

# **Ottawa Light Rail Transit Provincial Public Inquiry**

M. Rick O'Connor, CMO, LLB

City Clerk, Ottawa

May 11, 2023

Zone 6, Smiths Falls



**A.K.A. OLRT PI**

# Trail derailment in Smith Falls yard Monday night



A CP freight train derailed at slow speed in the Smiths Falls yard Monday night.

Canadian Pacific confirms that the cars stayed upright after derailing. They confirmed that there were no leaks, spills, or injuries.

An investigation into how it happened is being carried out, and there's been no word on possible damages.

Lanark Leeds Today  
(February 22, 2023)

# Judicial Inquiries

## Investigation by Judge – Section 274

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;

## Section 274 cont'd

- (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.

# Section 274 cont'd

## Application of Public Inquiries Act, 2009

(2) Section 33 of the Public Inquiries Act, 2009 applies to the investigation or inquiry by the judge.

## Report

(3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable.

## 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.

# Section 274 cont'd

## Representation by counsel

(5) Any person whose conduct is called into question in the investigation or inquiry may be represented by counsel.

## 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.

*Section 274, Municipal Act, 2001*

## Section 274 cont'd

“The power of an Ontario municipality to authorize a judicial inquiry into matters touching on 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.”

*Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*



## Section 274 cont'd

“A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. 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)*

## Section 274 cont'd

“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.”

Investigation Re: Red Hill Valley Parkway  
(March 13, 2019), p.6.

## Section 274 cont'd

“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 [Commission Counsel], for persons with standing and the municipality, as well as administrative and investigative staff.”

Investigation Re: Red Hill Valley Parkway  
(March 13, 2019), p.6.

## Section 274 cont'd

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.

## Section 274 cont'd

Despite the Important role that 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 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.**

## Section 274 cont'd

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.

# ***Public Inquiries Act, 2009***

## **Purpose**

1. The purpose of this Act is to establish an effective and accountable process for public inquiries where there is a public interest to,
  - (a) Independently inquire into facts or matters;
  - (b) Make recommendations regarding those facts or matters.

# Public Inquiries Act cont'd

## Duties of Commission

**5** A commission shall,

- (a) conduct its public inquiry faithfully, honestly and impartially in accordance with its terms of reference;
- (b) ensure that its public inquiry is conducted effectively, expeditiously, and in accordance with the principle of proportionality; and
- (c) ensure that it is financially responsible and operates within its budget.



# Public Inquiries Act cont'd

## Commission Activities

**6** subject to the order establishing it, a commission may engage in any activity appropriate to fulfilling its duties, including,

- (a) Conducting research and collecting information, including conducting interviews and undertaking surveys;
- (b) Consulting, in private or in public, with persons or groups, including consulting prior to making its rules or determining who may participate in the public inquiry;
- (c) Consulting with the general public;
- (d) Receiving oral and written submissions; and
- (e) Holding public hearings.

# Public Inquiries Act cont'd

## Commission Budget

**25** (1) The Minister shall, in consultation with the commission, set a budget for the conduct of a public inquiry.

## Staffing

- (2) The Minister may, in consultation with the commission,
- (a) Establish fees and rates of pay for persons engaged by the commission under subsection 26 (1); and
  - (b) Provide for the secondment of public servants to assist the commission.

# Public Inquiries Act cont'd

**26** (1) A commission may engage the services of,

- (a) one or more lawyers to act as its counsel,
- (b) clerks, reporters and assistants; and
- (c) other persons having special technical or other expertise or knowledge.

# Public Inquiries Act cont'd

## Commission

1. A Commission is established, effective as of the date of this Order in council (the “Commission”).
2. The Honourable C. William Hourigan is appointed Commissioner under Section 3 of the *Public Inquiries Act, 2009*.

Executive Council of Ontario – Order in Council (December 16, 2021)

# Public Inquiries Act cont'd

## Mandate

3. Having regard to Section 5 of the *Public Inquiries Act, 2009*, the Commission shall inquire into the commercial and technical circumstances that led to the OLRT 1 Project breakdowns and derailments.

Executive Council of Ontario – Order in Council (December 16, 2021)

# Public Inquiries Act cont'd

## Mandate

10. In accordance with the Public Inquiries Act, 2009, the Commission shall obtain all records necessary to perform its duties and, for that purpose, may require the provision or production of information that is confidential information which is described in sections 19 and 27.1 of the *Auditor General Act*. Where the Commission considers it necessary, it may impose conditions on the disclosure of information to protect the confidentiality of that information.

Executive Council of Ontario – Order in Council (December 16, 2021)

# Public Inquiries Act cont'd

## Mandate

12. The Commission shall promote accessibility and transparency to the public through the use of technology, including establishing and maintaining a website and holding virtual hearings where the Commissioner deems it appropriate.

Executive Council of Ontario – Order in Council (December 16, 2021)

# Public Inquiries Act cont'd

## Designated Minister

13. The Minister of Transportation is designated as the minister responsible for the Commission under clause 3(3)(f) of the *Public Inquiries Act, 2009*.

Executive Council of Ontario – Order in Council (December 16, 2021)



# What happens at a Judicial Inquiry?

# There are 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. They 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 may seek applications from members of the public who 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, and recommendations.



# 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.*

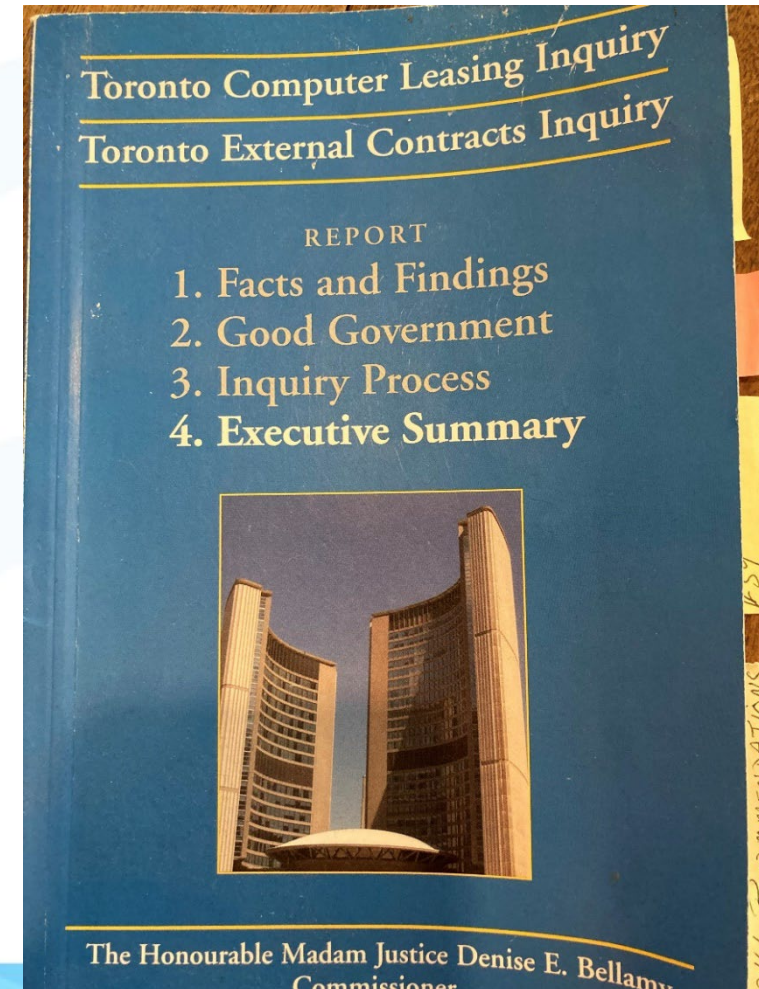
## Costs cont'd

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.***

# Costs cont'd

- Sarnia: Land Transactions (1994) \$600K
- Waterloo: Rim Park Financing (MFP) (2003) \$3.87M
- Toronto: Computer Leasing (MFP) (2005) \$19.2M
- Mississauga: Land Transactions (2011) \$7.5M
- Collingwood: PUC Transactions (2020) \$8.2M



# Costs cont'd

## City of Hamilton Judicial Inquiry

- Cost: ~\$28 million
- Duration: commenced April 2019 and ongoing



Hamilton

## Costs cont'd

It is important to note that the costs 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.

## Costs cont'd

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.



# Council doesn't address latest LRT derailment as some members pursue judicial inquiry

Jon Willing

Sep 22, 2021 • 16 hours ago • 3 minute read • [Join the conversation](#)



Ottawa Citizen  
(September 22, 2021)

OTTAWA | News

# City council opts to have auditor general investigate LRT over judicial inquiry

Published Wednesday, October 13, 2021 4:53PM EDT

CTV Ottawa  
(October 13, 2021)



# Province to launch public inquiry into Ottawa LRT network

Line only recently returned to service after September train derailment

[Trevor Pritchard](#) · CBC News · Posted: Nov 17, 2021 5:30 PM ET | Last Updated: November 17, 2021



CBC  
(November 17, 2021)

# Ottawa LRT inquiry hearings to begin in June



Workers with Alstom and RTG watch as an LRT car moves along the Confederation Line on Oct. 27, 2021, near the spot where a train derailed on Sept. 19. (Jeremie Charron/CTV News Ottawa)

CTV  
(March 7, 2022)



# People can now register to speak at Ottawa LRT inquiry's public meetings



Deadline is May 20 for meetings May 25 and 26

CBC News - Posted: Mar 23, 2022 11:33 AM ET | Last Updated: March 23



An OC Transpo O-Train is seen west of Tremblay station in Ottawa in September 2021 after it derailed the previous day. (Justin Tang/The Canadian Press)

CBC News  
(March 23, 2021)

# **LRT public inquiry demands Ottawa council's WhatsApp, text messages**



City of Ottawa had already sent public inquiry lawyers a half million documents

CBC Ottawa  
(June 24, 2022)

# Mayor Watson didn't tell LRT inquiry about briefings through private chat group



Testified for more than 5 hours Thursday

CBC Ottawa  
(July 1, 2022)

# LRT inquiry: City manager defends decision to not let council know about early trial run failures

*Kanellakos said he depended on expert advice regarding the testing criteria and felt that informing council only after the system had passed was in its best interest.*

Ottawa Citizen  
(July 4, 2022)

# **“ Steve Kanellakos resigns as city manager, issues preemptive defence of city staff ahead of LRT inquiry report**

*Mayor Mark Sutcliffe said he would be bringing forward a motion at Wednesday’s council meeting to appoint the city’s chief financial officer Wendy Stephanson as acting city manager.”*

Ottawa Citizen  
(November 29, 2022)

# 'Egregious violations of public trust': LRT rushed into service, commission finds



'Deliberate malfeasance is unacceptable in a public project,' Justice William Hourigan writes in final report

CBC News  
(November 30, 2022)



# Mayor Sutcliffe pledges accountability in wake of scathing LRT inquiry report



664-page report 'accurately' portrayed Confederation Line's woes, Ottawa mayor says

CBC News  
(December 1, 2022)

# City of Ottawa unveils 'robust' plan to tackle LRT inquiry recommendations



Fulfilling inquiry report recommendations 'top priority,' says transit GM

CBC News  
(April 19, 2023)

# **LRT Public Inquiry has Cost Taxpayers \$14.5M so far**

Province has spent about \$10M, while the City has  
shelled out \$4.5M

CBC News  
(November 25, 2022)

“As mentioned at the beginning of this summary, the Commission views its primary role as providing answers about what happened and why, and making recommendations to avoid a repetition of the project’s problems. In doing so, I do not hold the project or its participants to a standard of perfection. That would be unrealistic and unfair. In any enterprise of this size and complexity, there are bound to be errors and misjudgments. What is essential in a review like this is to identify those missteps, determine their causes, and learn from them for future projects.”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)

“While human errors are understandable and expected, deliberate malfeasance is unacceptable in a **public** project. When participants deliberately mislead the **public** regarding the status of a **public** undertaking, they violate a fundamental obligation that underlies all **public** endeavours. The **public** rightly trusts both the government and private-sector entities to act in a manner that furthers the broader **public** interest. As a condition of their involvement, participants in a **public project** undertake to honour that obligation to the **public**. There are two instances in the OLRT1 project that stand out as egregious violations of the **public** trust.”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)

“First is the conduct of RTG and OLRT-C in providing RSA (Revenue Service Availability) dates that they knew were entirely unrealistic. It is evident that this was done as part of a misconceived scheme to increase commercial pressure on the City. As a commercial tactic, it was a failure because the deliberate communication of unachievable dates did nothing to improve RTG’s commercial position with the City. To the contrary, this gambit only served to increase and accelerate the mistrust that was developing between the parties.”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)

“More fundamentally, it represented a troubled lack of concern for the public nature of the project and the interests of the people of Ottawa. The leadership at RTG and OLRT-C seemed to have given no thought to the fact that the provision of this misinformation adversely impacted the daily lives of hundreds of thousands of people. The people of Ottawa trusted RTG and OLRT-C to be straight with the City and tell them honestly when the system would be ready. The Commission finds that RTG and OLRT-C betrayed that trust.”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)

“Second is the conduct of senior City staff and Mayor Watson in not sharing information about trial running. This conduct prevented councillors from fulfilling their statutory duties to the people of Ottawa. Moreover, it is part of a concerning approach taken by senior City officials to control the narrative by the nondisclosure of vital information or outright misrepresentation. Worse, because their conduct was wilful and deliberate, it leads to serious concerns about the good faith of senior City staff and raises questions about where their loyalties lie. It is difficult to imagine the successful completion of any significant project while these attitudes prevail within the municipal government.”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)



“Is there any reason to believe that their conduct regarding the trial running testing results was an aberration or that transparency has improved within the City? Unfortunately, based on the City’s conduct during this Inquiry, there is not. By way of example, throughout the hearings, the City published, at taxpayers’ expense, a summary of the proceedings that was a blatant attempt to spin the testimony in a way that was favourable to the City. This appears to be unprecedented in Canadian judicial history and is part of a ***troubling pattern of controlling and shaping information flow to Council and the public.***”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)

“In the end, the problems with the OLRT1 were a consequence of myriad factors, including the reliance on new vehicles and new relationships, a lack of integration, decisions to rush the system into service, an inadequate investment in maintenance, and several other factors, some of which were beyond the control of the parties. The result was a flawed LRT that failed to meet the needs of the people of Ottawa.”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)

“Despite the forgoing, there is reason for optimism, as the parties have begun working together more co-operatively and the reliability of the system is showing some signs of improvement. This improvement demonstrates that, over time, structural problems can be resolved through good faith, communication, and co-operation. However, until such time as the private and public entities involved in the OLRT1 project understand that their first obligation is to the public, there is reason to be concerned that the project will continue to suffer problems.”

OLRT Public Inquiry Report - Executive Summary, Pages 28-29  
(November 30, 2022)

# So, W-I-F-C?

## (What's In It For Clerks?)

# Governance Structure

Three bodies were established to coordinate, support and guide the City's response to the Public Inquiry (or "Commission"):

1. Executive Steering Committee (City Manager; Director, City Manager's Office; General Manager of Transit Services) – Made final decisions where required.
2. Advisory Committee (City Solicitor, City Clerk, Chief Procurement Officer) – As this was the first time the City was a party to a public inquiry, the Advisory Committee provided advice and recommendations for new and unforeseen situations.

# Governance Structure cont'd

3. Public Inquiry Response Team (Eight-member staff team led by the Corporate Public Policy Advisor in the City Manager's Office, in concert with the City Solicitor) – The Team was responsible for various tasks and included staff from Legal Services, Information Technology Services, the Information Management Branch, the Office of the City Clerk, Economic Development Services and Transit Services.

# Public Inquiry Response Team – Activities

- Securing external legal counsel through a scoped procurement process and working with the external counsel;
- Identifying the location, form and number of records, and ensuring that information in databases at the end of their lifecycle was migrated to a SharePoint site;

# Public Inquiry Response Team – cont'd

- Setting up the team's own records architecture in SharePoint and providing the City's Auditor General with full access;
- Providing the Commission with information regarding key personnel, including dozens of current and former City employees, consultants and vendors;



# Public Inquiry Response Team – cont'd

- Ensuring documents were retained, produced, reviewed and provided to the Commission in accordance with its procedures and requests;
- Facilitating information sessions for Members of Council and citizen Transit Commissioners with external counsel, and undertaking document production on a Member's behalf (with the Member's consent) if so desired; and
- Identifying gaps in Information Management practices and processes, as well as internal project management, and bringing forward related recommendations to Council.

# External Counsel

- Singleton Urquhart Reynolds Vogel LLP was secured to guide the City through the inquiry process, ensuring that the City's privilege with respect to ongoing litigation was protected.
- External counsel was responsible for:
  - Establishing processes and protocols with the Commission's counsel;
  - Providing document, management, storage and transfer services;
  - Coordinating the City's response to all summonses received by City officials and staff, using the file exchange protocol the Commission established;
  - Supporting any witnesses from the City that were interviewed or called to testify at the public hearings; and
  - Working with the City's litigation team and Commission counsel to protect the City's legal privilege, including with respect to litigation.

# Document Management & Production

- External counsel engaged Deloitte Canada to undertake the document management function using the Relativity database required by the Commission.
- A document production plan was developed by external counsel, approved by the City and provided to the Commission.
  - The production plan applied to all documents to be assembled by the City and all current and former City staff and current Councillors for whom the City had accepted service of any summons to produce documents.
  - The plan set out matters relating to the intended scope of documentary discovery, compliance with the exchange protocol, confidentiality and privilege, and timing of document production.

# Document Production – Outcome

- The City provided Deloitte with more than 1.8 million documents.
- Following review for duplications, relevance, removal of constituency records and privileged records, more than 570,000 City records were provided to the Commission by external counsel *before* public hearings began.
- Additional productions of several hundred more documents ‘as needed’ or ‘as requested’ occurred *prior* to and during the public hearings.

# Cost\$

- The City spent approximately \$4.8 million to respond to the Public Inquiry, which includes:
  - Approximately \$3.6 million in legal fees;
  - Approximately \$913,000 for database and file transfer services; and
  - Other City costs related to Information Technology services, fit up for secure physical space and overtime, as necessary.

“The public must be able to trust that the government is making decisions based on complete, accurate , and timely information. Anything less risks undermining the public trust. These recommendations seek to ensure that government decision makers have the information they require to oversee the delivery of complex infrastructure projects.

The Honourable William Hourigan, Commissioner  
(November 30, 2022)