

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 COMMISSION COUNSEL

(MOTION FOR DIRECTIONS OF THE OFFICE OF THE CITY AUDITOR)

August 22, 2022

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PART I. FACTS AND OVERVIEW

A. Overview

1. On April 25, 2019, pursuant to s. 274 of the *Municipal Act, 2001*, the City of Hamilton passed a resolution requesting that a judge of the Superior Court of Justice conduct an inquiry into *Terms of Reference*. These Terms of Reference arose from the non-disclosure to Council of the Tradewind Scientific Ltd. Report about friction testing (“Tradewind Report”) on the Red Hill Valley Parkway (“RHVPI”).
2. The Tradewind Report, dated November 20, 2013, was provided to the City’s Engineering Services Department in January 2014, appended to the 2014 Golder Report. However, it was not disclosed to Council until February 6, 2019.
3. The Honourable Justice Herman J. Wilton-Siegel was appointed as Commissioner of the Red Hill Valley Parkway Inquiry (“RHVPI”) in May 2019. The Commissioner is tasked with addressing a number of questions about why the Tradewind Report, or the information and recommendations therein, were not disclosed to Council.
4. On August 10, 2022, the RHVPI delivered a summons to Domenic Pellegrini (Senior Internal Auditor, Audit Services, Office of the City Auditor) requiring him to give testimony on October 7, 2022.
5. Commission Counsel seek to call only limited evidence from Mr. Pellegrini. This evidence goes to the heart of the RHVPI’s *Terms of Reference*, and is not subject to any privilege.

6. The Office of the City Auditor (“OCA”) has expressed concerns that the legislative scheme governing the OCA does not permit Mr. Pellegrini to comply with the summons. OCA brings a motion for directions before the Commissioner as a result.

7. Commission Counsel’s position is that the statutory secrecy provision under s. 223.22 of the *Municipal Act, 2001* does not insulate Mr. Pellegrini from a summons issued under s. 33 of the *Public Inquiries Act, 2009*. As a pure question of statutory interpretation, the *Municipal Act’s* restrictions on compelling members of the OCA to testify in civil proceedings does not apply to public inquiries. Contrary to the submissions of the OCA, this matter does not engage any jurisdictional issues between the RHVPI and the OCA. Neither law nor policy compel a result that would insulate Mr. Pellegrini from scrutiny as the RHVPI attempts to address its *Terms of Reference*.

B. Facts

8. The RHVPI has received documents from the City of Hamilton about a Value for Money Audit conducted by the OCA. These documents form part of the RHVPI’s Overview Documents, which have not been tested for their truth. In the public hearings, Commission Counsel and the participants may call evidence from witnesses at the Inquiry that casts doubt on the truthfulness or accuracy of the content of the documents underlying the Overview Documents.

9. The documents received by the RHVPI indicate that Mr. Pellegrini received a redacted copy of the 2014 Golder Report at some time in advance of November 27,

2018 in connection with the OCA's Value for Money Audit.¹ The 2014 Golder Report (in unredacted form) includes the Tradewind Report as an appendix.

10. The information redacted from the 2014 Golder Report related to friction testing. Correspondence between Mr. Pellegrini and Gord McGuire (Director, Engineering Services) on December 3, 2018, indicates that the content in the 2014 Golder Report that was withheld from OCA on the advice of the City's Legal Services was "related to friction testing and subject to an FOI / MFIPPA request on that subject."²

11. The documents received by the RHVPI, as set out in the Overview Documents, suggest that following discussions with Mr. McGuire, Mr. Pellegrini reviewed the unredacted 2014 Golder Report and took copies of the redacted information for OCA on December 4, 2018. The documents available to Commission Counsel indicate that Engineering Services' staff understood that Mr. Pellegrini had agreed not to take copies of the redacted information prior to his review of the unredacted 2014 Golder Report.³ Commission Counsel anticipate that Mr. McGuire will testify as to the content of the discussions with Mr. Pellegrini that preceded December 4, 2018.

12. Mr. Pellegrini also attended a meeting with Gary Moore (formerly Director, Engineering Services) under the subject line "RHVP" on February 4, 2019. During his

¹ [Overview Document 9](#) at p 149, [para 355](#).

² [Overview Document 9](#) at pp 167-168, [paras 382-383](#).

³ [Overview Document 9](#) at p 196, [para 475](#).

testimony, Mr. Moore stated that he could not recall what this meeting was about, or whether it concerned friction or friction testing on the RHVP.⁴

13. Commission Counsel has concluded that Mr. Pellegrini's evidence about these discrete events is directly relevant to the RHVPI's *Terms of Reference*, as set out in more detail below. As such, a summons was issued to Mr. Pellegrini on August 10, 2022, which requires that he attend to give testimony to the RHVPI on October 7, 2022.

14. OCA now seeks direction from the Commissioner as to whether Mr. Pellegrini can comply with the summons.

15. Commission Counsel proposes an order from the Commissioner that will limit the scope of Mr. Pellegrini's examination to evidence directly relevant to the RHVPI's *Terms of Reference*.

PART II. SUBMISSIONS

16. The RHVPI is convened pursuant to s. 274 of the *Municipal Act, 2001*.⁵ Under this provision of the *Municipal Act, 2001*, s. 33 of the *Public Inquiries Act, 2009* applies to the RHVPI.⁶ The only restriction on an inquiry's ability to summons evidence under s. 33 of the *Public Inquiries Act, 2009* is the requirement that this evidence is relevant to the Commission's mandate and not privileged:⁷

Power to summon witnesses, papers, etc.

33(3) The person or body conducting the inquiry may require any person by summons,

⁴ Transcript from Examination of G Moore, July 20, 2022 at p 8932, lines 15-25.

⁵ *Municipal Act, 2001*, SO 2001, c 25 at s [274\(1\)](#).

⁶ *Municipal Act, 2001*, SO 2001, c 25 at s [274\(2\)](#).

⁷ *Public Inquiries Act, 2009*, SO 2009, c 33, Sch 6 at 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). [...]

Privilege

33(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.

17. Mr. Pellegrini's testimony is relevant to the RHVPI and not privileged. The statutory duty of secrecy established under the Municipal Act, 2001 does not render Mr. Pellegrini's evidence inadmissible. Moreover, there is no jurisdictional conflict between the RHVPI and the OCA.

A. Mr. Pellegrini's evidence is relevant

18. Mr. Pellegrini's testimony is relevant to the work of the RHVPI. His testimony has probative value. It will assist the Commissioner in reaching conclusions on questions set out in the RHVPI's Terms of Reference, and thereby advance the inquiry.

19. Contrary to OCA's claims, there is no requirement that the information summonsed be "new" or "originating" evidence.⁸ Any evidence that is "reasonably relevant to the subject matter of the inquiry" is admissible, including hearsay evidence. Evidence is reasonably relevant if it "in some degree advances the inquiry, and thus has probative value."⁹

⁸ Factum of the Office of the City Auditor at para 5(b).

⁹ *Re Bortolotti et al and Ministry of Housing et al*, [1977 CanLII 1222](#) (Ont CA) at pp [624-625](#); See also [Ruling on the CPSO Motion for Directions](#) (October 10, 2007) at p [3](#), *Report on Inquiry Into Pediatric Forensic Pathology*, [Vol 4](#), Appendix 16 at pp 752-767.

20. Commission Counsel seeks to examine Mr. Pellegrini on a limited number of topics, directly relevant to the RHVPI's *Terms of Reference*:

- a) A brief background on the OCA's Value for Money Audit;
- b) The events leading to, and the details of, Mr. Pellegrini's receipt of a redacted version of the 2014 Golder Report;
- c) Mr. Pellegrini's understanding of his agreement with Mr. McGuire about his review of an unredacted version of the 2014 Golder Report and Tradewind Report, and his review of the report on December 4, 2018; and
- d) The meeting between Mr. Pellegrini and Mr. Moore on February 4, 2019.

21. Mr. Pellegrini has evidence directly relevant to the RHVPI's *Terms of Reference* by the OCA's own admission. OCA admits that "it is obvious" that OCA came into possession of the Tradewind Report referenced in the *Terms of Reference*, and that Mr. Pellegrini's testimony could corroborate or contradict evidence other witnesses may give to the Commissioner.¹⁰

22. Under the *Terms of Reference*, the Commissioner is required to determine who received or was aware of the Tradewind Report both after it was provided to Engineering Services in January 2014 and in 2018.¹¹ Mr. Pellegrini was engaged in discussions with Dipankar Sharma (Senior Project Manager, Continuous Improvement, Engineering Services) about a "redacted" RHVP report provided to OCA further to the

¹⁰ Factum of the Office of the City Auditor at paras 8 and 28.

¹¹ [RHVPI Terms of Reference](#) at paras [2\(a\)\(i\)](#), [2\(a\)\(viii\)](#).

Value for Money Audit as of November 27, 2018.¹² Commission Counsel have received documentation from the City indicating that the redacted report was the 2014 Golder Report, which appended the Tradewind Report.¹³

23. However, the documents provided to the RHVPI do not indicate how Mr. Pellegrini became aware of the 2014 Golder Report and Tradewind Report, the details as to who provided the redacted version of the report to the OCA, and/or information about how or when the redacted report was provided to Mr. Pellegrini by November 27, 2018. This information, which Commission Counsel seek to obtain through Mr. Pellegrini's testimony, would advance the inquiry, and is highly probative. It goes to the heart of the RHVPI's *Terms of Reference*.

24. Mr. Pellegrini's testimony about his understanding of the terms of his review of the unredacted 2014 Golder Report, appending the Tradewind Report, is also directly relevant to the *Terms of Reference*. The Commissioner is tasked with assessing whether appropriate steps were taken to disclose the Tradewind Report once it was discovered in 2018.¹⁴ Correspondence between Mr. Pellegrini and Mr. McGuire on December 3, 2018 indicates that the content in the 2014 Golder Report that was withheld from OCA, at Legal Services advice, was "related to friction testing and subject to an FOI / MFIPPA request on that subject."¹⁵ Mr. Pellegrini reviewed the unredacted report, and took copies of the redacted information for OCA on December 4, 2018.¹⁶ Mr. Pellegrini's testimony about his understanding as to the terms of his review of the

¹² [Overview Document 9](#) at p 149, [para 355](#).

¹³ [Overview Document 9](#) at p 196, [para 475](#).

¹⁴ [RHVPI Terms of Reference](#) at para [2\(a\)\(viii\)](#).

¹⁵ [Overview Document 9](#) at pp 167-168, [paras 382-383](#).

¹⁶ [Overview Document 9](#) at p 196, [para 475](#).

unredacted 2014 Golder Report, appending the Tradewind Report, may assist the Commissioner in assessing the steps taken by Public Works staff following the discovery of the Tradewind Report.

25. Mr. Pellegrini attended a meeting with Mr. Moore under the subject line “RHVP” on February 4, 2019. During his testimony, Mr. Moore stated that he could not recall what this meeting was about.¹⁷ Mr. Pellegrini’s testimony as to what was discussed at this meeting, including whether friction testing, friction test results, and/or the 2014 Golder Report and Tradewind Report, was discussed at this meeting is also directly relevant to the *Terms of Reference*.

26. Commission Counsel are prepared to consent to an order limiting the scope of Mr. Pellegrini’s testimony to the limited number of topics enumerated at paragraph 20 above to alleviate OCA’s concerns that Commission Counsel seek to engage in a full-scale inquiry into the OCA’s Value for Money Audit. Commission Counsel seek only to call evidence from Mr. Pellegrini that is directly relevant to the *Terms of Reference* and will advance the RHVPI.

B. Mr. Pellegrini’s evidence is not privileged under the law of evidence

27. Mr. Pellegrini’s reasonably relevant testimony is not privileged under the law of evidence and must be admitted. An inquiry must admit reasonably relevant evidence unless it is privileged under the law of evidence.¹⁸ OCA makes no assertion of privilege in connection with Mr. Pellegrini’s testimony.

¹⁷ Transcript from Examination of G Moore, July 20, 2022, at p 8932, lines 15-25.

¹⁸ *Re Bortolotti et al and Ministry of Housing et al*, [1977 CanLII 1222](#) (Ont CA) at p 625.

C. Subsection 223.22 does not affect the admissibility of Mr. Pellegrini's evidence

1. The OCA's duty of secrecy does not extend to prohibit disclosure of documents sought by summons

28. The statutory secrecy provision under s. 223.22 of the Municipal Act, 2001 does not prevent Mr. Pellegrini from being summonsed to testify before the RHVPI.

29. S. 223.22 requires every person acting under the instructions of the Auditor General, including Mr. Pellegrini, to preserve secrecy over all matters that come to their knowledge in the course of their duties. While the term "secrecy" is used in the provision, it is labelled as a "Duty of Confidentiality":

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).

(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.

Section prevails

(4) This section prevails over the Municipal Freedom of Information and Protection of Privacy Act.

30. Commission Counsel agree that Mr. Pellegrini is a person covered by s. 223.22, and that his testimony may contain information over which he is required to maintain secrecy, subject to the statutory exceptions.

31. However, the statutory secrecy regime created by s. 223.22 is not a bar to the production of information to the RHVPI under summons. Statutory promises of confidentiality do not bar compelled production by summons unless the information meets the test for privilege, or the legislature has used language specifically prohibiting its introduction into evidence.

32. In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, the plaintiff served a summons to witness pursuant to rule 39.03(1) of the *Rules of Civil Procedure* on a representative of the Office of the Superintendent of Financial Institutions ("OSFI"), a federal regulatory agency.¹⁹ The summons required production of all correspondence, memoranda, reports, guidelines, instructions, policies, filings and documents of any nature exchanged between OSFI and the defendants in the action.²⁰ The defendants and OSFI moved to set aside the summons, inter alia, on the basis of a statutory confidentiality provision. Sharpe J., as he then was, held at pages 301-302 that the statutory confidentiality provision did not bar production of the documents:²¹

The defendants and OSFI rely on the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp), s. 22 which provides as follows:

22(1) All information

(a) regarding the business or affairs of a financial institution or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament, ... is confidential and shall be treated accordingly. ...

In my view, these statutory provisions do not advance the case of the defendants or OSFI for two reasons: ...

¹⁹ *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1995), [27 OR \(3d\) 291](#) (Gen Div) at para [1](#).

²⁰ *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1995), [27 OR \(3d\) 291](#) (Gen Div) at para [10](#).

²¹ *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1995), [27 OR \(3d\) 291](#) (Gen Div) at paras [21-24](#).

Second, and perhaps more fundamental, even if these statutory promises of confidentiality do apply to the information sought here, in my view, **a statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of OSFI. I see no reason to give statutory confidentiality a higher degree of protection than any other form of confidentiality. There is no reason why Parliament should be taken to have adopted the legal category of confidentiality without intending that category to have in its ordinary legal meaning and effect. It is well established that confidential information may be subpoenaed and introduced in evidence if ordered by a court.** The general rule is that although information is confidential, it must be produced unless the test laid down in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 ... is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required. (For discussion of statutes having this effect, see Bushnell, "Crown Privilege" (1973), 51 C.B.R. 551 at 552 - 555.) I see no reason to impute an intention to accomplish that end where Parliament has adopted a recognized and established legal category which does not have that effect: see Hogg, *Liability of the Crown* (2nd ed. 1989) at p. 76:

Many statutes contain provisions that expressly make information confidential ...The scope of these provisions is a matter of interpretation in each case. Those provisions that specifically prohibit the introduction of evidence in court will obviously be effective to withhold the protected material from litigation. More commonly, however, such provisions prescribe confidentiality but say nothing specific about the introduction of evidence in court. Such provisions have been interpreted as not barring either the production of documents in court or oral testimony in court. (footnotes omitted)

33. This jurisprudence was followed by two decisions of Commissioner Goudge and Linden, in the Inquiry into Pediatric Forensic Pathology in Ontario and in the Ipperwash Public Inquiry respectively. Both cases are highly relevant to the issue before the Commissioner. Contrary to OCA's assertions, these cases did not focus on "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."²² Both of these inquiries were called by the Province and not a municipality and were thus governed by different sections of the Public Inquiries Act, but both had specific terms of reference that governed them.²³ In both cases, the Commissioners addressed the same issue currently before the Commissioner - whether statutory duties

²² Factum of the Office of the City Auditor at para. 6.

²³ [Order in Council](#) (April 25, 2007), *Report of the Inquiry Into Pediatric Forensic Pathology*, [Vol 4](#), Appendices 1-2 at pp 677-682; [Order in Council](#) (November 12, 2003), *Report of the Ipperwash Public Inquiry*, [Vol 3](#), Appendix 1 at pp 74-75.

of secrecy or confidentiality bar compliance with summons issued under the Public Inquiries Act:

34. In the Inquiry into Pediatric Forensic Pathology in Ontario, Commissioner Goudge determined that a statutory duty of confidentiality under section 36(1) and (3) of the *Regulated Health Professions Act* did not bar the Registrar of the College of Physicians and Surgeons of Ontario from complying with a s. 10 *Public Inquiries Act* summons to give evidence and produce documents.²⁴

35. Similarly, in the Ipperwash Public Inquiry, Commissioner Linden determined that the statutory secrecy provision in the *Police Services Act* did not provide a statutory bar to a summons issued under the *Public Inquiries Act*. The summons required the Commissioner of the Ontario Provincial Police to attend before the inquiry and produce discipline files and policies around informal discipline.²⁵ Notably, the statutory secrecy provision in the *Police Services Act* was very similar to the duty of secrecy at issue in this case:

80. Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,

(a) as may be required in connection with the administration of this Act and the regulations;

(b) to his or her counsel;

(c) as may be required for law enforcement purposes; or

²⁴ [Ruling on the CPSO Motion for Directions](#) (October 10, 2007) at p 8, *Report on Inquiry Into Pediatric Forensic Pathology*, Vol 4, Appendix 16 at pp 752-767.

²⁵ [Ruling Re: Motion by Ontario Provincial Police and the Ontario Provincial Police Association](#) (August 15, 2005), *Report of the Ipperwash Public Inquiry*, Vol 3, Appendix 13C at pp 162-178.

(d) with the consent of the person, if any, to whom the information relates.²⁶

36. Like the statutes considered by Commissioners Goudge and Linden, there is no explicit language in the *Municipal Act, 2001* that places Mr. Pellegrini's testimony beyond the reach of a summons. The fact that s. 223.22 (2) of the *Municipal Act, 2001* – like s. 80 of the *Police Services Act* - contains narrow exceptions to the duty of secrecy does not alter this reality. The enumeration of exceptions for when information subject to a duty of secrecy may be communicated does not convert a confidentiality or secrecy provision into a privilege provision.²⁷

37. If the Legislature intended the duty of secrecy in the *Municipal Act, 2001* to prevail over s. 33 of the *Public Inquiries Act, 2009* this would be provided for in the statute. S. 223.22 (4) of the *Municipal Act, 2001* explicitly states that the duty of secrecy prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.²⁸

38. There is no similar provision placing the OCA's duty of secrecy above the summons power granted by s. 33 of the *Public Inquiries Act, 2009*. In the absence of such a provision, there is no basis on which to impute an intention by the legislature that the duty of secrecy in the *Municipal Act, 2001* overrides the power to summons under s.33 of the *Public Inquires Act, 2009*.

²⁶ [Ruling Re: Motion by Ontario Provincial Police and the Ontario Provincial Police Association](#) (August 15, 2005) at para 30, *Report of the Ipperwash Public Inquiry, Vol 3*, Appendix 13C at pp 170-171.

²⁷ [Ruling Re: Motion by Ontario Provincial Police and the Ontario Provincial Police Association](#) (August 15, 2005) at para 33, *Report of the Ipperwash Public Inquiry, Vol 3*, Appendix 13C at pp 171.

²⁸ *Municipal Act, 2001*, SO 2001, c 25 at s 223.22(4).

39. The *Michael Di Biase v City of Vaughan* does not assist on this point, as that case did not address whether the Integrity Commissioner would be required to respond if summonsed.

40. Commission Counsel could find no cases that address whether an auditor or Integrity Commissioner appointed under the *Municipal Act* can resist a s. 33 *Public Inquiries Act* summons served upon them. This may be a function of the limited nature of those authorized to issue summons under s. 33 of the *Public Inquiries Act*; to be empowered to issue such summons, one must be granted these powers under another piece of legislation, for example, the regulators of health professions who investigate their members (like the CPSO who was subject to summons in the Goudge Inquiry).²⁹

2. The Prohibition on OCA Testimony does not extend to public inquiries

41. S. 223.23 of the *Municipal Act, 2001* specifically precludes persons acting under the instructions of the Auditor General from being compelled to testify in civil proceedings.³⁰

Testimony

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.

42. No similar provision exists in the *Municipal Act, 2001* to prevent the Auditor General or any person acting under their instructions from being compelled to testify before a public inquiry – be it municipal, provincial, or federal. It is well established at law that an inquiry is not a civil proceeding, as inquiries are not about enforcing or

²⁹ [Regulated Health Professions Act, 1991](#), SO 1991, c 18 at s [76\(1\)](#).

³⁰ [Municipal Act, 2001](#), SO 2001, c 25 at s [223.23](#).

vindicating private rights. There are no legal consequences attached to the determinations of a commissioner:

A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Somalia Inquiry Commission)* (1997), 146D.L.R. (4th) 708 (Fed. C.A.), at pp. 716-17:

A public inquiry is not equivalent to a civil or criminal trial. ... In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. ... The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report". ... Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding ... is that reputations could be tarnished.

Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.³¹

43. If the legislature intended to prevent a person acting under the Auditor General's instructions from being compelled to testify before a public inquiry or to comply with the summons powers afforded to municipal inquiries called under the *Municipal Act*, this would be provided for in the act itself. It would be inconsistent with the purpose of public inquiries – which is to use fact-finding to “uncover the truth” of what occurred, and to develop recommendations to prevent similar, future incidents - to place certain

³¹ *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 34; see also *Re the Children's Aid Society of the County of York*, [1934] OWN 418 (CA) at 419-420 per Mulock, CJO and Ridefl, JA; *Re Bortolotti et al and Ministry of Housing et al*, 1977 CanLII 1222 (Ont CA) at pp 624-625; *Ruling on the CPSO Motion for Directions* (October 10, 2007) at p 12, *Report on Inquiry Into Pediatric Forensic Pathology, Vol 4*, Appendix 16 at pp 752-767; *Ruling Re: Motion by Ontario Provincial Police and the Ontario Provincial Police Association* (August 15, 2005) at para 42, *Report of the Ipperwash Public Inquiry, Vol 3*, Appendix 13C at pp 170-171.

information beyond the scope of the inquiry. There is no reason to impute an intention to accomplish that end where the legislature chose language that did not have that effect.

D. No jurisdictional conflict

44. There is no jurisdictional conflict between the RHVPI and OCA. This case ultimately concerns a question of statutory interpretation, not jurisdiction.

45. The OCA's work is not being investigated by the City of Hamilton, as alleged. Mr. Pellegrini's evidence is being summonsed in respect of discrete evidentiary topics directly relevant to the *Terms of Reference* of the RHVP.

46. The RHVP is entirely independent from the City of Hamilton. A judicial inquiry under s. 274 of the *Municipal Act, 2001* is entirely distinct from an investigation carried out by the Auditor General. Council sets the initial scope of a judicial inquiry through the *Terms of Reference*. However, once a judge is appointed as commissioner of the inquiry, the municipality has no ability or authority to control the inquiry process. The Commissioner is obligated to report the results of the inquiry to Council, but is otherwise completely independent from the municipality.

47. The RHVP has broad authority to fulfill its terms of reference, including by summonsing Mr. Pellegrini. S. 274 of the *Municipal Act, 2001*, gives the Commissioner authority to inquire into any matter connected with the good government of the municipality, or 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.³²

48. There is no conflict between s. 33 of the *Public Inquiries Act, 2009* and s. 223.22 (2) of the *Municipal Act, 2001*. As set out above, once called, the RHVPI is not an arm of a municipality. A municipality calls the judicial inquiry, but once called, the judicial inquiry is entitled to engage the summoning powers of s. 33 of the *Public Inquiries Act, 2009*, a provincial statute. Statutes do not operate in a vacuum, and the same level of government frequently enacts more than one piece of legislation affecting the rights and obligations of persons operating in a certain sphere. In such circumstances, courts presume a harmony, coherence and consistency among statutes dealing with the same subject matter.³³

49. Statutes are not inconsistent simply because they overlap, occupy the same field or deal with the same subject matter. It is entirely possible that such statutes were designed to complement each other. Statutory provisions are not inconsistent unless they cannot stand together.³⁴ The summoning power under s. 33 of the *Public Inquiries Act, 2009* and the statutory duty of secrecy under s. 223.22 (2) of the *Municipal Act, 2001* can stand together.

50. Statutory promises of confidentiality do not bar compelled production by summons unless the information meets the test for privilege, or the legislature has used language specifically prohibiting its introduction into evidence. Mr. Pellegrini's evidence

³² [Municipal Act, 2001](#), SO 2001, c 25 at s 274.

³³ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 27.

³⁴ *Urban Outdoor Trans Ad v Scarborough (City)*, [2001] OJ No 261 (CA) at para 21. See also *Brantford (City) Public Utilities Commission v Brantford (City)*, [1998] OJ No 235 (CA) at pp 432-433.

is not privileged, and the legislature has not used language prohibiting the introduction of evidence from individuals acting under the instructions of the Auditor General into evidence at a public inquiry.

E. OCA's request for alternative relief

51. Should the Commissioner direct Mr. Pellegrini to give evidence, OCA requests that that the law firm of Cassels Brock and Blackwell LLP be provided the right to act as counsel to Mr. Pellegrini and to question Mr. Pellegrini after Commission Counsel's examination.³⁵

52. This request is consistent with the RHVPI's *Rules of Procedure*. The RHVPI's *Rules of Procedure* stipulate that witnesses are entitled to have their own counsel present while they testify. A witness' counsel may make objections during their testimony, subject to the Commissioner's power to control the process.³⁶ The established order of examination further stipulates that counsel for a witness will examine the witness following the examinations of Commission Counsel, and any cross-examination by counsel to the Participants.³⁷

53. Commission Counsel does not object to this alternative request for relief.

PART III. ORDER SOUGHT

54. Commission counsel request that the Commissioner:

- a) Decline to quash the summons;

³⁵ Factum of the Office of the City Auditor at para 64(c).

³⁶ [Rules of Procedure for the RHVPI Investigation and Public Hearings](#) at [Rule 49](#).

³⁷ [Rules of Procedure for the RHVPI Investigation and Public Hearings](#) at [Rule 58](#).

- b) Order that Mr. Pellegrini shall comply with the summons;
- c) Order that, subject to leave of the Commissioner, Mr. Pellegrini's testimony will be confined to the following topics:
- i. A brief background on the OCA's Value for Money Audit;
 - ii. The events leading to, and the details of, Mr. Pellegrini's receipt of a redacted version of the 2014 Golder Report;
 - iii. Mr. Pellegrini's understanding of his agreement with Gord McGuire about his review of an unredacted version of the 2014 Golder Report and Tradewind Report, and his review of the report on December 4, 2018; and
 - iv. The meeting between Mr. Pellegrini and Gary Moore on February 4, 2019.
- d) Order that Mr. Pellegrini's counsel may attend during his testimony and question him following his examination by Commission Counsel and any Participants' counsel who wish to cross-examine, pursuant to the RHVPI's *Rules of Procedure*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 22, 2022



Emily Lawrence / Hailey Bruckner

Paliare Roland Rosenberg Rothstein LLP

Commission Counsel

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Re Bortolotti et al and Ministry of Housing et al*, [1977 CanLII 1222](#) (Ont CA)
2. [Ruling on the CPSO Motion for Directions](#) (October 10, 2007), *Report on Inquiry Into Pediatric Forensic Pathology*, [Vol 4](#).
3. *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1995), [27 OR \(3d\) 291](#) (Gen Div).
4. [Ruling Re: Motion by Ontario Provincial Police and the Ontario Provincial Police Association](#) (August 15, 2005), *Report of the Ipperwash Public Inquiry*, [Vol 3](#).
5. *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [\[1997\] 3 SCR 440](#).
6. *Re the Children’s Aid Society of the County of York*, [\[1934\] OWN 418](#) (CA).
7. *Bell ExpressVu Limited Partnership v Rex*, [2002 SCC 42](#).
8. *Urban Outdoor Trans Ad v Scarborough (City)*, [\[2001\] OJ No 261](#) (CA).
9. *Brantford (City) Public Utilities Commission v Brantford (City)*, [\[1998\] OJ No 235](#) (CA)

SCHEDULE “B” – TEXT OF STATUTES, REGULATIONS & BY-LAWS

Municipal Act, 2001, [S.O. 2001, c. 25](#)

ACCOUNTABILITY AND TRANSPARENCY

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.

...

Section prevails

(4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*. 2006, c. 32, Sched. A, s. 98.

...

Testimony

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. 2006, c. 32, Sched. A, s. 98.

JUDICIAL INVESTIGATION

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)

***Public Inquiries Act, 2009*, [S.O. 2009, c. 33, Sched. 6](#)**

PROCEDURES UNDER OTHER ACTS

Former Part II inquiries

Power to summon witnesses, papers, etc.

33 (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).

Regulated Health Professions Act, 1991, [SO 1991, c 18](#) at s 76(1).

REGISTRAR'S POWER TO INVESTIGATE

Application of *Public Inquiries Act, 2009*

76 (1) An investigator may inquire into and examine the practice of the member to be investigated and section 33 of the *Public Inquiries Act, 2009* applies to that inquiry and examination. 2009, c. 33, Sched. 6, s. 84.

[Rules of Procedure for the RHVPI Investigation and Public Hearings](#), Dated June 25, 2020

General Principles for the Receipt of Evidence and Testimony of Witnesses

Rule 49. Witnesses are entitled to have their own counsel present while they testify. Counsel for a witness will be permitted by the Commissioner to make objections during their client's testimony, subject to the Commissioner's power to control the process.

Rules of Examinations in the Public Hearings

Rule 58. The order of examination will be as follows, subject to orders made pursuant to paragraph 60:

- (a) Commission Counsel will question each witness;
- (b) Participants will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination among the Participants for

each witness will be determined by agreement of the Participants or, if they are unable to reach agreement, by the Commissioner;

(c) Counsel for the witness will examine next; and

(d) Commission Counsel will have the right to conclude the examination of the witness.