

February 12, 2020

## REASONS AND DECISION CONCERNING PARTICIPATION AND FUNDING

### Mr. Justice Herman J. Wilton-Siegel Commissioner

1. On April 24, 2019, pursuant to section 274 of the *Municipal Act, 2001*, S.O. 2001, c. 25, the Council of the City of Hamilton established the Red Hill Valley Parkway Inquiry (the “Inquiry”) and affirmed its terms of reference (the “*Terms of Reference*”). The *Terms of Reference* are available on the Inquiry’s website. I was appointed as Commissioner of the Inquiry.

2. Pursuant to the Inquiry’s mandate under the *Terms of Reference*, the Inquiry published the *Rules Regarding Applications to Participate and Seek Funding* (the “Rules”) on October 30, 2019, and interested persons were invited to submit applications to participate on or before November 29, 2019.

3. Commission Counsel were not required to make an application for participation and will have full participation rights throughout. Commission Counsel have the primary responsibility to represent the public interest and ensure that all relevant matters are brought to my attention in a manner that is not adversarial or partisan.

4. Nine applicants sought to participate:

(a) The City of Hamilton (the “City”);

- (b) Her Majesty the Queen in Right of Ontario (“Ontario”);
- (c) Dufferin Construction Company, A division of CRH Canada Construction Group Inc. (“Dufferin”);
- (d) Golder Associates Ltd. (“Golder”);
- (e) Mirle B. Chandrashekar;
- (f) Malcolm Hodgskiss;
- (g) Jodi Gawrylash;
- (h) Belinda Marazzato; and
- (i) Grosso Hooper Law (Robert J. Hooper, Mary Grosso, and Kim Jossul) and Scarfone Hawkins (David Thompson, Matthew Moloci, and Michael Grant) (“Grosso Hooper/Scarfone Hawkins” or the “Firms”).

5. The City, Ontario, Dufferin and Mr. Chandrashekar sought participation rights only. The remaining applicants sought the right to participate as well as a recommendation to the City that it fund their participation.

6. On December 10, 2019, I invited all nine applicants to make oral submissions in support of their applications. I also directed the publication of eight applications on the Inquiry’s website, some with redactions of confidential information. I exercised my discretion not to publish the application of Mr. Hodgskiss pending a fuller appreciation of his application.

7. All nine applicants and/or their counsel made oral submissions before me on January 10, 2020.

**A. Summary of Decision**

8. For the reasons set out below, I grant full participation rights to the City, Ontario, Dufferin and Golder. I do not recommend funding for Golder at this time.

9. I decline to grant participation to Mr. Chandrashekar, Mr. Hodgskiss, Ms. Gawrylash, Ms. Marazzato, and the Firms.

**B. Other Avenues to Assist the Inquiry**

10. I acknowledge that, as a result of this decision on participation, the Inquiry does not have any participants who were directly or indirectly affected by accidents on the Parkway, or who speak for concerned or affected citizens as a collectivity. In order to ensure that all issues relevant to such parties are addressed, the Inquiry will take the following steps.

11. First, I have directed Commission Counsel to ensure that all relevant matters are well-canvassed.

12. Second, I encourage the applicants who are not granted the right to participate to communicate with Commission Counsel if they feel they have information that may be of assistance to the Inquiry in fulfilling its mandate.

13. Third, I intend to provide a forum in which individuals who have been personally affected by particular accidents on the Parkway will be heard as part of the Inquiry, even if reconstruction of any particular accident is unlikely to fall within the *Terms of Reference*.

There will be no requirement to obtain participation status to take part in that forum. Mr. Hodgskiss, Ms. Gawrylash, Ms. Marazzato, Mr. Chandrashekar, the Firms, and the Firms' clients may take part in this forum together with other members of the public that have such information for the Inquiry.

14. Fourth, upon the conclusion of the public hearings and before completion of my report, the Inquiry will invite written submissions from both participants and non-participants.

15. Fifth, applications for participation remain open. The Inquiry's process would be well-served by having a representative voice from a broad-based group of concerned citizens whose focus is on the matters addressed in the *Terms of Reference*. Such a group would bring the public's perspective to the subject matter of the Inquiry, including on the topics of pavement design and construction, and the good governance of the City. Such a group could include, but need not be limited to, individuals who are victims of accidents, whether as injured parties or as family members or friends of injured parties. Accordingly, I invite further application(s) for participation and funding from one or more of such group(s), particularly from any group that has established arrangements with one or more legal counsel that are designed to remove the concerns regarding the focus of the Inquiry described below.

**C. Considerations respecting participation**

16. The *Terms of Reference* direct the Inquiry to determine the facts relating to 24 questions posed which fall into five general categories:

- (a) Issues around the friction testing conducted in late 2013 by a subcontractor to Golder, Tradewind Scientific Ltd. ("Tradewind"), on the Red Hill Valley Parkway (the "Parkway") and the Lincoln M. Alexander Parkway and the subsequent report based on such testing (the "Report"), including who was involved in or received the Report after it was transmitted by Golder to the City, why it was not provided to City Council or the public, the circumstances surrounding its coming to light in 2018, the steps taken at that time, and the ramifications, if any, arising from the Report not having been disclosed;
- (b) Issues around the Ontario Ministry of Transportation ("MTO") friction testing on the Parkway in 2007, including whether the testing supported or rebutted the 2013 friction test results, who received the results (the "MTO Report"), why the MTO Report was not provided to City Council or made available to the public, and the ramifications, if any, arising from the MTO Report not having been disclosed;
- (c) Whether the City or the MTO conducted any other friction tests, asphalt assessments, or general road safety reviews or assessments of the Parkway, and whether these supported or rebutted the 2007 and 2013 friction testing results;
- (d) The standards in Ontario, if any, respecting acceptable friction levels and how the test results conducted on the Parkway compare with those standards; and

- (e) The extent to which factors other than friction, including driver behaviour, lighting and weather conditions, contribute to motor vehicle accidents on the Parkway as compared to the impact of friction levels.

17. These five categories are the subject matter and scope of the Inquiry. The Inquiry is not a forum in which to reconstruct specific accidents on the Parkway. It is currently anticipated that the Inquiry will address specific accidents only to the extent that such an exercise contributes to a fuller understanding of the expert evidence and technical issues concerning pavement design and construction.

18. The Rules make clear that participant status and the extent and scope of participation rights will be granted at the discretion of the Commissioner, in accordance with the *Terms of Reference*, the subject matter of the Inquiry, and the desirability of fair and expeditious proceedings.

19. Rule 14 of the Rules sets out the considerations for assessing the applicants:

14. When determining whether an applicant should be granted the right to participate in some or all parts of the Inquiry, the Commissioner may consider if an applicant:

- (a) has a substantial and direct interest in the subject matter of the Inquiry;
- (b) is uniquely situated to offer information or assistance to the Inquiry and/or whether the applicant shares a common interest or perspective with other applicants;
- (c) is likely to be notified of a possible finding of misconduct by the Inquiry;
- (d) would assist the conduct of the Inquiry; and

(e) would contribute to the openness and fairness of the Inquiry.

20. Participation rights include the right to access a database of relevant documents, to comment on background materials or written evidence prepared by Commission Counsel, to propose individuals to be interviewed or to appear as witnesses at the Inquiry's public hearings, to examine witnesses at the Inquiry's public hearings, and to make oral or written submissions to the Commissioner.

21. In assessing the form and extent of participation granted to the applicants, I have been guided by the factors set out in Rule 17, the role of Commission Counsel, the need to balance the importance of a thorough inquiry with the need to minimize duplication to the extent possible, and the extent to which each applicant's participation would assist me to fulfill my role to inquire into matters set out in the *Terms of Reference* and to write a comprehensive and meaningful report of my findings. In doing so, I considered that the scope and extent of an applicant's rights of participation, if any, should reflect the applicant's interest in the subject matter of the Inquiry, and be directed at their ability to assist the Inquiry regarding that subject matter.

***D. Considerations respecting funding***

22. Rule 19 of the Rules addresses funding issues. It provides:

19. Where the Commissioner concludes that a Participant would not be able to participate in the Inquiry without receiving funding, the Commissioner may recommend to the City of Hamilton that it provide the Participant with funding to the extent of that Participant's interest in accordance with the City of Hamilton's funding criteria, attached as Appendix A to these *Rules*. The final decision on

whether or not to provide funding and, if so, the level of funding, will be made by the City of Hamilton acting in its sole discretion.

***E. Decisions respecting participation***

23. With these factors in mind, I turn to the nine applications.

**1. The City**

24. I find that the City meets the criteria for participation set out in Rule 14.

25. The *Terms of Reference* direct me to inquire into the actions or omissions of City staff relating to the Report regarding the Parkway, and my recommendations will relate to the good governance of the City. The City will therefore be directly and substantially affected by all aspects of this Inquiry.

26. The City is also uniquely situated to offer information and assistance to the Inquiry through production of documents in its possession and the identification of current or former City staff with relevant knowledge on issues central to the mandate of the Inquiry.

27. The City applied for full rights of participation in all aspects of the Inquiry, which I grant.

**2. Ontario**

28. Counsel for the Ministry of the Attorney-General made oral submissions on behalf of Ontario. Ontario is the legal entity that includes the MTO and other provincial ministries or offices, and the current and former public servants who may be required to provide information or evidence to the extent that such information relates to their duties as public



servants. Ontario indicated that it does not share a common interest or perspective with other applicants.

29. I find that Ontario meets the criteria for participation set out in Rule 14.

30. Ontario has a direct and substantial interest in the aspects of the Inquiry that relate to the MTO's friction testing of the Parkway, and the request for and distribution of the MTO Report. Ontario is uniquely situated to provide documents and information on these aspects of the Inquiry. Its participation will assist with the conduct of the Inquiry and will contribute to the openness and fairness of the Inquiry.

31. As the entity that deals with friction standards in the context of provincial roadways, Ontario also has a direct and substantial interest in, and can make a unique and helpful contribution to, the aspects of the Inquiry that relate to the applicable friction standards for roadways in the province.

32. Ontario applied for full rights of participation in the Inquiry, which I grant. However, in granting such participation, I expect Ontario will focus its participation on the aspects of the Inquiry that engage its interests as described above.

### **3. Dufferin**

33. In 2006 and 2007, Dufferin, then a division of St. Lawrence Cement, built the relevant section of the Parkway following a public tender process. Its counsel submitted that Dufferin has knowledge of the manner in which the Parkway was constructed, the materials that it used and why those materials were used, and the applicable standards at the time of construction.

34. I find that Dufferin meets the criteria for participation set out in Rule 14.

35. Dufferin has a direct and substantial interest in the aspects of the Inquiry that relate to the construction and design of the Parkway in 2006 and 2007 and applicable standards thereto. Dufferin is uniquely situated to offer relevant background and contextual information and assistance to the Inquiry.

36. Dufferin applied for full rights of participation in the Inquiry. Its counsel acknowledged in oral submissions that Dufferin would only participate in the aspects of the Inquiry that relate to its interests and to the extent that it will assist the Inquiry.

37. I grant Dufferin full rights of participation in the Inquiry. However, in granting such participation, I expect Dufferin will focus its participation on the aspects of the Inquiry that engage its interests as described above.

#### **4. Golder**

##### ***(a) Participation***

38. Golder is a Canadian employee-owned, global company providing engineering and environmental science consulting, design, and construction services. Among other involvement with the Parkway, Golder provided pavement design services, and quality assurance, materials laboratory testing, field testing and review services, during the design and construction of the Parkway. The City also retained Golder in 2013 to evaluate the performance of the Parkway at that time. As part of this retainer, Golder retained Tradewind to perform friction testing on the Parkway, the results of which were set out in the Report that is included in the subject matter of the Inquiry. Golder submits that it was also subsequently involved in discussions with City staff about options to improve the

Parkway's frictional characteristics and in further investigation of the condition of the pavement surface of the Parkway.

39. I find that Golder meets the criteria for participation set out in Rule 14.

40. Golder has a direct and substantial interest in the aspects of the Inquiry that relate to the construction and design of the Parkway and applicable standards thereto, the circumstances surrounding the Report, including its delivery to the City, any subsequent investigations and remedial options proposed by Golder and considered by the City, and communications with the MTO. Golder is uniquely situated to offer information and assistance to the Inquiry on these matters. Its participation will assist with the conduct of the Inquiry and will contribute to the openness and fairness of the Inquiry.

41. Golder applied for full rights of participation in the Inquiry which are granted. However, in granting such participation, I expect Golder will focus its participation on the aspects of the Inquiry that engage its interests as described above.

***(b) Funding***

42. Golder also made a request for a recommendation for funding.

43. Counsel submitted that, as a function of Golder's internal structure, Golder's costs to participate (which its counsel estimated will be in the range of \$200,000) will be borne by approximately twenty partners in Golder's geotechnical group.

44. The Rules direct me to consider whether a participant would not be able to participate in the Inquiry without receiving funding. Golder's counsel acknowledged that

Golder's request for a recommendation for funding was not based on an inability to pay. I agree that Golder does not meet the test for funding on that basis.

45. Counsel made three alternative submissions in support of a recommendation for funding:

- (a) Golder's participation in the Inquiry is an "extraordinary and unforeseen expense" for which these individuals at Golder could not possibly have budgeted;
- (b) As a participant with key information, it would be unreasonable and unfair to require a small number of employee-owners at Golder to fund its participation to the same level as the publicly-funded participants (the City and Ontario); and
- (c) Golder's 2013 contract with the City included an indemnity provision in which the City agreed to indemnify, defend and save Golder harmless from losses and expenses arising from acts, errors or omissions of the City. Golder is of the view that this indemnity requires the City to indemnify Golder for the legal expense of participating in this Inquiry and, as such, it would be reasonable and fair to recommend funding.

46. An "extraordinary and unforeseen expense" is not a basis for recommending funding. In any event, I am not persuaded that the legal expenses resulting from Golder's work on the Parkway project constitute an "extraordinary or unforeseen expense". As mentioned, Golder sought and received an indemnity provision in its 2013 contract with

the City regarding future legal expenses related to its retainer. The indemnity suggests that Golder turned its mind to the possibility that some future legal expenses could arise as a result of the project.

47. I also do not accept Golder's submission that the existence of the indemnity, by itself, would make it fair and reasonable to recommend funding. I have not received submissions from the City on its position regarding the applicability or scope of the indemnity. As I understand the situation, these issues remain to be resolved between Golder and the City, either consensually or by a determination in another forum. It would be inappropriate for me to interfere with that process at this time. Accordingly, I am not prepared to recommend funding for Golder based on the existence of the indemnity.

48. However, I am prepared to accept that, in principle, the test for funding should contemplate whether a participant's *meaningful* participation may be curtailed by resource considerations. Such a consideration should be balanced against the importance of the participant's role in the subject matter of the Inquiry and the likely contribution of the participant. As applied to Golder, I accept that Golder has a significant and unique contribution to make to this Inquiry and will be required to expend significant resources to participate in this Inquiry.

49. Golder's application does not include financial information or evidence that its meaningful participation would be curtailed by resource constraints. In addition, the City's position on the operation of the indemnity may affect the information that Golder could provide to me in order to assess its ability to participate meaningfully.

50. Given the foregoing, I decline to recommend funding for Golder at this time. However, Golder is permitted to make a future request for a recommendation for funding if Golder considers it appropriate to do so after it has explored fully the extent of the legal expenses it anticipates and the other sources of funding available to it. Any future request for funding should be supported by a detailed explanation of incurred fees and disbursements, and an estimate of future fees and disbursements, evidence of whether or not Golder was able to obtain full or partial indemnification from the City under its contract, and evidence from Golder about its ability and intention to participate meaningfully in the Inquiry.

**5. Mirle B. Chandrashekar**

51. Mr. Chandrashekar is a former employee of the City. In his written application and oral submissions, Mr. Chandrashekar submitted that he believed the Inquiry is the appropriate forum to address deficiencies in transparency, accountability and minority representation in the City's senior management, undue interdependence between politicians and City staff, and nepotism.

52. However, Mr. Chandrashekar did not identify any specific section of the *Terms of Reference* in which he has a direct and substantial interest or to which he could provide a unique contribution or otherwise assist the conduct of the Inquiry.

53. The Inquiry appreciates the perspective of Mr. Chandrashekar, and his time and effort to submit an application for participation. However, the issues that he wishes to raise do not fall within the mandate of the Inquiry. As I explained to Mr. Chandrashekar

at the hearing, as Commissioner, I do not have the authority to amend the *Terms of Reference* to include the matters raised by him.

54. I therefore decline to grant Mr. Chandrashekar participation status.

**6. Malcolm Hodgskiss**

55. Mr. Hodgskiss is a resident of the Hamilton area.

56. Mr. Hodgskiss delivered a written application to the Inquiry. In his application, Mr. Hodgskiss made numerous broad references to corruption, bid-rigging, illegal operations, environmental damage, and resulting injury to him relating to identified and unidentified public officials, other individuals, and companies. None of his assertions have been substantiated.

57. In his oral submissions, Mr. Hodgskiss submitted that he has a direct and substantial interest in, and could provide a unique and helpful contribution to, all aspects of the Inquiry's mandate as set out in the *Terms of Reference*. His submissions focused on three principal matters:

- (a) the City's involvement with the Westdale Bridges Project, the Lincoln M. Alexander Parkway and "Sewergate", as examples of wide-spread corruption or illegal activity in Hamilton;
- (b) his speculation that the Report was discovered after his attempts to initiate a police investigation into the City's public works department; and
- (c) his belief that certain material used in the construction of the Parkway contributed to its slipperiness.

58. The Inquiry appreciates the perspective of Mr. Hodgskiss, and his time and effort to submit an application. However, given the focus of Mr. Hodgskiss' issues and the role of Commission Counsel to marshal relevant evidence, I find that Mr. Hodgskiss does not have a direct and substantial interest in the Inquiry and that he is not uniquely situated to offer information or assistance to the Inquiry. The Inquiry's scope does not include investigation of the Westdale Bridges Project, the Lincoln M. Alexander Parkway, or "Sewergate" nor do I have the authority to amend the *Terms of Reference* to include them. Mr. Hodgskiss' speculation that he played a role in the discovery of the Report is not substantiated and, in any event, does not constitute a direct and substantial interest in the Inquiry. Lastly, Mr. Hodgskiss does not have personal knowledge or expertise that would assist the Inquiry in inquiring into the materials used in the construction of the Parkway.

59. I decline to grant Mr. Hodgskiss participation status. Having declined his application for participation, I have not considered his request for a recommendation regarding funding.

60. On December 10, 2019, I exercised my discretion not to publish the application of Mr. Hodgskiss pending a fuller appreciation of his application. Having now received Mr. Hodgskiss' oral submissions, I confirm my past decision not to publish his application on the Inquiry's website. I find that it would not be in the public interest to make public Mr. Hodgskiss' application as it contains unsubstantiated assertions on topics outside the scope of the Inquiry.



## **7. The applications of Jodi Gawrylash, Belinda Marazzato and the Firms**

### ***(a) Applications and Proposal to Collaborate***

61. The Inquiry has received two applications from two individuals, Ms. Gawrylash and Ms. Marazzato, who have been personally impacted by tragic accidents on the Parkway. Each has engaged their own legal counsel and seeks to participate separately in their individual capacities.

62. In addition, the Inquiry has received an application from six lawyers from the two Firms, in their personal capacities. These lawyers have commenced a legal action against the City related to motor vehicle accidents on the Parkway, which the Firms hope to have certified as a class proceeding.<sup>1</sup> The Firms advised the Inquiry that they represent between 200 and 250 individuals who would be members of the proposed class. However, the class proceeding is at a very early stage.

63. At Commission Counsel's request, in advance of the oral submissions, counsel for each of Ms. Gawrylash and Ms. Marazzato and of the Firms provided Commission Counsel with a letter setting out a proposal for their possible collaboration. This letter and the oral submissions from these applicants made clear that each was seeking separate full participation status on all aspects of the Inquiry, including full access to the Inquiry's database of documents. The applicants proposed a joint funding model in which the Firms would take the lead in document review and attendance at hearings.

---

<sup>1</sup> For ease of reference, I refer to the class proceeding, class counsel and class members in this decision, although the action has not been certified as a class proceeding at this time.

**(b) Preliminary Considerations**

64. The following considerations are important in informing the decisions below regarding these three applications.

65. First, the views of Hamilton residents who have been personally affected by particular accidents on the Parkway are relevant to the work of the Inquiry, even if reconstruction of any particular accident is unlikely to fall within the *Terms of Reference*. It will assist the Inquiry to have this information. To ensure that these views are heard, as mentioned, the Inquiry will convene a forum to provide an avenue to receive information from affected individuals regarding their personal circumstances and perspectives on the Inquiry.

66. However, an interest of affected individuals in having an inquiry receive such information does not, by itself, constitute an interest that gives rise to the right to participate fully in that inquiry, including testing the evidence of other participants. Generally, to obtain rights of participation, the applicant must demonstrate that the applicant has expertise or information related to the subject matter of an inquiry. A participatory role for affected individuals may be appropriate where the subject matter of an inquiry is directly tied to the circumstances giving rise to their loss or injury, such that it requires a review of their individual circumstances. However, that is not the case here, as the subject matter of the Inquiry is focused on the pavement design and construction of the Parkway and the City's governance processes, and not on the cause of individual accidents.

67. Second, in a number of other public inquiries, Commissioners have granted the right to participate to citizen groups having an interest in the subject matter of an inquiry and have recommended funding to enable them to engage legal counsel to represent them. The role of a concerned citizens group is different from that of a group of affected individuals. Affected individuals provide evidence of their personal circumstances; a concerned citizens group (which may include affected individuals) typically brings the perspective of the citizenry as a whole on the full range of issues addressed by the inquiry. A group of concerned citizens with participatory rights can provide a helpful check on the participants whose conduct is the subject matter of the inquiry and who are (quite appropriately) acting in their own self-interest. Such groups complement the impartial role of commission counsel.

68. Commissioners have recognized this distinction in other public inquiries. For example, in the Walkerton Inquiry, to which Mr. Hooper referred, two broad-based coalitions of concerned citizens received standing and funding to bring the public's perspective to the issue of the contaminated water supply. A group of "injured victims", some of whom were part of a proposed class in a related class proceeding, also applied to participate. The group was represented by counsel in the class proceeding. In contrast to the broad-based coalitions, the "injured victims" group was granted very limited rights to participate, in one part of one phase of the Walkerton Inquiry and only in respect of the impact of the contamination on them. Moreover, they did not receive funding, because of their anticipated limited involvement in the inquiry, coupled with their representation by

class counsel and the involvement of some members of the group in the class proceeding.<sup>2</sup>

69. With these considerations in mind, I turn to these three applications.

***(c) Application of the Firms***

70. As noted above, six individual applicants, Robert J. Hooper, Mary Grosso, and Kim Jossul from Grosso Hooper, and David Thompson, Matthew Moloci, and Michael Grant from Scarfone Hawkins, filed a written application to participate. Mr. Hooper made oral submissions before me.

71. The Rules direct me to assess the applicant's interest in the Inquiry and the applicant's possible contribution to the Inquiry. The Firms' written application was made on behalf of these six individuals lawyers. In his oral submissions, Mr. Hooper submitted that the Firms made the application on behalf of "between 200 and 250 members of the public who have had car crashes on the Red Hill Valley Parkway between its opening and when the reports were disclosed", rather than on behalf of the Firms or the named lawyers. During his oral submissions, Mr. Hooper also invited the Inquiry to consider that the Firms were acting as representative counsel, or as "agent", on behalf of a coalition of concerned citizens, analogous to the citizens groups granted standing in the Walkerton Inquiry referred to above.

72. I do not accept that the Firms act for a coalition of concerned citizens. There is no formal authorization given to the Firms, or requested by them, to act on behalf of the

---

<sup>2</sup> Walkerton Inquiry, Decision on standing and funding, available at [http://www.archives.gov.on.ca/en/e\\_records/walkerton/legalinfo/docs/ruling.html](http://www.archives.gov.on.ca/en/e_records/walkerton/legalinfo/docs/ruling.html)

suggested coalition. There is also no list of the individuals alleged to be participating in this coalition, much less any formal organization of such individuals that would provide direction to the Firms in respect of their participation in the Inquiry.

73. Despite Mr. Hooper's efforts to characterize this application differently, I conclude that, both in form and in substance, this is an application by the lawyers of the Firms in their personal capacities. In the absence of authority from their clients in the class action to act for them in the Inquiry, it appears that the Firms have applied in their own right on the basis of an expanded authority they consider can be inferred from their role in acting for their clients in the class proceeding. This conclusion is supplemented by the contingency fee financing of the class proceeding and the preliminary state of that proceeding.

74. I have considered whether the Firms' application on behalf of six lawyers who represent a proposed class of affected persons meets the test under Rule 14, such as to warrant the full participatory rights the Firms have sought. I conclude it does not.

75. I accept that some or all of the Firms' clients may have an interest in understanding whether road surface conditions contributed to their respective accidents. To the extent that the Firms or their clients are able to provide the perspective of injured victims and their families who have suffered personal or financial injury or the loss of a loved one as a result of accidents on the Parkway, the Inquiry welcomes this information. As mentioned, the Inquiry will provide a forum to receive such information and is, in any event, open to receiving any information via Commission Counsel. This includes receipt of the narratives of their clients' accidents, as well as any technical evidence or statistical

analysis that the Firms' clients wish to provide, which will be considered along with information obtained from the participants.

76. However, having information about particular accidents and an interest in understanding whether road surface conditions contributed to individual accidents does not create an interest in the subject matter of the Inquiry; it creates an interest in the conclusions of the Inquiry. The process initiated by these applicants before the courts is the appropriate forum in which to establish potential liability or fault for particular accidents on the Parkway arising out of road conditions. In that regard, the plaintiffs in the class proceeding will have the benefit of the final report of the Inquiry.

77. My comments above about the distinction between the interests and roles of affected persons and concerned citizens are relevant here. The Firms represent affected persons in a civil proceeding, not concerned citizens more broadly. Moreover, if the Firms were to obtain formal authority to act for a broad-based coalition of concerned citizens, I would have questions about whether the dual responsibilities of the Firms could result in the Inquiry being used to further interests other than the investigatory and truth-seeking mandate of the Inquiry, or that the scope and mandate of the Inquiry could be distorted. I would have to carefully consider whether such risks would be outweighed by the potential benefit that the participation of the Firms could bring to the Inquiry. However, given my conclusion that the Firms do not represent a broad-based coalition of concerned citizens, I need not address this further.

78. Based on the foregoing, I decline to grant participation status to the Firms on the basis proposed in their application. Nothing in this decision should be taken, however, as

preventing any of the individuals currently participating in the class proceeding from also participating in any coalition of concerned citizens that may apply for participation. As mentioned above, I will look favourably upon any application(s) from any such group(s), particularly from any group that has established arrangements with one or more legal counsel that are designed to remove the concerns regarding the focus of the Inquiry described above.

79. Having declined the Firms' application for participation, I have not considered the Firms' request for a recommendation regarding funding.

***(d) Application of Jodi Gawrylash***

80. Ms. Gawrylash was catastrophically injured in a single-car rollover accident at the King Street off-ramp from the Parkway on December 3, 2011. She has no memory of her accident. Her accident pre-dates the friction testing set out in the Report, but post-dates the preparation of the MTO Report. Ms. Gawrylash is in litigation against the City in respect of this accident.

81. In oral submissions, her counsel narrowed Ms. Gawrylash's proposed focus of participation to the issue of the extent, if any, to which the MTO Report in 2007 contained information that is relevant to the condition of the Parkway in 2011.

82. The Inquiry appreciates the perspective of Ms. Gawrylash, and her time and effort to submit an application for participation. There can be no doubt that her accident severely altered Ms. Gawrylash's life. As such, she has an interest in the mandate of the Inquiry as it pertains to the MTO Report.

83. The Inquiry would benefit from receiving information about Ms. Gawrylash's lived experience in the forum to be convened to hear from affected persons. However, I am not satisfied that Ms. Gawrylash is uniquely situated to offer any other information or assistance to the Inquiry as a participant. In her written application, Ms. Gawrylash did not identify any specific types of evidence or information she proposed to provide. In oral submissions, Ms. Gawrylash's counsel submitted that he would make available information from the productions in her civil litigation with the City that are not in the possession of the Inquiry. However, the City itself is obligated to provide all relevant documentation other than documentation to which privilege attaches. I am not persuaded that possible cross-referencing of material of other parties from another forum would contribute to the openness and transparency of the Inquiry such as to warrant participation status.

84. Accordingly, I decline to grant Ms. Gawrylash participation status. I reiterate, however, that in addition to providing information in the forum to be convened for affected individuals, Ms. Gawrylash may also participate in any group of concerned citizens that may be organized to apply for participation rights.

85. Having declined Ms. Gawrylash's application for participation, I have not considered her request for a recommendation regarding funding.

***(e) Application of Belinda Marazzato***

86. Belinda Marazzato applied on behalf of herself and her adult children. Ms. Marazzato is the mother of Olivia Smosarski who died in a car accident on the Parkway on May 5, 2015. Ms. Smosarski was a passenger in a car driven by her friend, Jordyn



Hastings. Ms. Hastings lost control of her car and both Ms. Smosarski and Ms. Hastings died in a head-on collision after the car crossed over the median. Soon after the accident, Ms. Marazzato attended the scene of her daughter's accident and made inquiries about the state of the Parkway. Following the deaths of Ms. Smosarski and Ms. Hastings, the City's Public Works Committee adopted a motion on May 21, 2015, which specifically refers to their deaths and called for an investigation of additional safety measures for the Parkway. In September 2018, Ms. Marazzato settled a civil action against Ms. Hastings' estate and the insurer of the owner of the vehicle.

87. Ms. Marazzato's counsel submitted in oral submissions that Ms. Marazzato has an interest in and can make contributions to the Inquiry in respect of sections (x), (xii), (xx) and (xxiv) of the *Terms of Reference*.

88. Ms. Marazzato has suffered the profound loss of a child. I appreciate Ms. Marazzato's attempts to understand the cause of her daughter's accident and death. As such, she has an interest in the subject matter of the Inquiry.

89. The Inquiry would benefit from receiving Ms. Marazzato's perspective on the issues she has identified in the forum to be established for such purpose. However, as with Ms. Gawrylash, I am not satisfied that Ms. Marazzato is uniquely situated to offer information or assistance to the Inquiry beyond that. Further, as mentioned, the Inquiry does not have a mandate to inquire into and make findings about specific car accidents.

90. Accordingly, I decline to grant Ms. Marazzato participation status. However, in addition to taking part in the forum to be convened to hear from affected persons, Ms.

Marazzato may also participate in any group of concerned citizens that may be organized to apply for participation rights.

91. Having declined Ms. Marazzato's application for participation, I have not considered her request for a recommendation regarding funding.

**8. Conclusion**

92. I would like to thank all of the applicants for their applications. I appreciate their interest in the Inquiry.

93. I wish to reiterate that, apart from formal participation in the Inquiry, I encourage any person or entity with information that would assist the Inquiry to investigate the matters set out in the *Terms of Reference* to contact Commission Counsel and to take part in the other forum that will be offered to receive information.



---

**Mr. Justice Herman J. Wilton-Siegel  
Commissioner**

**February 12, 2020**