

## **RULES OF PROCEDURE** **(REVISED FEBRUARY 8, 2022)**

### **General**

1. These Rules of Procedure (“Rules”) apply to the Ottawa Light Rail Transit system (“LRT”) Commission of Inquiry (the “Commission” or “Inquiry”), established pursuant to the *Public Inquiries Act*, 2009, S.O. 2009 c.33, sched. 6 (the “Act”) and Order in Council 1859/2021 (the “Terms of Reference”).
2. Subject to the *Act*, the conduct of, and procedure to be followed at, the Inquiry is under the control and discretion of the Honourable C. William Hourigan (the “Commissioner”). The Commissioner may issue directions or orders including on his own motion or following an application.
3. All participants, witnesses and their counsel are bound by these Rules and may raise any issue of non-compliance with the Commissioner.
4. The Commissioner may deal with any non-compliance with these Rules as he deems appropriate, including by revoking the standing of a participant or imposing restrictions on a participant.
5. The Commissioner may amend these Rules or dispense with compliance with these Rules as he deems necessary to ensure that the Inquiry is conducted efficiently, fairly, expeditiously, and in accordance with the principle of proportionality.
6. In these Rules,
  - a. “person” refers to individuals, groups, corporations, governments, agencies, institutions or any other entity;
  - b. “participant” refers to a person who has been granted standing to participate in the Commission pursuant to the Rules of Standing and Funding; and
  - c. “document” is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device.

## Investigation

7. The Inquiry will commence with an investigation by Commission Counsel. The goal of the investigation, in part, will be to identify the core and background facts, to identify witnesses and to gather witness statements.
- 7.1 In accordance with section 26(1)(c) of the Act, the Commission may engage the services of persons having special technical or other expertise or knowledge to assist it in its tasks, under the direction of the Commission.
8. The investigation will consist primarily of document review, consultation with interested persons, and witness interviews by Commission staff, Commission Counsel and other persons engaged by the Commission in accordance with Rule 7.1.
- 8.1 Persons engaged by the Commission and who may assist it with document review, witness interviews and other tasks, are, as persons acting on behalf of or under the direction of the Commission, bound by the confidentiality obligations of the Commission under section 22(2) of the Act.
- 8.2 In accordance with subsections 7(2) and 31(1) of the Act, Commission Counsel may require that witness statements be recorded and transcribed. Statements may also be taken under oath or affirmation.

## Document Production

9. Copies of all relevant documents must be produced to the Commission by any participant or recipient of a summons by the Commission at the earliest opportunity, in a format acceptable to the Commission. Prior to taking part in the Commission, each participant or summons recipient, if a natural person, or the chief executive officer of each participant or summons recipient, if a corporation, must certify in writing that this obligation has been complied with.
10. Production to the Commission, and to persons engaged by the Commission, by a participant or summons recipient will not constitute a waiver of any claim to privilege, including solicitor-client privilege, which a participant or summons recipient may wish to assert. Participants or summons recipients are, however, required to identify to Commission Counsel, within a reasonable time period, in accordance with the procedure set out in paragraph 11, any documents over which they intend to assert a claim of privilege.
11. Where a participant or summons recipient objects to the production of any document, or part thereof, or to disclosure to participants of any document, or part thereof, on the grounds of privilege, pursuant to subsection 8(3) of the Act, the following procedures will apply:

- a. The participant or summons recipient shall deliver to Commission Counsel a list setting out pertinent details of the document(s), or part thereof, over which claims for privilege are being asserted. This shall include the date, author, recipient(s) and a brief description of the document(s), and may include additional material, such as an affidavit, to support its claims;
  - b. Commission Counsel shall review the list and decide if they will recommend to the Commissioner that he accept the claim for privilege;
  - c. If Commission Counsel are not prepared to recommend to the Commissioner that he accept the claim for privilege, the list and any further material filed by the participant or summons recipient shall be submitted forthwith, together with Commission Counsel's written submissions, to the Commissioner or, at the Commissioner's option, to another adjudicator designated by the Commissioner, for determination. If the Commissioner or designated adjudicator is unable to make a determination based on the record before them, they may request a copy of the disputed document(s) for inspection; and
  - d. If the claim for privilege is dismissed, the document(s) shall be produced to Commission Counsel forthwith and, subject to relevance, may be used by the Commission and participants in the inquiry.
12. Originals of relevant documents are to be provided to Commission Counsel only upon their request and where doing so would not interfere with any potential or ongoing investigation or legal proceeding. The participants and summons recipients will otherwise preserve originals of relevant documents until such time as the Commissioner has fulfilled his mandate or has ordered otherwise.
  13. Counsel to the participants and witnesses will be provided with documents and information, including witness statements or statements of anticipated evidence, only upon executing the written undertaking at Appendix "A" that all such documents and information will be used solely for the purposes of the Inquiry.
  14. Counsel are entitled to provide those documents or information to their clients only on terms consistent with the undertakings given, and after the clients have entered into the written undertaking at Appendix "B" to the same effect.
  15. Potential witnesses or participants who are unrepresented will also be entitled to receive documents or information relevant to their testimony after having entered into the written undertaking at Appendix "C".
  16. The Commission orders that each person who has entered into a written undertaking in the form set out at Appendix "A", "B" or "C" comply with its terms. Failure to do so will be a breach of an order of the Commission and be dealt with in accordance with ss. 29 and 30 the Act.

17. These undertakings will be of no force or effect if any of the conditions of s.12(2) or 12(3) of the *Act* are met.
18. The Commission may require that the documents provided, and all copies made, be returned to the Commission if not tendered in evidence. Alternately, the Commission may require the destruction of those documents provided, and all copies made, such destruction to be proven by a certificate of destruction.
19. In accordance with section 10 of the Terms of Reference and subsection 10(3) of the *Act*, the Commission may require the provision or production of information that is confidential or inadmissible under any Act or regulation, other than confidential information which is described in sections 19 and 27.1 of the *Auditor General Act*, R.S.O 1990, c. A.35.
20. Where a participant or summons recipient objects to the disclosure of a document or information to other participants and/or to the public at the hearing or otherwise on the grounds of confidentiality, and seeks an order pursuant to subsections 10(4) or 14(3) of the *Act*, a copy of the document and/or the information in issue will be produced in an unedited form to the Commission. The participant or summons recipient shall provide, in writing, a submission setting out the order requested and the reasons for it. In determining whether to make the order, the Commissioner will consider, among other things, the duty of procedural fairness to the other participants and his obligation pursuant to section 17 of the *Act*. Where the Commission considers it necessary, it may impose conditions on the disclosure of information to protect the confidentiality of that information.
21. Rules 10, 11 and 20 apply, with necessary modifications, to persons who have had documents seized by or produced to the Transportation Safety Board of Canada or the Auditor General (Ontario) in the course of their respective investigations or audits, and whose documents were then delivered to the Commission by the Transportation Safety Board of Canada or the Auditor General (Ontario) pursuant to a summons issued by the Commission.

## **Evidence**

### *(i) General*

22. The Commission may collect and receive information that it considers relevant and appropriate, whether or not the information would be admissible in a court of law and in whatever form the information takes, and may accept the information as evidence at the Inquiry. However, pursuant to section 8(3) of the *Act*, nothing is admissible in evidence at the Inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

23. In accordance with section 6 of the Terms of Reference and section 9 of the *Act*, the Commission may prepare “Overview Reports” which may contain core or background facts. The Commission may also refer to and rely on any existing records or reports relevant to its mandate, and on any other matters set out in section 9 of the *Act*.
24. Commission Counsel will provide a reasonable opportunity to the participants, in advance of the filing of Overview Reports as evidence, to comment on the accuracy of the Overview Reports, and the Commission may modify the Overview Reports in response. Participants may also, pursuant to Rule 35, propose witnesses to be called to challenge or supplement the Overview Reports in ways that are likely to significantly contribute to an understanding of the issues relevant to this Inquiry.
25. The Overview Reports may be used to assist in identifying systemic issues relevant to the Inquiry, to make findings of fact and to enable recommendations to be made, but the Overview Reports will not be used in a manner precluded by section 4 of the Terms of Reference.
26. The Commission will rely, wherever possible, on the Overview Reports and may consider such reports instead of calling witnesses. Commission Counsel may call witnesses or experts, who may, among other things, support, comment upon or supplement the Overview Reports.
- 26.1 Commission Counsel may obtain certified transcripts of witnesses’ evidence gathered during witness interviews as described in Rules 7 to 8.2. In accordance with subsections 9(1)(f) and (2) of the *Act*, these witness interview transcripts can be admitted into evidence in place of part or all of that individual’s oral testimony, whether the evidence was taken under oath or affirmation or not.
- 26.2 Commission Counsel will circulate these witness interview transcripts to the witness and to participants prior to entering them into evidence at the hearings. The witness or participants may make a claim of privilege in respect of any portion of the witness interview transcript, in accordance with the procedure set out in Rules 10 and 11.
- 26.3 Commission Counsel may redact any portion that is the subject of a claim of privilege, or refer the matter to the Commissioner with its recommendation in accordance with Rule 11.
- 26.4 Commission Counsel may rely on the witness interview transcripts in lieu of calling the witness to testify, subject to the right of participants to request that the witness be called for the purpose of cross-examination. Commission Counsel may also call the witness to testify, and may seek to supplement, challenge or have the witness comment upon the witness interview transcript.

27. Commission Counsel and a witness may prepare a sworn affidavit of the witness's evidence. At the Commissioner's discretion, this sworn affidavit can be admitted into evidence in place of part or all of that individual's oral testimony.
28. Evidence may be received at the Inquiry from one or more panels of expert witnesses. In accordance with section 10 of the Terms of Reference, the Commission may also rely on representative witnesses on behalf of institutions and may convene or consult, or both, with panels of representative witnesses.
29. The Commissioner may modify these Rules as may be appropriate for the disclosure of documents and the questioning of panelists by the participants.

*(ii) Oral Hearings and Witnesses*

30. The Commissioner will conduct hearings as set out in these Rules.
31. The Commissioner will set the dates, hours and place of the hearings. Due to COVID-19 and the timelines set out for the Inquiry in the Terms of Reference, some or all of the public hearings may be conducted electronically.
32. The Commission anticipates that the hearings will take place in two parts, one dealing with events relating to the procurement, design and building of the LRT, and the other dealing with the delivery, operation, maintenance, repair and rehabilitation of the LRT. The Commission anticipates that each part will address the issue of the City of Ottawa's oversight of these respective phases of the project.
33. The Commissioner may make such orders or give such directions as he considers proper to maintain order and to prevent the abuse of the Commission's process.
34. Participants may propose witnesses to be called as part of the Inquiry. Participants will provide to Commission Counsel the names and addresses of all witnesses they believe ought to be heard and will provide Commission Counsel, where applicable, with copies of all relevant documents, including affidavits or statements of anticipated evidence, at the earliest opportunity.
35. Commission Counsel will have discretion to refuse to call or present evidence proposed by a participant. A participant may, however, apply to the Commissioner for leave to call a witness whom the participant believes has information relevant to the Commission's mandate. If the Commissioner is satisfied that the information of the witness is required, Commission Counsel will call the witness subject to Rule 42.
36. Anyone interviewed by or on behalf of Commission Counsel, is entitled, but not required, to have counsel present for the interview to represent his or her interests. Counsel will be retained at the expense of the interviewee. The Terms

of Reference do not grant the Commissioner jurisdiction to order the Province to provide funding for legal counsel. However, requests for funding may be made to the Commissioner in accordance with the *Rules of Standing and Funding*. Pursuant to section 14 of the Terms of Reference, the Commission may make recommendations to the Minister of Transportation regarding funding to participants in the inquiry to the extent of that participant's interest where, in the Commissioner's view, the participants would not otherwise be able to participate in the inquiry without such funding.

37. Witnesses who are not represented by counsel for participants are entitled to have their own counsel present while they testify. Counsel for the witness will be permitted to make appropriate objections during the testimony of that witness.
38. Witnesses may be called more than once. Witnesses may be called upon to testify in panels.
39. Witnesses will give their evidence at a hearing under oath or affirmation. However, the Commissioner may admit evidence not given under oath or affirmation.

#### **Rules of Examination**

40. In the ordinary course, Commission Counsel will call and question witnesses who testify at the Inquiry. Except as otherwise directed by the Commissioner, Commission Counsel are entitled to adduce evidence by way of both leading and non-leading questions, and to challenge the witness's evidence.
41. Participants will have an opportunity to cross-examine the witness, to the extent of their interest, as determined by the Commissioner. The Commissioner will determine the order of cross-examinations.
42. Counsel for a participant may apply to the Commissioner to examine a particular witness in chief. If counsel is granted the right to do so, examination will be confined to the normal rules governing the examination of one's own witness.
43. The Commissioner may direct any counsel whose client shares a commonality of interest with the witness only to adduce evidence through non-leading questions, except with respect to non-essential matters.
44. Counsel for a witness, regardless of whether he or she is also representing a participant, will examine after the other participants have concluded their cross-examinations. If he or she has adduced the evidence of the witness in chief, he or she will have a right to re-examine the witness. If, however, counsel for the witness intends to adduce evidence in chief not adduced by Commission Counsel, he or she will examine the witness immediately following Commission Counsel and will then have a right to re-examine the witness following the cross-examinations by the other participants.

45. Commission Counsel has the right to re-examine any witness at the conclusion of his or her evidence.
46. The Commissioner may set time allocations for the conduct of examinations and cross-examinations.

### **Use of Documents at Hearing**

47. In advance of the testimony of a witness, Commission Counsel will provide a transcript of the witness' evidence, if applicable, and in the absence of a transcript, will endeavour to provide the participants with reasonable notice of the subject matter of the anticipated evidence in chief and a list of the documents associated with that evidence.
48. In cases where counsel other than Commission Counsel is intending to lead the evidence in chief of a witness, they will provide the participants with reasonable notice of the subject matter and a list of documents associated with that evidence.
49. Neither participants nor Commission Counsel will be entitled to cross-examine a witness on any "will-say statement" (anticipated evidence statement or witness interview summary) that may be provided, except with leave of the Commissioner.
- 49.1 Participants and Commission Counsel will be entitled to cross-examine a witness on any certified transcript of the evidence of that witness or any other witness.
50. Participants who intend to cross-examine a witness will provide reasonable notice to Commission Counsel and the participants of any documents to which they intend to refer during their cross-examination, other than those documents for which notice has previously been provided pursuant to Rules 47 or 48.
51. For the purpose of these Rules, the Commissioner will have discretion to determine what constitutes "reasonable notice" or "at the earliest opportunity" in all of the circumstances.
52. The Commissioner may grant Commission Counsel or counsel for a participant or witness leave to introduce a document to a witness at any point during the hearing upon such terms as are just and fair.

### **Applications**

53. A person may apply to the Commissioner for an order by:
  1. preparing an application in writing;
  2. attaching to the application any supporting materials; and



3. delivering the application and supporting materials to the Commission by email at Notice@OLRTPublicInquiry.ca.
54. Unless the Commissioner otherwise directs, the Commission shall promptly deliver the application and supporting materials to each other participant.
55. Participants are entitled to respond to an application where their grant of standing identifies them as having an interest in the subject matter of the application.
56. Commission counsel may provide the Commissioner with any submissions or materials Commission counsel consider relevant and necessary to the proper resolution of the application. Due to time constraints, where there is an oral hearing on the application, Commission counsel need not file responding materials prior to the hearing of the application but should, as much as is practicable, advise the participants of Commission counsel's position on each application in advance of the hearing of the application.
57. The Commissioner will determine the schedule for the filing of submissions and materials and for the hearing of oral argument, if any. Applications may be dealt with in writing.
58. The Commissioner may make an order or direction based on the written material filed or, at his discretion, after hearing oral argument.
59. Subject to any order from the Commissioner, all application materials including submissions and responses will be posted to the Commission website.

### **Submissions**

60. Commission counsel, and each participant authorized to do so, may make submissions to the Commissioner as permitted by the Commissioner. Submissions will primarily be in writing.
61. Subject to any order from the Commissioner, submissions will be posted to the Commission website.

### **Service**

62. All documents shall be served by email.
63. If a Participant is represented by legal counsel ("Counsel"), service on the Participant shall be by email to its Counsel. If a Participant is not represented by legal counsel, service on the Participant shall be by email to the Participant's designated contact person (the "Contact Person").

64. Documents to be provided to, or served on, the Commission shall be delivered electronically no later than 4:00 p.m. on the specified date, to Notice@OLRTPublicInquiry.ca.

### **Notices of Alleged Misconduct**

65. In accordance with subsection 17(1) of the *Act*, the Commissioner will not make a finding of misconduct on the part of any person unless that person has had reasonable notice of the substance of the alleged misconduct and was given the opportunity to respond.
66. All notices of alleged misconduct will be delivered on a confidential basis to the person to whom the allegations of misconduct refer, or their counsel.
67. If a notice of alleged misconduct is delivered, the recipient may apply to the Commissioner for leave to call evidence that the recipient believes may be helpful to respond to the alleged misconduct.

Dated February 8, 2022

## APPENDIX “A”

### **Confidentiality Undertaking for Counsel to Participants or Potential Witnesses in the LRT Commission of Inquiry**

For the purpose of this Undertaking, the term “document” is intended to have a broad meaning, and includes any and all documents and information in connection with the proceedings of the LRT Commission of Inquiry (the “Inquiry” or “Commission”), including without limitation, any and all technical, corporate, financial, economic and legal information and documentation, financial projection and budgets, plans, reports, opinions, models, photographs, recordings, personal training materials, memoranda, notes, data, analysis, minutes, briefing materials, submissions, correspondence, records, sound recordings, videotapes, films, charts, graphs, maps, surveys, books of account, or any other notes or communications in writing, and data and information in electronic form, data and information recorded or stored by means of any device and any other information pertaining to the Inquiry, irrespective of whether such information or documentation has been identified as confidential, and includes all other material prepared containing or based, in whole or in part, on any information included in the foregoing, including will-say statements referred to in Rule 49 above.

I, \_\_\_\_\_, undertake to the LRT Commission of Inquiry that any and all documents which are produced to me in connection with the Commission’s proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documents to anyone for whom I do not act or who has not been retained as an expert for the purposes of the Inquiry. In respect of anyone for whom I act, or any witness, or any expert retained for the purposes of the Inquiry, I further undertake that I will only disclose such documents to the individual in question upon receiving the written undertaking annexed as Appendix “B” to the *Rules of Procedure*.

I understand that this undertaking has no force or effect with respect to any document which has become part of the public proceedings of the Commission, or to the extent that the Commissioner has provided a written release to me from the undertaking with respect to any document. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry.

With respect to those documents which remain subject to this undertaking at the end of the Inquiry, I undertake to either destroy those documents, and provide a certificate of destruction to the Commission, or to return those documents to the Commission for destruction. I further undertake to collect for destruction such documents from anyone

to whom I have disclosed any documents which were produced to me in connection with the Commission's proceedings.

I understand that a breach of any of the provisions of this Undertaking is a breach of an order made by the Commission.

Signature

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Print Name

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Date

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Witness

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Print Name

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Date

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## **APPENDIX “B”**

### **Confidentiality Undertaking for Participants and Potential Witnesses with Counsel to the LRT Commission of Inquiry**

For the purpose of this Undertaking, the term “document” is intended to have a broad meaning, and includes any and all documents and information in connection with the proceedings of the LRT Commission of Inquiry (the “Inquiry” or “Commission”), including without limitation, any and all technical, corporate, financial, economic and legal information and documentation, financial projection and budgets, plans, reports, opinions, models, photographs, recordings, personal training materials, memoranda, notes, data, analysis, minutes, briefing materials, submissions, correspondence, records, sound recordings, videotapes, films, charts, graphs, maps, surveys, books of account, or any other notes or communications in writing, and data and information in electronic form, data and information recorded or stored by means of any device and any other information pertaining to the Inquiry, irrespective of whether such information or documentation has been identified as confidential, and includes all other material prepared containing or based, in whole or in part, on any information included in the foregoing, including will-say statements referred to in Rule 49 above.

I, \_\_\_\_\_, undertake to the LRT Commission of Inquiry that any and all documents which are produced to me in connection with the Commission’s proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documents to anyone.

I understand that this undertaking has no force or effect with respect to any document which has become part of the public proceedings of the Commission, or to the extent that the Commissioner has provided a written release to me from the undertaking with respect to any document. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry.

With respect to those documents which remain subject to this undertaking at the end of the Inquiry, I further understand that such documents will be collected from me by the person acting as my counsel who disclosed them to me.

I understand that a breach of any of the provisions of this Undertaking is a breach of an order made by the Commission.

Signature

\_\_\_\_\_

Print Name

\_\_\_\_\_

Date

\_\_\_\_\_

Witness

\_\_\_\_\_

Print Name

\_\_\_\_\_

Date

\_\_\_\_\_

## APPENDIX “C”

### **Confidentiality Undertaking for Potential Witnesses or Participants with No Counsel to the LRT Commission of Inquiry**

For the purpose of this Undertaking, the term “document” is intended to have a broad meaning, and includes any and all documents and information in connection with the proceedings of the LRT Commission of Inquiry (the “Inquiry” or “Commission”), including without limitation, any and all technical, corporate, financial, economic and legal information and documentation, financial projection and budgets, plans, reports, opinions, models, photographs, recordings, personal training materials, memoranda, notes, data, analysis, minutes, briefing materials, submissions, correspondence, records, sound recordings, videotapes, films, charts, graphs, maps, surveys, books of account, or any other notes or communications in writing, and data and information in electronic form, data and information recorded or stored by means of any device and any other information pertaining to the Inquiry, irrespective of whether such information or documentation has been identified as confidential, and includes all other material prepared containing or based, in whole or in part, on any information included in the foregoing, including will-say statement referred to in Rule 49 above.

I, \_\_\_\_\_, undertake to the LRT Commission of Inquiry that any and all documents which are produced to me in connection with the Commission’s proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documents to anyone.

I understand that this undertaking has no force or effect with respect to any document which has become part of the public proceedings of the Commission, or to the extent that the Commissioner has provided a written release to me from the undertaking with respect to any document. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry.

With respect to those documents which remain subject to this undertaking at the end of the Inquiry, I further understand that such documents will be collected from me by Commission Counsel or a person designated by the Commission Counsel who disclosed them to me.

I understand that a breach of any of the provisions of this Undertaking is a breach of an order made by the Commission.

Signature

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Print Name

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Date

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Witness

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Print Name

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Date

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