

December 14, 2022

REASONS AND DECISION ON MOTIONS FOR LEAVE TO FILE EXPERT EVIDENCE

Mr. Justice Herman J. Wilton-Siegel
Commissioner

1. Commission Counsel has delivered expert reports of Gerardo Flintsch, dated November 22 (the “Flintsch Report”) and True North Safety Group, dated November 1, 2022 (the “TNS Report”). Golder Associates Ltd. (“Golder”) and the City of Hamilton (the “City”) have brought motions pursuant to Rule 32(d) of the Rules of Procedure of the Inquiry (the “*Rules*”) seeking leave to file responding reports.
2. On December 13, 2022, after submissions, I advised the Participants that I would be granting leave to deliver expert reports governing certain matters and that I would release my decision shortly addressing the remaining issues. This decision sets out my determinations regarding each of the matters in the proposed reports. It also sets a schedule for the delivery of the expert reports and dates for the public hearings respecting the evidence in these reports, as previously agreed to by the Participants. However, I note below that the schedule that has been directed may be affected by the scope of the City’s expert reports as currently proposed.

Golder’s Motion for Leave to File an Expert Report

3. The anticipated scope of the report of Golder’s technical expert, Dr. Hassan Baaj, is set out in a letter dated December 7, 2022 of Golder’s counsel (the “Golder Letter”). From his curriculum vitae, I accept that Dr. Baaj has expertise in materials engineering with a particular focus on asphalt.

4. Golder has proposed that Dr. Baaj's report provide certain opinions regarding the significance to be attached to the testing in 2007 and 2017 of the aggregate used in the stone mastic asphalt (the "SMA") placed on the Red Hill Valley Parkway (the "RHVP"). Dr. Baaj's opinions on these matters will be based on the evidence before the Inquiry supplemented only by scientific or technical evidence in the form of papers or studies supporting his opinion. As Golder's legal counsel advised in her submissions, the proposed report will supplement the evidence in the Flintsch Report regarding the testing of the aggregate. The issues addressed in the Flintsch Report and the proposed opinion of Dr. Baaj are relevant to the Terms of Reference that address friction testing on the RHVP and more generally the state of the RHVP and safety concerns pertaining to the RHVP.
5. Accordingly, leave is granted to Golder to provide an expert report of Dr. Baaj on the issues addressed in the Golder Letter on the basis described above. However, counsel for Golder and the City should confer to avoid duplication in accordance with paragraph 15 below.

The City's Motion for Leave to File Expert Reports

6. The City seeks leave to file expert reports of Mr. David Hein and Mr. Dewan Karim. The specific issues that these experts are intended to address, and their anticipated evidence on these issues, are set out in Appendices A and B, respectively, to a letter dated December 7, 2022 of the City's counsel, which also sets out the principal reasons for the City's submission that leave ought to be granted. I will address the City's motion dealing with Mr. Hein's proposed report and Mr. Karim's report collectively as they raise certain common issues.
7. I accept that the issues proposed to be addressed in paragraphs 1(A), (B), (C) and 4 of Appendix A involve Mr. Hein's opinions regarding certain matters that fall within his expertise or experience as a consulting engineer specializing in pavement design and materials engineering among other areas. As the City's legal counsel advised in his submissions, Mr. Hein's opinions in these matters will be based on the evidence before the Inquiry supplemented only by scientific or

technical evidence in the form of papers or studies supporting his opinion. They address conclusions in the Flintsch Report and are relevant to the Terms of Reference that relate to friction testing on the RHVP and, more generally, to the safety of the RHVP, including the actions of City staff in addressing traffic safety on the roadway.

8. Similarly, I accept that the issues proposed to be addressed in paragraphs 1(A) and (B) of Appendix B involve Mr. Karim's opinions regarding certain matters that fall within his expertise as a transportation safety engineer. As the City's legal counsel advised in his submissions, Mr. Karim's opinions on these matters will be based on the evidence before the Inquiry – supplemented only by technical evidence in the form of papers or studies or industry guidelines that support his opinions. They address conclusions in the TNS Report and are relevant to the Terms of Reference that relate to traffic safety on the RHVP and to City staff actions in addressing such matters.
9. Accordingly, leave is granted to the City to provide expert reports of Mr. Hein and Mr. Karim on the issues addressed above on the foregoing basis.
10. The issues proposed to be addressed by Mr. Hein in paragraphs 1(D) and 1(E) of Appendix A were clarified at the hearing. As so clarified, they relate respectively to whether the Tradewind Report could be relied upon in the context in which, and for the purposes for which, it was delivered and to whether it is reasonable for a municipality to rely upon the standard of FN (30) in testing of the nature conducted by the Ministry of Transportation for the Province of Ontario (the "MTO") rather than the standard applied in the Tradewind Report. As I understand the City's submissions, in rendering his opinions on these issues Mr. Hein will be relying on evidence already before the Inquiry supplemented only by his personal understanding of facts pertaining to the standard in Ontario regarding friction levels on a roadway and of the standard applied in the Tradewind Report.

11. Accordingly, leave is granted to the City to provide a report of Mr. Hein on these issues on the foregoing basis.
12. Paragraph 2 of Appendix A contemplates an opinion from Mr. Hein containing evidence as to why Ontario municipalities do not have friction management programs. It also contemplates that Mr. Hein will speak to the challenges of addressing friction-related issues at the municipal level. I note that the evidence before the Inquiry to date indicates that there are no municipalities in Ontario that have adopted friction management programs. I also note that, to the extent this issue is relevant, it pertains only to municipalities in Ontario that are responsible for freeways comparable to the RHVP.
13. It is not clear that this evidence is necessary to address the Terms of Reference of the Inquiry. However, I acknowledge that the proposed evidence raises an issue that could be of relevance to the City on a going-forward basis as a matter of policy, among other things.
14. More significantly, it is not clear that Mr. Hein is the best source of the evidence which the City seeks to put before the Inquiry. I understand he was a consultant to many municipalities, but he does not have personal experience as a public servant employed by a municipality. If the Inquiry is to receive evidence regarding why Ontario municipalities do not have friction management programs and/or the asserted challenges of addressing friction-related issues at the municipal level, that evidence should come from those with personal and direct experience and responsibility for municipal freeways. For these reasons, I do not grant leave to the City to file a report from Mr. Hein on this contemplated evidence. However, if the City concludes that the cost and possible delay in the Inquiry's process of adducing the contemplated evidence justifies obtaining such evidence, it is entitled under Rule 32(b) of the *Rules* to propose alternative witness(es) having more direct municipal experience in respect of the current practice and utility of friction-management programs for municipal freeways.

15. The anticipated opinion of Mr. Hein contemplated in paragraph 3 of Appendix A pertaining to the significance to be attached to the PSV testing of the aggregate in the SMA cores taken from the RHVP in December 2017 overlaps to a considerable extent with the proposed report of Dr. Baaj. I also grant leave to the City to file a report on this issue. However, in order to avoid duplication, City counsel and Golder's counsel should confer to minimize if not exclude any such overlap. I also note that, for efficiency in the public hearings, I may limit examination on these reports to the extent that the reports fail to address this duplication.
16. The opinions of Mr. Hein and Mr. Karim in paragraph 5 of the Appendix A and paragraph 3 of Appendix B, respectively, appear to deal with the same matters and raise the same question. In each case, the City has submitted that Mr. Hein and Mr. Karim intend to opine that the relative contributions of various factors to the causation of any individual accident requires an accident reconstruction of that particular accident. In each case the proposed experts will also opine that the contributory factors to wet road collisions cannot be ranked in any generalized manner. It is less clear whether it is also intended that either or both of these proposed experts will provide an opinion that it is not meaningful to identify contributory factors to wet road accidents on the RHVP in a generalized manner in the absence of accident reconstruction reports.
17. As I understand the City's submissions, in rendering their opinions on these issues Mr. Hein and Mr. Karim will be relying solely on evidence already before the Inquiry. On this basis, leave is granted to the City to include the contemplated opinions in the reports of Mr. Hein and Mr. Karim.
18. I note however that the approach of both CIMA Canada Inc. ("CIMA") in their reports to the City in 2015 and 2018 and of City staff, which adopted CIMA's approach in those reports, was based on an analysis of overall contributory factors to accidents on the RHVP and in particular to accidents under wet road conditions. The City has not previously indicated that it was considering challenging this approach to traffic safety of its own consultants and staff through expert reports. I

have therefore pointed out to City counsel that, if the City's experts adopt this position in either of the proposed expert reports, it would be necessary to give serious consideration to permitting witnesses who wish to address this position an opportunity to respond in some manner if they so desire. Inevitably, therefore, any such development could entail further significant timing and cost consequences to the Inquiry.

19. The last item to be addressed is paragraph 2 of Appendix B. Mr. Karim's proposed evidence addresses two issues pertaining to the data set upon which the TNS Report drew certain conclusions, the second of which could also attract material timing and cost consequences for the Inquiry.
20. The first matter pertains to alleged limitations regarding the drawing of conclusions respecting the state of the roadway surface pre-resurfacing in 2019 from data obtained regarding the roadway surface post-resurfacing. This is a matter of opinion evidence based solely on the factual evidence before the Inquiry. It is relevant for the Terms of Reference relating to friction testing on the RHVP and to safety concerns related to the friction levels of the roadway after discovery of the Tradewind Report in the autumn of 2018. Accordingly, leave is granted to the City to deliver a report addressing this issue.
21. The second matter is, as mentioned, more problematic. The City advises that Mr. Karim has obtained collision statistics in respect of his view of a comparator roadway from the City of Toronto (the Don Valley Parkway) and is seeking further collision statistics from the MTO via a Freedom of Information request which has already been filed. Using this data, Mr Karim proposes to provide an analysis of overall mainline collision rates and wet road collision rates comparing the experience of the Don Valley Parkway with the experience of the RHVP. Mr. Karim has sought collision data for MTO-highway segments for a similar analysis. The City anticipates that his evidence will be that the RHVP total mainline collision rates and wet road collision rates for the entire length are overall relatively lower than the Don Valley Parkway. As such, it appears that Mr. Karim intends to challenge

the conclusions of CIMA regarding the relative mainline collision rates and the existence of disproportionate wet road accident rates on the RHVP. These conclusions were set out in CIMA's various reports to the City, and in City staff's reports to City Council which adopted these conclusions and made recommendations upon such conclusions.

22. The MTO has objected to this proposed opinion on the grounds that it may involve findings regarding the safety of MTO highways, which fall outside of the Terms of Reference of the Inquiry. While I appreciate that there is an argument that the Terms of Reference may not extend to findings regarding the safety of MTO highways, I am not persuaded that this potential limitation on the scope of the Terms of Reference would, in any event, be engaged by the evidence and findings in the contemplated opinion of Mr. Karim. Any finding that the RHVP collision experience compares favourably to that of any MTO highway is not by itself a finding that the MTO highway is unsafe.
23. However, the manner in which the City proposes to introduce this evidence raises potential concerns regarding the criteria for selection of the comparator roadways, or segments thereof, as well as regarding the range and nature of the data included in the database to be used in such comparisons and/or the methodologies applied. Further, there has been no prior indication of the City's intention to seek to introduce such evidence which involves collision data not before the Inquiry, and the City did not put it to any of the witnesses who have appeared before the Inquiry. Accordingly, it is possible that one or more witnesses will ask to respond to any report prepared by Mr. Karim. In addition, the data obtained by Mr. Karim relating to the Don Valley Parkway has not yet been provided to Commission Counsel nor to the Inquiry's retained experts. In order to ensure the Inquiry has appropriate evidence before it, I would expect that Commission Counsel would want its own experts to have access to this data, and that Commission Counsel may decide to file a responding expert report. I note that proceeding in this manner has the potential for further material timing and cost consequences for the Inquiry.

24. Given that the City has called this Inquiry, I am reluctant to prevent the City from putting forward this evidence if, in its considered opinion, this evidence is necessary notwithstanding such timing and cost implications. However, if it proposes to do so, the City will be required to make available to Commission Counsel and any Participant who so requests:
- a. a copy of any Freedom of Information Request or other request filed with the City of Toronto or the MTO seeking data for the purposes of Mr. Karim's analysis, within 2 days of any such request, and
 - b. all data received from the City of Toronto, within 2 days of any such request, and from the MTO, within two days of receipt thereof by Mr. Karim and/or City counsel.

I also direct the City to advise Commission Counsel no later than noon on December 22 whether it intends to produce a report of Mr. Karim on these issues on the basis described above.

25. Subject to the foregoing, leave is granted to the City to include a report in respect of such comparator information in the report of Mr. Karim.

Schedule

26. The schedule for delivery of expert reports and dates for the public hearings and closing oral submissions, all of which were previously agreed to between Commission Counsel and the Participants, is as follows:
- a. Participant expert reports to be delivered by February 1, 2023. These are the reports for which I granted leave in this decision;
 - b. Phase 2 hearings to be heard on February 16-17 and 21-23, 2023;

- c. Written closing submissions by Participants to be delivered by March 10, 2023; and
 - d. Oral closing submissions to be heard on March 22-24, 2023.
27. However, as stated above, this schedule, except for the February 1, 2023 date for delivery of the reports of Dr. Baaj, Mr. Hein, and Mr. Karim, may be affected by the scope of the City's expert reports as currently proposed. If so, I will provide additional directions.



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Commissioner

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