

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 City of Hamilton will make a Motion for Directions to the Honourable Justice Herman J. Wilton-Siegel, the Commissioner to the Red Hill Valley Parkway Inquiry, in writing or, if directed by the Commissioner by videoconference on a date to be set by the Commissioner.

PROPOSED METHOD OF HEARING: The Motion is to be heard in writing or by video conference.

THE MOTION IS FOR DIRECTIONS:

- (a) Appointing a designate (the “**Designate**”) to determine the claim for legal privilege with respect to the Documents Under Review (defined below), pursuant to Rule 15 of the Rules of Procedure for the Red Hill Valley Parkway’s Investigation and Public Hearings, dated June 25, 2020 (the “**Rules**”);
- (b) Directing that the motion before the Designate be heard *in camera* and any motion materials be filed with redactions so as to protect information that may be subject to legal privilege, including solicitor client or litigation privilege; and
- (c) Directing that the Designate’s decision be made public, subject to redacting any portions of the decision which are necessary to protect privileged information, as deemed necessary by the Designate.

THE GROUNDS FOR THE MOTION ARE

I. Background to the City's Request for Directions:

- (a) On April 24, 2019, the City of Hamilton (the “City”) passed a resolution pursuant to section 274 of the *Municipal Act, 2001* requesting the Chief Justice of the Ontario Superior Court of Justice to appoint a Superior Court judge to investigate the matters listed in the Terms of Reference.
- (b) The Honourable Mr. Justice Herman J. Wilton-Siegel was appointed as the Commissioner of the Red Hill Valley Parkway Inquiry (the “Inquiry”) in May 2019. The Commissioner appointed Robert Centa, Emily Lawrence and Andrew C. Lewis at the law firm of Paliare Roland as Commission Counsel;
- (c) Commission Counsel requested that the City produce all documents relevant to the issues in the Inquiry, as defined in the Terms of Reference, pursuant to the summons authority under section 33(3) of the *Public Inquiries Act*.
- (d) Pursuant to section 33(11) of the *Public Inquiries Act*, any information that is protected by legal privilege is inadmissible at the Inquiry. The courts have described solicitor client privilege as a “fundamental civil and legal right” that is essential to our legal system. Privilege is routinely maintained in litigation or other proceedings, including judicial inquiries.
- (e) The City has produced over 62,500 documents that were potentially relevant to the Terms of Reference and responsive to the summons. In addition to these documents, the City identified a number of documents which are subject to legal

privilege, including documents that contain legal advice or are prepared for the purpose of litigation, that may also be relevant to the Terms of Reference and advised Commission Counsel that these privileged documents would either not be produced on the basis of their inadmissibility or, where possible, would be produced in redacted form.

- (f) Initially, the City withheld approximately 1000 relevant documents (the “**Privileged Documents**”) on the basis that these documents were subject to legal privilege and are inadmissible in the hearing stage of the Inquiry pursuant to section 33(13) of the *Public Inquiries Act, 2009*.
- (g) In February 2021, Commission Counsel advised the City that it did not agree with the City’s assertions of privilege over the Privileged Documents, asserting that the City waived privilege over all documents relevant to the Inquiry.
- (h) The City subsequently provided Commission Counsel with unredacted copies of all Privileged Documents requested by Commission Counsel, on a without prejudice basis, to permit Commission Counsel to review and identify the specific Privileged Documents which they deemed relevant to the work of the Inquiry.
- (i) The City worked cooperatively with Commission Counsel to find a balanced approach that would allow Commission Counsel to have access to information that was truly relevant to the Terms of Reference, while protecting the privileged nature of the information.

- (j) Following these discussions, the City agreed to produce the majority of the documents Commission Counsel identified, while maintaining the City's assertions of privilege over 43 unique documents (and a total of 87 documents when document duplicates and partial email chains are accounted for) (the "**Documents Under Review**").

- (k) The City and Commission Counsel have agreed to use the same approach as set out above in respect of any other relevant documents over which the City may claim privilege (the "**Additional Documents Under Review**").

- (l) In light of the City and Commission Counsel's positions regarding the Documents Under Review, the City seeks directions from the Commissioner:
 - (i) To appoint a Designate to determine whether the Documents Under Review and, if necessary, any Additional Documents Under Review, are privileged pursuant to Rule 15 and, if necessary, to waive the requirements under Rule 15(c) regarding the appointment of a current judge of the Superior Court as the Commissioner's designate;
 - (ii) To direct that the motion before the Designate be heard *in camera* and any motion materials filed with redactions to protect any potentially privileged information; and
 - (iii) To direct that the Designate's decision be made public, subject to redacting any portions of the decision to protect privileged information.

II. The Basis for the Motion for Directions:

i. Appointment of the Designate

- (l) Rule 15 provides a procedure for the assertion of privilege by Participants to the Inquiry. The City has complied with this process throughout the Inquiry, including providing Commission Counsel with access, on a without prejudice basis, to unredacted copies of all the Privileged Documents, and agreed to produce the majority of the Privileged Documents requested by Commission Counsel. However, there remain 43 unique documents (and a total of 87 Documents Under Review when document duplicates and partial email chains are accounted for), over which a privilege determination must be made at this time.
- (m) Pursuant to Rule 15(c), the Commissioner may appoint a designate to exercise the powers of the Commissioner in respect of the determination of the claims of privilege.
- (n) Appointing a delegate to determine the privilege claims would ensure that any privileged information contained within the Documents Under Review and, if necessary, the Additional Documents Under Review is not reviewed by the Commissioner, in the event that they are deemed inadmissible in the Inquiry, pursuant to section 33(11) of the *Public Inquiries Act, 2009*.
- (o) The practice of appointing a designate to adjudicate privilege claims has been followed by a number of other public inquiries.
- (p) For example, in the Elliot Lake Inquiry, Justice Goudge, a designate of the Commissioner, the Honourable Paul Belanger, adjudicated the privilege claims asserted by two summonsed parties over a number of documents that were relevant

to the Inquiry. Similarly, in the Goudge Inquiry, the Associate Chief Justice of Ontario, a designate of the Commissioner, adjudicated privilege claims asserted by the Kingston Police Service.

- (q) Appointing a designate of the Commissioner to review privilege claims is consistent with Justice Bellamy's recommendation in her report following the TCI Inquiry that issues of solicitor-client privilege be resolved by reference to the Regional Senior Justice of the Superior Court of Justice, or a judge designated by him.

ii. *The protection of potentially privileged information*

- (r) Rule 37 empowers the Commissioner to direct that matters within the Inquiry proceed in the absence of the public where such a direction is in the public interest.
- (s) Directing that the motion be held *in camera* would ensure that any privileged information, including the parties' submissions on the Documents Under Review and, if necessary, the Additional Documents Under Review, would remain confidential, in the event that the Designate determines that some or all of the Documents Under Review contain privileged information.
- (t) Similarly, directing that any written materials be redacted to protect potentially privileged information will ensure that any privileged information which is inadmissible in the Inquiry under s. 33 of the *Public Inquiries Act, 2009* will not be publicly disseminated and will remain confidential.
- (u) Directing that the Designate's decision be made public, subject to any redactions that are made to protect privileged information, as deemed necessary by the Designate, will similarly ensure that any privileged information which may

ultimately be deemed inadmissible in the Inquiry under s. 33 of the *Public Inquiries Act, 2009* will not be publicly disseminated.

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

- (a) The City may submit further written submissions or evidence as Counsel may advise and the Commissioner may permit.

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Commission Counsel

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