

OTTAWA LIGHT RAIL TRANSIT COMMISSION OF INQUIRY

The Honourable C. William Hourigan, Commissioner

**AFFIDAVIT OF MARY ELLEN BENCH
(SWORN JULY 29, 2022)**

I, Mary Ellen Bench, of the City of Mississauga, in the Province of Ontario, MAKE OATH
AND SAY:

1. I am a lawyer and currently practice as counsel in the real estate group at Dentons, where I advise a broad range of public and private clients on governance, municipal law, development, infrastructure and related matters.
2. I have more than 30 years' experience in municipal public service, including holding various leadership roles in the legal department at the City of Toronto, as well as acting as City Solicitor for the City of Mississauga from 2001 to 2019. Attached to this affidavit and marked as **Exhibit "A"** is a copy of my current curriculum vitae.
3. On July 21, 2022 I was retained by the City of Ottawa to provide an opinion on municipal governance and practice with respect to certain matters relevant to the mandate of the Commission. Attached to this affidavit and marked as **Exhibit "B"** is a copy of the retainer letter provided to me by the City's counsel.
4. My opinion with respect to these matters is set out in my letter of July 29, 2022 to counsel for the City, a copy of which is attached and marked as **Exhibit "C"**.
5. I confirm that as set out in Exhibit "A" I owe a duty of honesty, candour and neutrality to the Commission. Attached and marked as **Exhibit "D"** is an acknowledgement of expert's duty pursuant to Form 53 of the Rules of Civil Procedure.

6. I make this affidavit for the purposes of the Commission and for no further or improper purpose.


SWORN by Mary Ellen Bench of the City of Mississauga, in the Regional Municipality of Peel, before me at the City of Toronto, in the Province of Ontario, on July 29, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits
(or as may be)

EVAN RANKIN
LSO# 73016G

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MARY ELLEN BENCH

This is Exhibit “A” referred to in the Affidavit of Mary Ellen Bench sworn by Mary Ellen Bench of the City of Mississauga, in the Regional Municipality of Peel, before me at the City of Toronto, in the Province of Ontario, on July 29, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits (or as may be)

EVAN RANKIN

Mary Ellen Bench

Counsel



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Overview

Mary Ellen Bench serves as Counsel in Dentons' Real Estate group, where she advises a broad range of public and private sector clients on governance, municipal law, development, infrastructure and related matters.

Throughout her career, clients and colleagues, alike, have relied on Mary Ellen's exceptional skillset and professional excellence to lead numerous infrastructure and development projects, provide significant input on governance matters and municipal legislative reform, and advise on many municipal corporate, development and finance matters.

With more than 30 years' experience in municipal public service, Mary Ellen held various leadership roles in the legal department at the City of Toronto, as well as City Solicitor for the City of Mississauga. In those roles, she was often engaged on project teams outside of the traditional legal role, because of her practical approach that uniquely achieved solutions to challenging problems that respect and garner the support of all parties, a quality for which she is known throughout the business and legal communities.

In 2006, the Law Society of Ontario recognized Mary Ellen as a Certified Specialist in Municipal Law in respect of local governance matters, and land use planning and development, areas in which she exemplifies the highest standards of the profession. The Rotman School of Management also certified Mary Ellen as an In-House Counsel Specialist, reinforcing her capabilities as a strategic business partner, both internally and with her clients.

Recognition

First recognized in 2021, Mary Ellen has been commended for her extensive knowledge and experience in the following respected publication:

- *The Best Lawyers in Canada: Municipal Law*

Honors and Awards

- Ontario Bar Association, Award of Excellence in Municipal Law, 2019
- Canadian Corporate Counsel Association, Professional Contribution Award, 2019

- Osgoode Hall Alumni Gold Key Award, 2016
- Tom Marshall Award, Ontario Bar Association, 2015
- Bruce Noble Award, International Municipal Lawyers Association (IMLA), 2012
- Certified Specialist Municipal Law, Local Government and Land Use Planning and Development, Law Society of Upper Canada, 2006 to present
- Local Government Fellow, International Municipal Lawyers Association (IMLA), 2003 to present

In the Media

- Quoted in "Wasaga Beach Council Highlights," *The Town of Wasaga Beach*, May 2022
- Cover Article, *Canadian Corporate Counsel Association*, 2016,
- "A day in the Life of" , *International Municipal Lawyers Association*, 2015 Article
- Quoted in "People and Politics," *Canadian Lawyer*, 2014

Insights

- Co-author, "Chapter 18. Intelligent Communities - O'Brien's Encyclopedia of Forms, Division X - Computers and Information Technology, 2021"
- Co-author, "Bill 257 combines broadband with MZO changes – Planning Act amendments to further expand the Minister Zoning Order powers," *Dentons client alert*, March 5, 2021
- Co-author, "Ontario introduces COVID recovery measures impacting development and more," *Dentons client alert*, July 13, 2020
- Co-author, "Statutory Planning Act meetings during COVID-19," *Dentons client alert*, April 23, 2020
- Co-author, "Ontario's Local Planning Appeal Tribunal will be operational again on a limited basis ," *Dentons client alert*, April 1, 2020
- Co-author, "Local Planning Appeal Tribunal adjourns hearings and suspends timelines during Ontario's state of emergency," *Dentons client alert*, March 31, 2020
- Co-author, "The land development landscape during the COVID-19 crisis in Ontario," *Dentons client alert*, March 20, 2020
- Co-author, "Proposed new regulation respecting community benefits authority under the Planning Act," *Dentons client alert*, March 11, 2020
- Co-author, "What's changing? The *Provincial Policy Statement, 2020*," *Dentons client alert*, March 9, 2020

Activities and Affiliations

- Past President, International Municipal Lawyers Association (IMLA)
- Director, Canoe Kayak Ontario
- Emeritus Member, Women's General Counsel Canada (WGCC)
- Chair, Rapid Transit Working Group, International Municipal Lawyers Association (IMLA)
- Member, ULI Women's Leadership Initiative

- Frequent advisor, Association of Municipalities of Ontario (AMO)

Presentations

- Speaker at AMO annual conferences on various policy issues, including *Municipal Act* reform and ethics/accountability; *Planning Act* reform; sharing economy; cannabis and more
- Frequent speaker at conferences held by the Ontario Bar Association; International Municipal Lawyers Association at annual conference, IMLA in Canada and Top 50 Cities forums;
- Frequent speaker, Association of Municipal Clerks and Treasurers of Ontario Leadership and Privacy conference
- Speaker, "How to say the unsayable to elected officials," Municipal Law Departments Association of Ontario, December 6, 2019
- Moderator, session on Cybersecurity and Surveillance: Conflicting Incentives & Perspectives for Reform with Dr. Ulf Buermeyer and Sven Kohlmeier, Berlin, Germany, November 4, 2019
- Panelist, "Successfully managing complex litigation," Benchmark Women in Litigation Forum, October 24, 2019;
- Speaker, IMLA in Canada regarding role of in-house counsel, April 25-29, 2019
- Speaker, Municipal Integrity Commissioners of Ontario Association meeting, April 5, 2019
- Chair and President, International Municipal Lawyers Conference, October 14-18, 2017
- Co-chair, Canadian Corporation Counsel Annual Conference, March 1-4, 2017
- Co-chair and panelist, inaugural Canadian Women's General Counsel National Conference, January 19, 2017

Areas of focus

Practices

- Political Law, Ethics and Disclosure
- Real Estate Site Selection and Development Incentives
- Development Zoning and Planning
- Real Estate Public Private Partnerships and PF1/PF2/PF3 Projects
- Public inquiries and coroners' inquests in Canada

Industry sectors

- Risk Management
- Mixed-Use Properties
- Developers and Owners
- Government Corporations
- Infrastructure and PPP
- Hotels and Leisure

Issues and opportunities

- Global Smart Cities & Connected Communities Initiative and Think Tank

Education

- York University, Osgoode Hall Law School, 1984, Doctor of Law, (JD)
- York University, 1980, Bachelor of Arts, Political Science and Government

Admissions and qualifications

- Law Society of Ontario, 1986

Languages

- English

This is Exhibit “B” referred to in the Affidavit of Mary Ellen Bench sworn by Mary Ellen Bench of the City of Mississauga, in the Regional Municipality of Peel, before me at the City of Toronto, in the Province of Ontario, on July 29, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits (or as may be)

EVAN RANKIN



Peter Wardle
D 416 585 8604
pwardle@singleton.com
Our File: 15057.006

July 21, 2022

VIA EMAIL

Dentons Canada LLP
77 King Street West, Suite 400
Toronto, ON M5K 0A1

Attention: Mary Ellen Bench (*maryellen.bench@dentons.com*)

Dear Ms. Bench:

Re: Ottawa Light Rail Transit Public Inquiry

Thank you for agreeing to provide expert opinion evidence on behalf of our client the City of Ottawa in respect of this matter.

Preliminary Documents

I confirm that we are providing you with the following preliminary list of documents for the purposes of your opinion:

1. Exhibit 1 - Project Charter for Stage 1 of the OLRT dated October 26, 2011 (COM0000235) and updated Project Charter dated December 15, 2015 (COW0593637);
2. Exhibit 12 - Project Management Plan dated March 30, 2012 (COW0148076);
3. Exhibit 237 - Report to Council dated December 4, 2012 from the Deputy City Manager (COW0593639);
4. Minutes of Council dated December 19, 2012 delegating certain authority in connection with the Project to the City Manager (COM0001571);
5. Minutes of Council dated December 11, 2013 delegating certain authority in connection with the Project to the City Manager (OTT1835612);
6. Report to FEDCO dated December 11, 2013 from the Deputy City Manager (COW0496904);
7. RIO Governance Process dated January 11, 2016 (COW0593653);

8. Exhibit 233 - City of Ottawa Memo from Director OTrain Construction et al. to Mayor and Members of Council 13 August 2018 (COW0529881)
9. Exhibit 167 – WhatsApp messages City of Ottawa 24 April 2019 to 29 December 2019 (STV0002337)
10. Exhibit 234 - O-Train Confederation Line Project Update 10 July 2019 (COW0104281)
11. Exhibit 193 – WhatsApp Chat Log 16 July 2019 to 9 October 2019 (COW0593687)
12. Exhibit 241 - City of Ottawa Memo from General Manager Transportation Services to Mayor and Members of Council et al. 22 July 2019 (COW0483089)
13. Exhibit 235 - City of Ottawa Memo from General Manager, Transportation Services to Mayor and Members of Council et al. 27 July 2019 (COW0529052)
14. Exhibit 197 - Draft City of Ottawa Memo from General Manager to Mayor and Members of Council et al. Re: RTG postpones Trial Running 31 July 2019 (COW0000366)
15. Exhibit 196 - City of Ottawa Memo from Director, Rail Construction Program to Mayor and Members of Council Re: O-Train Light Rail Transit Stage 1 and Stage 2 Quarterly Update 7 August 2019 (COW0104401)
16. Exhibit 236 - Draft City of Ottawa Memo from General Manager to Mayor and Members of Council et al. 16 August 2019 (RTC00759323.0001.0002)
17. Exhibit 205 - City of Ottawa Memo from City Manager to Mayor and Members of Council Re – O-Train Confederation Line Trial Running – 23 August 2019 (COW0104291)
18. Transcript of Evidence dated June 28, 2022 (John Manconi)
19. Transcript of Evidence dated June 29, 2022 (Councilor Panel)
20. Transcript of Evidence dated June 30, 2022 (Mayor Watson)
21. Transcript of Evidence dated July 4, 2022 (Steve Kanellakos)
22. OLRTPI Overview Report - City Structure (draft) with City comments;
23. OLRTPI Overview Report – City Oversight (draft) with City comments;

Scope of Your Opinion

We ask that your opinion deal with municipal governance and practice with respect to a list of questions we will provide shortly.

Independence

You are being retained to provide neutral third party advice and opinions regarding factual matters on which expert assistance is required in the context of the Ottawa Public Inquiry.

Although your affidavit is not being obtained for purposes of civil litigation, we ask you to complete an acknowledgement of expert's duty pursuant to Form 53 signed by you.

In relation to your affidavit and any testimony you will give, you will owe a duty of honesty, candour and neutrality to the court, and your testimony will be evaluated based on the degree to which you provide your opinion in a fair and independent fashion, unbiased by the interests of the parties. We ask that you provide your advice and assistance to Singleton Reynold in this manner and in recognition of this obligation.

You will be compensated for the services that you perform in connection with this engagement (which may include, among other things, consulting with counsel, preparing an affidavit and/or testifying at the public inquiry) at an hourly billing rate to be agreed upon between us reflective of your usual rate for work of this nature. In addition, you will be reimbursed for all reasonable and necessary expenses in connection with this engagement. We understand that you will customarily bill on a monthly basis. Please direct your invoices to me at the address above.

This engagement, and all communications and work relating thereto, shall be conducted, in the first instance, on a confidential and privileged basis. Unless and until called upon to testify you agree, at all times, to treat as confidential all of your communications, opinions and all information and documentation received or developed in connection with this engagement, except to the extent authorized in writing by us and at the conclusion of this retainer, you will return to us all documents and data (including all documents and data in electronic form) received or developed by you during the course of this engagement or, at our option, you will destroy all such documents and data and certify in a form acceptable to us that such destruction has taken place.

Agreement

The City of Ottawa agrees to Dentons:

- (a) continuing to act adverse to Ottawa on existing matters we have for other clients (an indicative list is below); and
- (b) acting adverse to the City in future, unrelated matters (subject to specific conflicts checks at the relevant time).

The City of Ottawa also confirms being advised by Dentons as follow:

‘We have searched in our records your name for possible conflicting interests in our representing you. As we have discussed, our search identified potential conflicts of interests in that we represent other clients adverse to you in various matters, including but not limited to, the Canadian National Railway Company (Other Clients). Although we do not believe that our representations these Other Clients in the unrelated matters will interfere with our ability to competently represent you, this may create a conflict of interest. Accordingly, this email is intended to fully disclose these

circumstances and to confirm your waiver of the conflict or potential conflict of interest created by our work for the Other Clients. We confirm that we have obtained consent to act for you from the Other Clients. You further agree and consent by your signature below that we may continue to act adverse to you in these unrelated matters and may, without further notice, represent other clients adverse to you, even if they are directly and litigiously adverse to you, as long as (1) those matters are not substantially related to our representation of you; or (2) we erect formal ethical screening procedures preventing communication of confidential information we have received from you that might be relevant to such matters.

We will, of course, act in accordance with our ethical responsibilities and hold inviolate and confidential all information that we have acquired or may acquire in the course of our representation of you. Please understand that we do not consider a conflicting interest to exist where we represent another client who asserts legal positions through us that may be inconsistent with your own, is your business competitor, customer or supplier, or in another matter has an adverse interest to an entity you have a relationship with through ownership, contract, or otherwise'.

We confirm that your standard hourly rate is \$725.

Please confirm your acceptance of this agreement by signing and returning a copy of this letter to me.


Yours truly,
Singleton Urquhart Reynolds Vogel LLP



Peter Wardle
Partner

PCW/tl
Enclosures

AGREED TO AND ACCEPTED:

By:  Date: 7/29/2022
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Mary Ellen Bench

This is Exhibit “C” referred to in the Affidavit of Mary Ellen Bench sworn by Mary Ellen Bench of the City of Mississauga, in the Regional Municipality of Peel, before me at the City of Toronto, in the Province of Ontario, on July 29, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits (or as may be)

EVAN RANKIN

July 29, 2022

Via Email - pwardle@singleton.com

Mr. Peter Wardle
Messrs. Singleton Urquhart Reynolds Vogel LLP
150 King Street West
Suite 2512
Toronto, ON M5H 1J9

Dear Mr. Wardle:

Re: Municipal Questions

Further to your letter of July 21, 2022, my opinion follows with respect to the questions you asked me to address.

1. What are the roles of Council and the Mayor under the Municipal Act? What distinguishes the role of the Mayor from that of individual councillors?

The statutory framework is set out in the Municipal Act, 2001 (the "Act") is as follows:

Section 2 of the Act defines municipalities as responsible and accountable governments.

Section 5 provides that the powers of a municipality are to be exercised by Council.

224 - It is the role of council,

- (a) to represent the public and to consider the well-being and interests of the municipality;
- (b) to develop and evaluate the policies and programs of the municipality;
- (c) to determine which services the municipality provides;
- (d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;
- (d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;

- (e) to maintain the financial integrity of the municipality; and
- (f) to carry out the duties of council under this or any other Act.

225 It is the role of the (the Mayor as) head of council,

- (a) to act as chief executive officer of the municipality;
- (b) to preside over council meetings so that its business can be carried out efficiently and effectively;
- (c) to provide leadership to the council;
- (c.1) without limiting clause (c), to provide information and recommendations to the council with respect to the role of council described in clauses 224 (d) and (d.1);
- (d) to represent the municipality at official functions; and
- (e) to carry out the duties of the head of council under this or any other Act.

226.1 As chief executive officer of a municipality, the head of council shall,

- (a) uphold and promote the purposes of the municipality;
- (b) promote public involvement in the municipality's activities;
- (c) act as the representative of the municipality both within and outside the municipality, and promote the municipality locally, nationally and internationally; and
- (d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

The Mayor is often the only elected official that represents the entire municipality, and while the Mayor only has one vote at Council, the role of the Mayor is often significantly larger than that of a councillor. The Mayor has a leadership role and is called upon to advocate for the interests of the municipality with higher levels of government. The Mayor's leadership role is also recognized in the Emergency Management and Civil Protection Act which provides authority for the Mayor to declare and cancel a state of emergency. The Mayor, as the Chief Executive Officer, is also a signing officer for the municipality.

The role of the Mayor however is not clearly defined in legislation. Commissioner Bellamy, in her report on the Toronto Judicial Inquiry reviewed significant literature on the role of the Mayor and Council and senior staff, and in terms of the Mayor's role as Chief Executive Officer (CEO) she defined it as to supervise the senior administrative staff on behalf of Council.

Common practice reflects this. It is expected that the Mayor will have a close relationship with the Chief Administrative Officer (CAO) and will be more engaged than the rest of Council in matters related to governance and operations, and about what goes on the Council agenda. The Province, the media and

the public turn to the Mayor for information and direction about City matters. It has always been my experience that the best functioning administrations are those where the Mayor and CAO have an open and close relationship. Regular weekly meetings between the Mayor and CAO, council are expected, agenda briefings with both the Mayor, CAO and possibly other senior staff and committee chairs, and updates on emergency events often are sent to both the CAO and Mayor by senior staff, especially if an event is public facing.

In terms of the role of Council, Council is the body that makes policy and exercises authority on behalf of the municipality, including any delegation. Council also determines the governance structure for the municipality in terms of both the organizational structure of Council and the administration. Council determines what committees will exist and the procedural rules that will apply. Council determines the administrative structure in terms of departments and services to be provided, subject to statutory requirements. Council determines what authority will be delegated to what individual or body. Council decides policy and provides program direction and approves the budget to implement them. The Mayor has one vote on Council, but will have greater insight through the Mayor's leadership roles as CEO.

2. What is the role of the Chief Administrative Officer ("CAO") under the Municipal Act? Is the relationship between the CAO and the Mayor different than the relationship between the CAO and the rest of Council?

The Act does not provide much guidance on the role of the CAO. It provides:

229 A municipality may appoint a chief administrative officer who shall be responsible for,

- (a) exercising general control and management of the affairs of the municipality for the purpose of ensuring the efficient and effective operation of the municipality; and
- (b) performing such other duties as are assigned by the municipality.

The CAO will have an appointment by-law that sets out the expectations in greater detail, but generally the CAO is the sole employee of Council and Council's decisions and direction is communicated to staff through the CAO. There is no single standard of CAO by-law but often authority will be delegated regarding procurement up to a certain dollar amount.

The relationship is set out well by Michael Fenn and David Seigel in their paper *The Evolving Role of City Managers and Chief Administrative Officers*.

A municipal council is chosen by the electorate to represent the diverse elements of the community. Council functions as a deliberative body to consider alternatives and choose the best policy for the community, and to provide broad oversight of its implementation in regulation and programs. The implementation of certain policies might require the interaction of several administrative units in complex ways over time. As a deliberative body, council is not structured to manage policy implementation. This is where the CAO comes in.

Council relies on staff members to provide advice on policy matters. A wise council would not want to act without receiving the kind of advice that these experts can provide. The CAO is the conduit through which this advice flows to council. In some cases, different units may provide partial or even conflicting advice.

The CAO can help council sort out these differences. Staff members might also need to provide councillors with advice that they would rather not hear. In these cases, the CAO needs to ensure that this advice is provided in an appropriate manner.

In my in-house experience, Councillors receive orientation at the start of each term of office that provides them with background information, including the role of Council and staff, various policies and operational matters, and the legislation that applies to municipalities. This material is made available to them at all times. Councillors may sometimes comment on the relationship between the Mayor and CAO but do not challenge the need for it.

3. Please explain the concept of delegated authority and how it works in municipal administration. As part of this explanation, please advise as to the scope and nature of the exercise of delegated authority and in particular what limitations are imposed on a CAO (or City Manager) in exercising that authority. How does Council amend or change the scope of authority that has been delegated?

Authority for Council to delegate its power is set out in Section 23.1 of the Act, as follows:

23.1(1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to delegate its powers and duties under this or any other Act to a person or body subject to the restrictions set out in this Part. 2006, c. 32, Sched. A, s. 15.

Scope of power

(2) The following rules apply to a by-law delegating any of the municipality's powers or duties:

1. A delegation may be revoked at any time without notice unless the delegation by-law specifically limits the municipality's power to revoke the delegation.
2. A delegation shall not limit the right to revoke the delegation beyond the term of the council which made the delegation.
3. A delegation may provide that only the delegate can exercise the delegated power or that both the municipality and the delegate can exercise the power.
4. A delegation or deemed delegation under paragraph 6 of a duty results in the duty being a joint duty of the municipality and the delegate.
5. A delegation may be made subject to such conditions and limits as the council of a municipality considers appropriate.
6. Where a power is delegated, the power is deemed to be delegated subject to any limits on the power and to any procedural requirements, including conditions, approvals and appeals which apply to the power and any duties related to the power are deemed to be delegated with the power. 2006, c. 32, Sched. A, s. 15.

(3) The conditions and limits referred to in paragraph 5 of subsection (2) may include such matters as the following:

1. A requirement that the delegate act by by-law, resolution or otherwise, despite subsection 5 (3).
2. Procedures that the delegate is required to follow.
3. The accountability of the delegate and the transparency of the delegate's actions and decisions. 2006, c. 32, Sched. A, s. 15.

Council may delegate administrative or operational responsibility to an individual, including a councillor or to a department or a committee of Council. Council can only delegate administrative or operational authority, and cannot delegate its "government powers", being quasi-judicial or legislative in nature. Delegation to the CAO in an appointing by-law is a key exercise of this power.

In a large City there is extensive delegation of authority because of the massive amount of decisions that need to be made. The key delegation is that found in the CAO's by-law and also general delegation to other staff. For example, the city solicitor will often be delegated authority to defend litigation or to settle matters up to a certain dollar limit, and the planning commissioner will be delegated authority to approve site plan and other planning agreements that conform with policy approved by Council. On large projects it is common for authority to be delegated to the CAO or a specific commissioner, with sub delegation to a steering committee or project team.

Specific staff will be delegated authority to take all necessary action to implement Council's direction and on large or phased projects, staff will often recommend a framework on when to report back for Council to consider and adopt. This provides a structure to seek direction from Council when decisions not delegated are required and an expectation regarding when and how information reports will be provided to Council. The City of Ottawa Delegation of Authority By-Law No. 2019 – 280 is an example of the large number of matters that Council delegates to staff, sometimes with requirements to report back to Council or a standing committee when delegated authority is exercised and sometimes subject to ward councillor approval before exercising delegated authority. The City's policy respecting delegated authority is clear about how Council expects delegated authority to be exercised and that Council can revoke any such authority at any time.

4. What role, if any, does Council play in operational decisions within a municipality, including for decisions for which authority has been delegated?

Generally, there is no role for Council in operational matters where authority has been delegated. In smaller municipalities I have seen Councillors want to take a more hands-on role in directing staff, but even small municipalities have generally chosen to have a CAO and respect the CAO's role in that regard. Council sets the vision and direction of the City; chooses between competing priorities; enacts by-laws that establish City policies and programs. Staff provide their best professional advice to Council. Council may ask staff for status report on implementation or other updates and staff will provide them. It is well established that it is the responsibility of staff to implement Council's decisions, and staff need to be trusted to carry out their role to operationalize Council's decisions.

The Ministry of Municipal Affairs and Housing posts information about the roles of council, councillor and Mayor on its website. It defines the role of a councillor in three parts:

- (i) Representative role - to represent the views of the residents of their ward on issues that come before Council, to consult with municipal staff on issues raised by individuals constituents, and to respect the role of staff decisions that are arm's length from council.
- (ii) Policy-making role - to provide the principles and direction for municipal operations i.e. a policy-making role.
- (iii) Stewardship role - to ensure that municipal financial and administrative resources are used properly. The Ministry says; "There is a fine line between council's overall stewardship of the municipality and the administration's management of day-to-day activities. Generally, council monitors the implementation of its approved policies and programs, but the practical aspects of its implementation and administration are a staff thing."

5. What is the Bellamy report and what was its significance for municipal procurement? What does the report say about the role of the Mayor, Council, and the CAO?

The Bellamy report is the report prepared by Commissioner Bellamy following her investigation into the Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry. Commissioner Bellamy made 241 recommendations, of which 111 recommendations were about procurement. They were divided into three phases of the process:

- 75 recommendations concern the activity before a procurement process
- 24 recommendations deal with the activity during the process itself
- 12 recommendations address activity after a procurement process

A key recommendation was that no member of Council be party to the procurement process.

In Recommendation No. (214), Commissioner Bellamy proposed that for major procurements, the City's evaluation committee should be a group that is representative of all areas affected by the procurement. To ensure fairness, she recommends that no one involved in the pre-procurement phase or the bidding process should be involved in evaluating the bids. This is difficult to implement given that for major RFPs, a number of individuals will have a role in either crafting or approving the RFP document (i.e. all of the individuals affected by the procurement as recommended). The expertise required in preparing the RFP is also required for evaluating the responses. Therefore, to offset the concern of impartiality on large RFPs, the City (of Toronto) engages a fairness commissioner to ensure that both the development of the RFP and the evaluation of the responses is conducted fairly. This procedure, which was adopted in Toronto, is reflected in how the City of Ottawa conducted its procurement for this project.

Commissioner Bellamy issued her report in four parts: Volume 1 summarizes her factual findings; Volume 2 contains her findings related to Good Governance; Volume 3 is a road map for the judicial inquiry process and Volume 4 is an Executive Summary. In Volume 2 Commissioner Bellamy observes

that the lines are blurred between the roles and responsibilities of the administration and council at times. She also comments that many of people (councillors and staff) she interviewed did not understand the difference between governing vs. managing, or how to operationalize it in a large municipality. She opines that while most understand the distinction in theory, they do not appreciate that governing does not mean 'operating' and 'managing'. For this reason, clearly defined roles and responsibilities are required when Council delegates authority. This is reflected in the City of Ottawa Council report where delegation of authority is clearly set out.

6. How does Council direct the frequency and nature of reporting by municipal staff on a particular project, including one for which authority has been delegated? In connection with Stage 1, what do the Project Charter and other documents you have reviewed outline with respect to reporting to Council?

Council provides direction by approving or not approving the reporting proposed in the staff report, and through policies on the exercise of delegated authority, accountability and other policies. When council wants more frequent reports than what is recommended in the staff report, council will ask for additional reports. Councils often ask for status reports on projects where they have a particular interest and budget and spending updates are also often requested. Such requests can be made at the time of approval of the project report, or at any time after that. A councillor who is not satisfied with the timing and content of a staff report may at any time, in a council or committee meeting, put forward a motion or a direction to staff to report more frequently or to report on a specific topic.

In connection with Stage 1 the Project Charter, council authority and related materials provide for quarterly reports to the City's Finance and Economic Development Committee (FEDCO) as well as communications to the general public, which I would expect Council would receive, and internal reports. The purpose of the reports to FEDCO is to keep FEDCO informed. There is no direction on what that means, so in the ordinary course that would be a report on what activity has taken place over the quarter, is the project still on time and is it still on budget. This information would be fairly high level, unless an issue that requires a decision from Council arises. In that case, there could be a separate in camera report to explain what the issue is. Any member of council can attend FEDCO meetings so this is an opportunity for councillors to learn about the project, and where they feel appropriate, prepare a motion for council seeking for example, more information for council or for the public, raise budget concerns or ask for a higher level of council oversight on certain matters related to the project like artwork.

7. In your experience of municipal governance and practice, do Mayors and committee chairs typically receive more information from staff than that provided to other members of Council? If so, why is this?

Yes they do, for the reasons set out above. The Mayor as CEO has responsibility for oversight and committee chairs are responsible for oversight of the matters that their particular committee is responsible for. In my experience the Mayor and city manager have always had a close relationship and the Mayor has an expectation that the city manager will keep the Mayor informed of all matters of significance, or possible significance. The Mayor will be briefed on policy, labour relations, the status of large projects, program updates, upcoming events, potential controversies and anything else that the city manager believes the Mayor would benefit from knowing. The Mayor's role as CEO is to provide oversight so the Mayor needs access to this information. The public expect the Mayor to have answers to questions, and

at every public event the Mayor attends he or she will be deluged with questions from members of the public, whether the business community or the general public. The Mayor is also responsible for working with the administration to approve council agendas, and determine what goes to council for consideration when. Often the potential for a council agenda to be too long requires the Mayor, city manager and other officials to balance what is placed on a council agenda when taking into account the matters that need a council decision within a specific timeframe for legislative, contractual or other reasons. Other matters, such as policy and public interest matters can be scheduled for future meetings. Likewise, committee chairs have responsibility to be aware of how the municipality is operating in the matters that relate to the jurisdiction of the committee, and for the same reasons need to be provided with more information in order to carry out the duties of the office of committee chair.

The City of Ottawa council procedure by-law No.2019-8 recognizes that the Mayor and committee chairs have responsibilities beyond those of being a council member, and as noted in the paragraph above, they need to be provided with information to properly carry out these functions. The Mayor's duties are set out in Section 3, the duties of members of Council in Section 6 and the Committee Chair's responsibility in Section 77.

8. With respect to this Project, was it consistent with municipal governance and practice for the Mayor's staff and Councillor Hubley (chair of Transit Commission) to be receiving updates on trial running through WhatsApp messages that were not provided to other members of Council?

Yes. For reasons previously expressed, the Mayor as CEO and committee chairs need to have more detailed information than council. WhatsApp was the method that seemed to work for this project, but I have seen text messages, emails and informal meetings used for the same purpose. I have reviewed the WhatsApp communications and see nothing unusual or unexpected in what was communicated. I also see no reason why this information would be provided to all of Council. Staff should not be overwhelming councillors with information as it takes time away from the important work that councillors are responsible for related to the agencies, boards and committees they sit on as members of council, community and ward events, etc. The role of a councillor in a large city can be overwhelming at times, especially in wards with significant land development applications. If councillors are bombarded with details about every project for information only, it makes it more challenging to gain a councillor's attention when a matter is important for them to review. I have seen staff chastised many times for doing this. Summary reports or memos are often used to convey information to Council, and it is a judgement call for staff as to how much detail is included and how often. As previously noted, if a councillor truly wishes more information, the councillor has opportunities to request this informally by communicating with the CAO or project lead and formally, by bringing a motion or direction to staff at council.

In addition, all such communications, regardless of the tool used, are subject to the Municipal Freedom of Information and Protection of Privacy Act, and many councillors are very good at using this legislation to gain access to additional information if it is denied to them. Commercially sensitive or materials that would otherwise be protected from disclosure, can often be reviewed in the clerk's office.

9. Does the Mayor and Committee chairs have a regulatory obligation to report to Council on operational matters that come to their attention? Based on your experience in municipal governance and practice, is there a regulatory obligation to report to Council includes operational matters that come to the attention of the Mayor and Committee chairs?

No. The Act does not impose a statutory obligation and the City of Ottawa's Procedure By-laws applicable at the time and to present (2019-8 and) do not impose such a requirement. Neither the City of Ottawa Delegation of Authority By-Law No. 2019 – 280 or the City's delegation policy or any of the other accountability policies, require this. I do not read Sections 224(d.1) and 225(c.1) of the Act as imposing an obligation on the Mayor to advise Council of details learned respecting technical details of a project. My experience has been that these provisions are interpreted as requiring the Mayor to advise Council of pending changes to legislation, or significant developments related to projects that require Council's strategic input, not to provide technical updates. The Mayor does not have the expertise to do this. It would be highly unusual to have such a requirement. I have never seen it in my experience.

I would be concerned if there was such a regulatory obligation. A key reason for delegating authority is to allow staff to do their job and implement Council's decisions. Virtually every project I have ever been part of in thirty years in-house and in my experience since, has bumps that need to be sorted out. These decisions need to be made in a timely fashion based on advice from professionals, whether on staff or external. They are technical and if timing is not met, they can lead to liability in many cases.

While City Solicitor in Mississauga I had an experience quite similar but on a smaller scale related to the construction of Mississauga's first bus rapid transit line. Issues respecting timing and certain design features came up quite regularly and in respect of one contractor, ended up in litigation. I was part of the staff and consultant team that managed to draw on contract terms to remove the contractor. The project lead and myself provided regular updates seeking strategic support and approval from the City Manager. The City Manager informed the Mayor and we responded to requests for information from her. Reports to Council however, were submitted as expected under the delegated authority granted to staff, and additional reports were submitted only as new Council authority was required. When matters appeared in media or when councillors were lobbied, there would be updates in memo form to Council but nothing additional on a Council agenda, because staff determined there was no benefit to Council in additional reporting, and delay and debate where there was nothing to decide could harm the City's position in trying to resolve issues.

10. Would it have been consistent with the applicable municipal governance and practice for the City Manager to make operational decisions such as (i) deferring reporting on trial running to Council until the process was complete; and (ii) not reporting to Council on matters such as changes to the criteria made by the Trial Running Test Team during trial running? Does your experience accord with the conduct of the City Manager here?

Yes, these are operational matters and because they do not require a decision by Council I would question the benefit of reporting. I would see them as possibly matters that could be mentioned in a quarterly report at the appropriate time, but not otherwise. It is a matter of professional judgement.

Council in my opinion acted in accordance with established municipal practice in delegating this authority as it did. These are very technical matters that require expert decisions to be made in a short time period, and it would be improper to ask Council to make decisions that require technical expertise. Council exercised its role in approving the project key terms, the budget and the timeline. The report from the Deputy City Manager dated December 4, 2012 that was provided to Council to make these decisions was detailed and complex, but at the same time was divided into small segments so that the information could be more readily understood. Council was provided with sufficient information to understand what

the project entailed, and to understand its role, which was not to be engaged in technical operating decisions. Of most importance, the recommendations and the authority being delegated are very clear.

Yours truly,

Dentons Canada LLP

A handwritten signature in blue ink, appearing to read 'MEB', is positioned above the printed name of the signatory.

Mary Ellen Bench
Counsel

MEB/an

This is Exhibit “D” referred to in the Affidavit of Mary Ellen Bench sworn by Mary Ellen Bench of the City of Mississauga, in the Regional Municipality of Peel, before me at the City of Toronto, in the Province of Ontario, on July 29, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits (or as may be)

EVAN RANKIN

OTTAWA LIGHT RAIL TRANSIT COMMISSION OF INQUIRY

The Honourable C. William Hourigan, Commissioner

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Mary Ellen Bench. I live in the City of Mississauga in the Province of Ontario.
2. I have been engaged by or on behalf of the City of Ottawa to provide evidence in relation to the above-noted public inquiry.
3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
 - (a) to provide opinion evidence that is fair, objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
 - (c) to provide such additional assistance as the Commission may reasonably require, to determine a matter in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date 7/28/2022

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MARY ELLEN BENCH