

## Order on Applications for Standing and Funding – March 3, 2022

### Part 1: Introduction

Pursuant to Order in Council 1859/2021, the Government of Ontario established this Commission to conduct an inquiry into the commercial and technical circumstances that led to the breakdowns and derailments of the City of Ottawa Stage 1 Light Rail Transit Project (the “Project”) and to make recommendations to assist in preventing such issues from happening in the future.

The Commission has the power under s. 15 of the *Public Inquiries Act*, S.O. 2009, c. 33, Schedule 6 (the “Act”), to determine, among other things, whether a person can participate in a public inquiry; section 15 provides as follows:

#### Determination of participation

15 (1) Subject to the order establishing the commission, a commission shall determine,

- (a) whether a person can participate in the public inquiry;
- (b) the manner and scope of the participation of different participants or different classes of participants;
- (c) the rights and responsibilities, if any, of different participants or different classes of participants; and
- (d) any limits or conditions on the participation of different participants or different classes of participants.

#### Considerations

(2) Before making a decision under subsection (1), the commission shall consider,

- (a) whether a person has a substantial and direct interest in the subject matter of the public inquiry;
- (b) whether a person is likely to be notified of a possible finding of misconduct under section 17;
- (c) whether a person’s participation would further the conduct of the public inquiry; and

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(d) whether a person's participation would contribute to the openness and fairness of the public inquiry.

## **Representation**

- (3) A person who is permitted to participate in a public inquiry,
- (a) may participate on their own behalf;
  - (b) may be represented by a lawyer; or
  - (c) may, with the leave of the commission, be represented by an agent.

Pursuant to the Commission's mandate, the Commission published *Rules of Standing and Funding* on January 20, 2022 to govern the application process, and called for applications to be submitted by interested applicants no later than February 28, 2022.

The *Rules of Standing and Funding* provide, in part, as follows with respect to granting applications for standing:

11. Standing will be granted in the discretion of the Commissioner, in accordance with section 15 of the Act, the Terms of Reference and the desirability of a fair and expeditious proceeding. The Commissioner will consider, among other things, the following factors:

- a. Whether a person has a substantial and direct interest in the subject matter of the Inquiry;
- b. Whether a person is likely to be notified of a possible finding of misconduct under section 17 of the Act;
- c. Whether a person's participation would further the conduct of the Inquiry; and
- d. Whether a person's participation would contribute to the openness and fairness of the Inquiry.

12. The Commissioner may determine the manner and scope of the participation of persons granted standing, as well as their rights and responsibilities.

13. The Commissioner may direct that a number of applicants share in a single grant of standing.

16. Subject to the Rules of Procedure, the Participants in the Inquiry may have, at the Commissioner's discretion, among other things:

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- a. Access to documents collected by the Commission subject to the Rules of Procedure;
  - b. Advance notice of documents which are proposed to be introduced into evidence;
  - c. Advance provision of will say statements of anticipated witnesses;
  - d. A seat at counsel table;
  - e. The opportunity to suggest witnesses to be called by Commission Counsel, failing which an opportunity to apply to the Commissioner to lead the evidence of a particular witness;
  - f. The right to cross-examine witnesses on matters relevant to the basis upon which standing was granted; and
  - g. The right to make closing submissions.

17. The Commissioner may decide, in his discretion, that one or more applicants for standing will have more limited rights of participation than others. He may also decide that two or more applicants for standing will be required to participate as a group, and be required to exercise their rights of participation jointly.

The Commission has no power to directly order funding for any participant. However, the Order in Council directed that the Commission may make recommendations to the Minister of Transportation regarding funding for participants in the Inquiry where they would not otherwise be able to participate.

In determining issues of standing, I am also obliged to consider practical procedural matters pertaining to the conduct of the Inquiry, including whether granting participation would expedite the Inquiry; as Justice Goudge has aptly observed, when determining whether to grant standing, “Commissioners must balance the imperative of openness against the requirement to conduct the inquiry expeditiously and without undue cost.”<sup>1</sup> Accordingly, a general guiding principle that I have followed in making my determinations on these applications for standing is the need to balance the right to participation against the need for this Inquiry to complete its work expeditiously.

## **Part 2: Applications Received**

The Commission received a total of 24 applications for standing from the following applicants by the February 28, 2022, deadline:

- (1) Dominic L’Heureux

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<sup>1</sup> Stephen Goudge & Heather MacIvor, *Commissions of Inquiry* (Markham, ON: LexisNexis, 2019) at 171.

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- (2) Dr. Christopher Jones
  - (3) The City of Ottawa
  - (4) National Capital Heritage Streetcar Committee
  - (5) Modus Strategic Solutions Canada Inc.
  - (6) Amalgamated Transit Union, Local 279
  - (7) Alstom Transport Canada Inc.
  - (8) Ontario Infrastructure and Lands Corporation
  - (9) Mireille Lavoie
  - (10) Morrison Hershfield Limited
  - (11) The Province of Ontario
  - (12) David Knockaert
  - (13) Al Speyers
  - (14) Justin Kelly
  - (15) James O'Shea
  - (16) STV Incorporated
  - (17) Rideau Transit Group Engineering Joint Venture
  - (18) Thales Canada Inc.
  - (19) Toussaint Smits
  - (20) IEDG Infrastructure & Energy Inc.
  - (21) Ottawa Light Rail Transit Constructors
  - (22) Rideau Transit Group General Partnership
  - (23) Rideau Transit Maintenance General Partnership
  - (24) Transport Action Canada

### **Part 3: Decisions on Standing**

#### **(a) Full Standing Granted**

I am satisfied that the following applicants should be granted full standing as participants in the Inquiry:

- The City of Ottawa
- Amalgamated Transit Union 279
- Alstom Transport Canada Inc.
- Ontario Infrastructure and Lands Corporation
- Morrison Hershfield
- The Province of Ontario
- Rideau Transit Group Engineering Joint Venture
- Thales Canada Inc.
- Transport Action Canada
- Ottawa Light Rail Transit Constructors, Rideau Transit Group General Partnership, and Rideau Transit Maintenance General Partnership.<sup>2</sup>

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<sup>2</sup> These participants are related entities with no diversity in their respective interests, and they have elected to be represented by the same counsel during the Inquiry process. Thus, a single grant of

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I have reached the decision to grant these applicants full standing because they were all significant players in the events that led to the construction and implementation of the Project, including in the tendering process, the construction of the Project, the decision to accept the LRT system, and the ongoing operation of the LRT system. In accordance with the Act and the *Rules of Standing and Funding*, I am satisfied that these parties have a substantial and direct interest in the subject matter of the Inquiry, that their participation would further the conduct of the Inquiry, and that their participation would contribute to the openness and fairness of the Inquiry.

With specific reference to the fairness of the Inquiry process, noting that the Commission has as yet made no determinations in this regard and without any prejudgment as to the conduct of any specific party, a factor weighing in favour of granting participant status for these parties is that as significant players in the LRT process, there is the potential that one or more of these parties could receive a notice of alleged misconduct under section 17 of the Act. Accordingly, the full participation of these parties will contribute to the overall fairness of the Inquiry process.

I have determined that these parties shall have the full rights of participation as listed in paragraph 16 of the *Rules of Standing and Funding*. However, I caution the parties that these rights shall be subject to revocation or restriction at any time for non-compliance with the Commission's *Rules of Procedure*, including a party's disclosure obligations. In this regard, I observe that I have significant concerns about these parties' lack of documentary production to date. The message that participants send when they do not produce documents in a timely manner is that they have no interest in expeditiously getting to the truth of the matters under investigation. I will continue to monitor the production of documents by these parties closely, and if the Commission determines that any of these, or other, participants have not fully complied with their production obligations, or have otherwise breached the *Rules of Procedure*, a party's respective rights of participation in the Inquiry will be revoked.

#### **(b) Partial Standing Granted**

I have determined that the following parties should be granted limited rights of standing in the Inquiry, for the following reasons:

##### **STV Incorporated**

STV Incorporated was part of the Capital Transit Partners Joint Ventures, which was awarded a preliminary engineering contract and performed various services during the Project. Accordingly, I am satisfied that STV Incorporated meets the criteria for standing set out under the Act and the Commission's *Rules*.

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standing will be made, and they will be treated as one entity for the purposes of participation in the Inquiry.

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However, in its application, STV requests to limit its participation only to having access to the Commission's database of documents and the right to comment on background materials or written evidence prepared by Commission Counsel. I am satisfied that this limited participation would nevertheless further the conduct of the Inquiry, and therefore I am granting STV Incorporated standing limited to participation in the activities it has requested.

#### David Knockaert

Mr. Knockaert seeks standing solely to bring to the Commission's attention his Access to Information request filed with the City of Ottawa related to the Project. He seeks to participate in the Inquiry only through written or oral submissions. I am satisfied that Mr. Knockaert's information and contributions would further the conduct of the Inquiry and therefore order that he be granted standing limited to the ability to make a single written submission, of no more than 25 pages, at a time to be designated by the Commission.

#### Justin Kelly

Mr. Kelly has created and maintains a website that tracks the operation and downtime of the Ottawa LRT. He has sought limited standing in his application. I am satisfied that the Commission will benefit from his input and that such input would further the conduct of the Inquiry. I order that Mr. Kelly be granted standing limited to the ability to make a single written submission, of no more than 25 pages, at a time to be designated by the Commission.

### **(c) Standing Denied**

I have determined that all other applications for standing received by the Commission prior to the February 28, 2022, deadline should be denied, as these applicants either do not have a substantial and direct interest in the Inquiry as contemplated by the Act and the Commission's *Rules*, or their participation would not further the conduct of the Inquiry or materially contribute to the openness and fairness of the Inquiry:

#### National Capital Heritage Streetcar Committee

The National Capital Heritage Streetcar Committee advises in its application that it proposes building a streetcar system that would connect the downtown cores of Ottawa and Gatineau, and that it has technical concerns regarding the design of OC Transpo LRT trains in the light of this proposal. While I appreciate that the subject matter of the Inquiry will be of interest to this organization, I am not satisfied that its participation would further the conduct of the Inquiry or that it has a substantial and direct interest in the subject matter of the Inquiry. In my view, any concerns that the Committee has regarding the compatibility of the Ottawa and Gatineau transit systems would best be addressed through direct communication with the City of Ottawa outside of this Inquiry process.

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Dr. Christopher Jones  
Modus Strategic Solutions Canada Inc.  
IDEG Infrastructure & Energy Inc.  
Mireille Lavoie

These applicants have each sought through their application for standing to provide professional services to the Commission. While the Commission will carefully consider those requests, and sincerely appreciates the interest of these applicants in participating in the Commission process, these requests are not properly the subject matter of an application for standing.

Toussaint Smits  
Dominic L'Heureux  
Al Speyers

These applicants are residents of Ottawa. It is fair to say that they all have a keen interest in the management of public transportation in the city. While I do not believe that granting them status as participants is necessary to further the conduct of the Inquiry, I would strongly encourage each of them to register to speak at the Public Meetings that the Commission will hold in Ottawa so that their views can be placed on the record and their information considered in the Inquiry process.

James O'Shea

Mr. O'Shea has indicated in his application that he was an employee of Alstom and, in that capacity, was involved in testing activities for the Project. Based on the information in his application, I do not believe that there is a basis to grant standing to Mr. O'Shea, but I direct Commission Counsel to interview him to determine whether he has relevant evidence to give as a witness to the Inquiry.

#### **Part 4: Conclusion**

Full and partial standing is granted in accordance with these reasons. No recommendations for funding will be delivered to the Minister of Transportation as none of the parties granted standing have applied for funding. The remaining applications for standing and funding are dismissed without prejudice to the rights of the applicants to participate in the Commission's Public Meetings.

I thank all parties for their applications.

C. William Hourigan, Commissioner