Auditor General;
3. An Auditor General is required to remain independent from the City under section 223.19(1.1) of the *Municipal Act*;
4. The OCA is responsible for, *inter alia*, reporting to City of Hamilton Council and is statutorily 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;
5. On August 10, 2022, the OCA was served with a summons that requires Domenic Pellegrini, an investigator acting under the direction of the OCA, to appear to give evidence on October 7, 2022 at 9:30 am;
6. At the time when Mr. Pellegrini was investigating, conducting interviews and making his personal notes, he was exercising his powers of examination under ss. 223.20 and 223.21 of the *Municipal Act* and s.33 of the *Public Inquiries Act*;
7. The OCA has a duty of secrecy under section 223.22 of the *Municipal Act*, which duty is distinguishable jurisprudence that has considered matters of confidentiality and the secrecy required, and expected, of an Auditor General;
8. The OCA is 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 Code;
9. The OCA is not a competent or compellable witness in civil proceedings, but it is acknowledged that a judicial inquiry is not a civil proceeding;
10. Mr. Pellegrini is not in possession of any information other than information he collected as an investigator appointed by the OCA;
11. All of the information collected by Mr. Pellegrini is information that is, or should be, available to the judicial inquiry through other means;

12. The proceedings that constitute the Red Hill Inquiry are limited in their extent and purpose to the jurisdiction provided by section 274 of the *Municipal Act*, section 33 of the *Public Inquiries Act* (“**PIA**”) and the terms of reference so long as those terms of reference do not exceed the grant of statutory jurisdiction under section 274 of the *Municipal Act*;
13. An inquiry under the *Municipal Act* takes its jurisdiction and authority from the City of Hamilton’s decision to appoint a judicial inquiry;
14. An inquiry is not a public inquiry for the purposes of the *Public Inquiries Act*, but is instead a judicial inquiry under the *Municipal Act* that specifically calls on the procedure under section 33 of the PIA;
15. The terms of reference cannot be used to extend the statutory right of inquiry under the *Municipal Act* and must be read down to the extent that they purport to do so;
16. Previous jurisprudence has relied on the broad provisions of the Government of Ontario’s use of inquiry powers under the PIA, as opposed to the significantly narrower provisions of section 33 of the PIA that are applicable to this inquiry;
17. The terms of reference are not directed at the OCA acting in its capacity as the independent auditor for the City, and it is questionable whether the terms of reference are broad enough to require participation of an auditor who is statutorily independent;
18. It is not clear that it is within the City’s power to order a judicial inquiry of an independent Auditor General appointed under the *Municipal Act*, and doing so may result in a conflict with the scope and intent of competing provisions found in Part V.1 and section 274 of the *Municipal Act*;
19. There are strong policy reasons that favour the existence of an independent Auditor General whose work and findings are not subject to secondary review or attack by a municipal council by holding those findings to a further level of account through a judicial inquiry;

20. The power to summons under section 33 is limited to matters that are relevant to the subject matter of the inquiry, and further limited by the statutory grant in the *Municipal Act*.
21. The inquiry has all of the relevant information it requires that falls within the subject matter of the inquiry, including the dates all matters that fall to the heart of the inquiry occurred and when that information was reported to City Council giving rise to this Judicial Inquiry;
22. The OCA is concerned that the summons relates to extrinsic evidence that is not relevant to an issue in the inquiry, is being called to contradict a witness as opposed to being called for the purposes of proving a fact necessary to advance the terms of reference in the inquiry, and in doing so is looking behind the secrecy provisions of the *Municipal Act* in a way that was not intended by the statute;
23. The *Municipal Act*, Part V.1 and section 274, *Public Inquires Act*, and in particular section 33, and Rules 42 to 50 of the Inquiry's Rules of Procedure, linked below

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

- (a) Such further and other evidence as counsel may advise and the Commissioner may permit.

August 12, 2022

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Commission Counsel

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