



MEMO / NOTE DE SERVICE

To / Destinataire Mayor Watson and Members of Council

From / Expéditeur David G. White, City Solicitor

Subject / Objet Judicial Inquiry

Date: October 7, 2021

In advance of Council's October 13, 2021 consideration of a motion requesting that a Judge of the Superior Court of Justice initiate a "judicial inquiry" on a number of issues related to the City's Light Rail Transit system, a variety of questions have been posed regarding the process, procedure and potential costs for such a judicial inquiry. Set out below is an outline of the statutory basis on which a municipality can request a judicial inquiry, as well as a collection of information compiled in relation to the main municipal judicial inquiries that have taken place in Ontario since 2000.

Members will recall that an outline of the public inquiry process was provided previously as part of the February 21, 2020, staff response to Council Inquiry OCC 20-3 on the issue of an "LRT Stage 2 Public Review", which was received by the Finance and Economic Development Committee at its Special Meeting of March 9, 2020 and listed on the agenda for the April 8, 2020 Special Meeting of City Council. A copy of that Response to Inquiry is attached, for ease of reference.

Background

The authority in a municipal council to initiate a judicial inquiry is set out in Section 274 of the *Municipal Act, 2001*, as follows:

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.

This Section, along with its predecessors in previous versions of the Act, was once the only mechanism by which a municipality might initiate an investigation into matters of public interest and potential misconduct. The following passage from a 1998 decision of Supreme Court of Canada Justice Ian Binnie has been cited as an outline of the rationale for the exercise of such authority:

“the power of an Ontario municipality to authorize a judicial inquiry into matters touching the good government of the municipality, or “any part of its public business”, and any alleged misconduct in connection therewith, reaches back to Confederation. Apart from a few amendments to harmonize this power with other legislative changes in the Province, [Section 274 of the Municipal Act, 2001] is substantially unchanged from its predecessor section in 1866. This reflects a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its baileywick. The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, of course, individuals who played a role in the events being investigated are also entitled to have their rights respected.” [Consortium Developments (Clearwater) Ltd. v. Sarnia (City)]

The implementation of a range of the recommendations made by Madam Justice Denise E. Bellamy in her 2005 *Report on the Toronto Computer Leasing Inquiry* and *Toronto External Contracts Inquiry*, has more recently expanded the scope of options available to municipalities to include such officials as Auditors General, Ombudsmen, and Integrity Commissioners, as outlined in the February 2020 Response. The distinction between these various avenues was succinctly summarized in the March 2019 Legal Report provided to Hamilton City Council:

While investigations by the auditor general and the ombudsman are similar, a judicial inquiry is an entirely distinct type of inquiry. Judicial inquiries are suited for complex, large scale investigations. While Council sets the initial scope of the investigation, once a judge is appointed, the nature and scope of the inquiry may be subject to change based on the judge’s views. In essence, the municipality relinquishes control of the inquiry once a commissioner is appointed.

Judicial inquiries will invariably be more costly and time consuming than investigations by the ombudsman or the auditor general. They invariably involve a number of other parties, including legal counsel for the judge, for persons with standing and the municipality, as well as administrative and investigative staff.

The municipality pays for all costs related to a judicial inquiry, even though it has no control over the process or scope once the inquiry is established.

The Public Inquiry Process

As noted in the February 2020 Response, the initiation of a judicial investigation is done by means of a resolution of the municipal council, passed pursuant to Subsection 274(1) of the *Act*. That resolution will define the initial scope of the inquiry and will consequently affect such things as the scope of document production and the number of parties and witnesses. These factors will, in turn, determine the complexity, cost, and duration of the public inquiry, appreciating always that "[o]nce a judge is appointed as commissioner of the inquiry, the municipality is stripped of its ability to control the inquiry process" and that, once appointed, "the commissioner may, without consulting the municipality, expand the scope of the investigation where he or she deems it appropriate to do so."

The actual steps in the inquiry were succinctly summarized in a collection of Questions & Answers prepared in relation to Hamilton's Red Hill Valley Parkway Judicial Inquiry:

What happens in a Judicial Inquiry?

There are generally six stages to a judicial inquiry:

- 1) Logistics and Staff;*
- 2) Collecting Documents;*
- 3) Interviewing Witnesses;*
- 4) Standing;*
- 5) the Hearing and,*
- 6) the Report.*

Logistics and Staff

In the first stage of the Inquiry, the commissioner hires staff necessary to conduct the inquiry, including lawyers, a communications officer and a chief administration officer, and obtains office space from which to conduct the inquiry.

Collection of Documents

In the second stage of an inquiry, the commissioner will work with counsel to the municipality to obtain copies of all documents that are in its possession and may be relevant to the work of the inquiry. The commissioner may also request relevant documents from third parties, such as former employees of the municipality.

Witness Interviews

In the third stage of the Inquiry, the commissioner and his or her lawyer will interview witnesses that may have knowledge or information relevant to the work of the inquiry. These may include current employees of the municipality, third parties engaged by the municipality or current and former members of City Council.

Standing

In the fourth stage of an inquiry, the commissioner will seek applications from members of the public who may wish to participate in the inquiry. By giving an individual (or a group of individuals) the right to participate in the inquiry, the commissioner is said to have granted “standing” to that party. Parties can have different levels of standing. For example, some parties may be given the right to access and review documents collected by the commissioner, while others may be given the right to examine witnesses and make submissions at the hearing. The commissioner will publicize the process for applying for standing in relevant media outlets once the process has been established.

Public Hearing

In the fifth stage of the inquiry, the commissioner will hold a public hearing where key witnesses will be examined.

The Report

In the sixth stage of an inquiry, the commissioner will draft the inquiry report, which will include a description of the evidence and his or her findings and conclusions.

Costs

The costs of an inquiry are the responsibility of the municipality, in accordance with Subsection 274(6) of the Act.

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.

In response to the request made by Hamilton City Council for such an inquiry in 2019, the Chief Justice of the Ontario Superior Court of Justice noted to that municipality's external counsel as follows:

The administrative costs of conducting an investigation can be significant and ought to be appreciated by the City of Hamilton...A judge appointed to an investigation can be requested to engage processes that make the cost of an investigation proportionate to the amounts and interests at issue. However, certain costs will be unavoidable and can be significant.

The significant costs associated with the municipal judicial inquiries that have taken place in Ontario were outlined in staff's February 2020 Response. A summary of those is set out below and updated where more recent figures have been made available

Region of Waterloo Inquiry

Cost: \$3.8 million, Duration: 1.5 years

City of Toronto Judicial Inquiry

Cost: \$19.2 million, Duration 3.5 years

Mississauga Judicial Inquiry

Cost: \$7.5 million, Duration: 1.5 years

Collingwood Judicial Inquiry

Cost: ~\$8.2 million (as of August 2021), Duration: 2.5 years

City of Hamilton Judicial Inquiry

Cost: ~\$6.6 million, Duration - commenced April 2019 and ongoing

* most recent cost estimate to completion is \$10-\$12 million

It important to note that the cost summaries set out above include only the direct costs to the municipalities of their respective inquiries, principle among them being legal fees for counsel to the Commissioner and the municipality. Other direct costs would necessarily include administrative support and technical staff, as well as related operating costs such as technology, document retrieval and storage, and translation. The indirect costs to an organization of a judicial inquiry elude clear measurement but should also be considered. These would include the significant staff time dedicated to the compilation and supply of documentation to the Inquiry, as well as that associated with their participation in the process itself. As it becomes the primary focus of the municipality, a Judicial Inquiry may consequently divert the organization from other important work and thereby hinder its ability to fulfill the municipality's strategic objectives.

Conclusion

While the request for a judicial inquiry was historically the only mechanism available to a municipality to "*get to the bottom of matters and events within its baileywick*", legislative changes brought about in response to recommendations made in prior inquiries offer supplementary, and potentially more targeted, means by which a municipality can review important matters of public interest. These alternate means include the use of integrity officials such as Integrity Commissioners, Ombudsmen and Auditors General.

Despite the important role that can be played by a judicial inquiry, it must be remembered that they do not make determinations of criminal or civil legal liability, as was noted as noted in a March 2019 report to Hamilton City Council from its external legal counsel:

Judicial inquiries are convened in the wake of public horror or outrage. They are expected to uncover the truth and are preventative, in that they seek to ensure that any mistakes uncovered will not be repeated. Unlike civil or criminal trials, no legal consequences flow from the commission's findings.

In view of the above, the significant costs and commitment of time and resources associated with a judicial inquiry are factors that warrant careful consideration prior to the invocation of a request pursuant to Section 274 of the *Municipal Act, 2001*. In addition, Council should understand that there are no timelines associated with an inquiry, once it is established. By way of example, the Red Hill Valley Parkway initiated by Hamilton City Council in April 2019 has yet to call a single witness.