

INVESTIGATION re:
RED HILL VALLEY PARKWAY

March 13, 2019

Report by Lenczner Slaght Royce Smith Griffin LLP for the City of Hamilton

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I. OUR MANDATE

We have been retained by the City of Hamilton (the “**City**”) to provide advice with respect to the different kinds of investigations available under the *Municipal Act, 2001* (the “**Municipal Act**”), the *Public Inquiries Act, 2013* (the “**Public Inquiries Act**”) and independent external investigations, as detailed under the Notice of Motion, dated February 13, 2019 (the “**Notice of Motion**”).

The choice of investigation will largely depend on the issue that Council wishes to investigate. In Section II of this report, we provide our understanding as to the nature and scope of the investigation and, in Section IV, we provide our recommendation as to which investigation would be the most cost-effective and timely, while still ensuring public accountability and involvement.

Key features of each type of investigation, including the applicable procedure, the powers of the investigator, what information the final report can contain and the projected time frame and costs is provided in Section III of this report.

II. SCOPE OF INVESTIGATION

Council must first identify the nature and scope of the investigation, before it can select the type of investigation it wishes to commence.

As we understand it, the crux of the investigation concerns the failure to disclose a draft report prepared by Tradewind Scientific Ltd., dated November 20, 2013 (the “**Report**”) to Council and to the public.

The Report was commissioned by Golder Associates Ltd. (“**Golders**”) to test the friction levels on the Red Hill Valley Parkway (the “**RHVP**”) as part of a larger safety audit of the RHVP, between Dartnall Road and Greenhill Avenue, initiated by the City in September, 2013.

The Report uses UK standards of measurements to calculate friction levels and assesses these levels against a reference table, which identifies threshold levels at which results may be classified as requiring investigation or immediate intervention. The Report concluded that the friction averages measured on some areas of the RHVP were “below or well below the same” UK investigatory levels and recommended that further friction testing take place.

We understand that in a subsequent report by CIMA, dated February 4, 2019, it is noted that when the 2013 friction levels are assessed against the United Kingdom Pavement Management (“**UKPM**”) table, (as opposed to the reference table used in the Report) the results were closer to the threshold levels, than what was indicated by Tradewind in the Report. The CIMA report also notes that the UKPM table is more broadly used than the reference table used in the Report.

In January, 2014, Golders submitted the Report to the City’s Engineering Services. For unknown reasons, Council, and consequently the public, were not made aware of the information and recommendations in the Report.

In or around August or September, 2018, the Director of Engineering Services became aware of an email leading to the Report. The Report was disclosed to the public in or around February, 2019.

As we understand it, the purpose of the investigation is to determine why Council, and consequently the public, were not made aware of the information and recommendations contained in the Report in 2014, after the Report was provided to the Director of the Department of Engineering Services.

Based on our review, we understand that Council may also consider broadening the scope of the investigation to review the manner in which the City addressed all safety concerns about the RHVP, including the failure to disclose the findings in the Report.

III. INVESTIGATIONS

A. Overview

There are three types of investigations available under the Municipal Act:

- (1) a judicial inquiry under s. 274;
- (2) an investigation by the appointed Ombudsman under s. 223.13; and
- (3) an investigation by the appointed Auditor General under s. 223.19.

The investigator's procedural powers are provided under the Public Inquiries Act, in the case of the auditor general and the judicial inquiry and in the Ombudsman Act, in the case of the ombudsman investigation.

We understand that the City has appointed Charles Brown as the Auditor General, but has not yet appointed an ombudsman.

In this case, Council has the following options. It can:

1. request a judicial inquiry;
2. appoint an ombudsman to conduct the investigation;
3. appoint an ombudsman and direct that he or she delegate their powers to an independent, external investigator to conduct the investigation;
4. request that Mr. Brown conducts the investigation or replace Mr. Brown as auditor general and request that his replacement conduct the investigation; or
5. direct Mr. Brown to delegate his powers for the purposes of the investigation to an independent, external investigator.

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

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

Investigations by the auditor general and ombudsman are better suited where the subject of the investigation relates to a specific and narrow issue. In both cases, the scope of the inquiry is set by Council, allowing for better control of the process to, for example, ensure public accountability and involvement in the process, while keeping the investigation cost-effective.

In the sections below, we have summarized the key features of each type of investigation and enclose the relevant statutory provisions.

B. Judicial inquiry

Judicial inquiries are convened in the wake of public horror or outrage.¹ They are expected to uncover the truth and are preventative, in that they seek to ensure that any mistakes uncovered will not be repeated. Unlike civil or criminal trials, no legal consequences flow from the commission's findings.²

Judicial inquiries often involve complex factual matrixes, including voluminous documents and a large cast of characters. Examples of Canadian judicial inquiries include the Walkerton Inquiry into the contamination of the water supply and the Krever Inquiry into the contamination of the Canadian blood system.

Judicial inquiries under the Municipal Act have been used to investigate aspects of particular transactions. For example, in the 2002 Computer Lease Inquiry, the Honourable Madam Justice Bellamy was appointed to investigate transactions related to certain computer leasing and software contracts entered into by the City of Toronto between 1998 and 2001 and to consider the impact of these transactions on the City's tax payers. The Toronto City Council passed a resolution authorizing this investigation in February, 2002. It took until 2005 for the public hearings to be completed and a final report to be issued. The initial budget of \$1 million increased to over \$11 million by the conclusion of the inquiry.

¹ "Toronto Computer Leasing Inquiry Report Volume 3: Inquiry Process", 2006; The Honourable Madam Justice Denise E. Bellamy, Commissioner ["**Justice Bellamy Report**"] at pg. 19.

² Justice Bellamy Report at pg. 22.

Similarly, in February, 2018, the Town of Collinwood passed a resolution to commence a judicial inquiry with respect to the sale of the Town's electric utility. It took until April, 2018, for a judge of the Superior court to be appointed to commission the inquiry. The inquiry was estimated to take 9 months. Based on this estimation, the cost of the inquiry was set between \$1.4 to \$1.6 million. Unfortunately, the inquiry is still pending and will likely continue until the fall of 2019. It is unclear what the current cost of the inquiry is, however, it is unlikely to remain within the estimated budget

In the sections below, we provide specific information about the judicial inquiry process, as requested in the Notice of Motion.

1. Who sets the scope of the judicial inquiry?

Under section 274 of the Municipal Act, a municipality may pass a resolution to commence a judicial inquiry by a judge of the Superior Court. The scope of the judicial inquiry is quite broad, giving the municipality latitude to commence an inquiry on virtually any matter related to the municipality. Specifically, the municipality can request a judge to:

- a. investigate misconduct or breach of trust of another council member, an employee or contractor of the municipality in relation to their duties and obligations to the municipality;
- b. inquire into any matter connected with the good governance of the municipality; or
- c. inquiry into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by council or elected by electors.

Once a judge is appointed as commissioner of the inquiry, the municipality is stripped of its ability to control the inquiry process. For example, although the municipality sets the initial scope of the inquiry, the commissioner may, without consulting the municipality, expand the scope of the investigation where he or she deems it appropriate to do so.

2. How does a judicial inquiry proceed?

Once a resolution to commence a judicial inquiry is passed by city council, the municipality must write to the Regional Senior Justice and Chief Justice of the Superior Court to request that a judge be appointed to the inquiry. It may take several months to identify a judge that is available to commission the inquiry in light of judicial shortages and the backlog of cases.

The procedure of a judicial inquiry is not prescribed by statute or regulation. The commissioner is entitled to set his or her own policies and procedures. There are, however, standard procedural steps that commissioners are likely to undertake. These are detailed below and include references to Justice Bellmay's report in which her Honour provided guidance on the practical aspects of conducting a judicial inquiry following the completion of the Computer Leasing Inquiry.

a. Practical and Logistical Considerations

Once a judge is appointed as the commissioner of the inquiry, there are a number of practical and logistical requirements that must be tended to before the investigation can commence. Often, the commissioner will meet with the municipality to discuss the logistics of the inquiry, including budget, office, venue, equipment and staff.

After this initial meeting the commissioner will retain legal counsel. The role of commission counsel is to represent the judge and assist him or her in the conduct of the inquiry. All costs associated commission counsel are borne by the municipality.

After commission counsel is appointed, the commissioner will employ a number of other staff members necessary to efficiently run the inquiry. This includes a chief administrative officer to oversee the logistics, including securing an office and a hearing room, a communications officer to liaise with the media, junior lawyers, researchers, investigators, law clerks and administrative and technology support, who, among other things, will maintain the inquiry website. As the judicial inquiry is a public process, the inquiry website is an important point of accessibility.

b. Rules of Procedure

After the initial logistical concerns are addressed, the commissioner will establish the rules of procedure for the inquiry. This involves preparing a draft set of rules and circulating to members with standing for their comments. Depending on the number of individuals with feedback, this process could take several weeks.

c. Document Management

Depending on the number of documents involved in the inquiry, the commissioner may conduct a tender to retain the services of a document management company to maintain an electronic database of documents.

d. Determining who has Standing

In a public inquiry, anyone that has an interest in the subject matter of the inquiry is invited to apply to receive standing to participate in the inquiry to some extent. For example, some members may be given the right to access and review documents, others may be given the right to examine witnesses and make submissions in the hearing.

Advertisements are made in relevant media outlets to encourage individuals who have an interest in the hearing to apply for standing. Preliminary hearings are conducted to determine whether or not applicants may receive standing. The decision to grant standing falls within the exclusive purview of the commissioner.

Depending on the number of individuals that apply for standing, this phase could take several months to complete. In this case, we understand that there are a number of members of the public, including families that have lost loved ones on the RHVP and individuals who have threatened or commenced legal action against the City with respect to the RHVP that may wish to apply for standing if Council elects to commence a judicial inquiry.

e. The Investigation

The investigation phase is the least public part of the inquiry. It involves the collection of documents, identifying and interviewing relevant witnesses, retention of experts or external investigators. Depending on the scope of the investigation, the number of documents and witnesses, the investigation phase could take up to a year.

f. The Hearing

The precise nature of a hearing may vary depending on the structure implemented by the commissioner. However, hearings generally involve: opening statements, examination and cross examination of witnesses and closing submissions by commission counsel and those parties who have been granted standing.

3. What are the powers of the commissioner?

The commissioner's procedural powers in a judicial inquiry are enumerated in s. 33 of the Public Inquiries Act. This includes the ability to summons witnesses and compel production of documents from third parties. It also includes the power to apply to the Court to apprehend a witness who failed to appear upon receiving a summons.

4. What findings can the commissioner make?

In their final report, the commissioner can:

- make findings of fact. For example, he or she can make findings as to when an individual became aware of the Report;
- make findings of misconduct. For example, he or she can find that an individual ought to have circulated the Report upon becoming aware of its existence; and

- make recommendations on policy changes and protocols.

However, unlike a civil or criminal trial, a judicial inquiry cannot establish criminal culpability or civil liability. Indeed, there are no legal consequences to a public inquiry.³

Rather, in an inquiry the commissioner makes findings of fact and renders his or her opinion at the conclusion of the investigation.⁴ These opinions or facts are not enforceable and do not bind courts considering the same subject matter.⁵ As stated by the Federal Court:

A public inquiry is not equivalent to a civil or criminal trial. . . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; **the Commission can only “inquire” and “report” . . . Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding . . . is that reputations could be tarnished.**⁶

5. What are the projected time frame and costs?

In our view, a judicial inquiry into why the Report was not disclosed to Council and/or to the public would take a minimum of a year and a half.

A broader investigation to review the manner in which the City addressed safety concerns relating to the RHVP, including the lack of disclosure about the Report may take up to two and a half years.

A judicial inquiry would cost a minimum of \$2 million up to potentially \$11 million. The costs are hard to predict and will depend on a myriad of factors, including the scope and nature of the investigation, the number of witnesses and documents, the number of individuals who are granted standing and whether any judicial applications are commenced.

C. Ombudsman Investigation

A municipality may appoint an ombudsman to conduct an independent investigation on a broad range of issues. Once an ombudsman is appointed, the municipality can direct the ombudsman to delegate its authority to an independent, external investigator to conduct the investigation.

³ Justice Bellamy Report at pg. 22

⁴ Justice Bellamy Report at pg. 23

⁵ *Ibid*

⁶ *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23.

The ombudsman, or the external investigator to whom the ombudsman has delegated his or her authority, can investigate any decision, recommendation, act done or omitted in the course of the administration of the municipality which affects any person in his, her or its personal capacity.

Past examples of investigations by the provincial ombudsman include an investigation into the City of Brampton's procurement practices and an investigation into the Ministry of Community Safety and Correctional Services' response to allegations of excessive abuse.

1. Who sets the scope of the ombudsman investigation?

The scope of the ombudsman's investigation will be set by the municipality.

The Municipality Act expressly authorizes the municipality to establish the ombudsman's duties and powers and requires the municipality to have regard to the ombudsman's independence, impartiality and the credibility and confidentiality of the investigative process when establishing these duties and powers.

2. Who can be appointed as an ombudsman?

Anyone can be appointed as an ombudsman; he or she need not be an employee of the municipality. The municipality can appoint external investigators, such as lawyers or auditors to perform the investigation.

The ombudsman can also delegate any of his or her powers and duties to any person, other than a member of Council. As such, Council can appoint a point person as the ombudsman, but instruct him or her to delegate the execution of the investigation to external investigators.

3. What is the procedure in an ombudsman investigation?

There is no prescribed investigation procedure by which an ombudsman must abide. This allows the ombudsman to devise a flexible procedure that is appropriate to the scale of the particular investigation.

As part of its mandate, Council can require the ombudsman to publish a draft procedural guide and invite limited, written feedback from stakeholders to ensure public accountability and involvement.

At a minimum, the investigation procedure will involve the review of documents, witness interviews, retention of experts, if necessary, and the production of a final report.

Council can require the ombudsman or external investigator to provide periodic reporting to ensure Council and the public is apprised of the status of the investigation.

4. What are the powers of the ombudsman?

Section 223.14(3) of the Municipal Act empowers the ombudsman to exercise the powers listed in s. 19 of the *Ombudsman Act* which, among other things, gives the ombudsman the right to

summons and examine an employee of the municipality or any other person who has information or documents relating to subject of the investigation.

5. What findings can an ombudsman make?

The ombudsman's investigation must be conducted in private. However, any information that is necessary to establish grounds for the conclusions and recommendations of the report can be made public.

In the final report, the ombudsman, or the external investigator to whom the ombudsman has delegated his or her authority to conduct the investigation, can address any issues identified by Council, including making:

- findings of fact. For example, the ombudsman can make findings as to when an individual became aware of the Report;
- findings of misconduct. For example, the ombudsman can find that an individual ought to have circulated the Report upon becoming aware of its existence; and
- recommendations on policy changes and protocols.

The ombudsman, or the external investigator, cannot make legal findings or conclusions. Any findings of fact or misconduct in his or her report cannot be used to establish civil or criminal liability.

6. What is the projected timeframe and expected costs?

Based on the information we have to date, an ombudsman investigation as to why the Report was not disclosed to Council and/or to the public would take between 2 to 4 months.

A broader investigation to review the manner in which the City addressed all safety concerns about the RHVP, including the lack of disclosure about the Report may take up to 9 months.

The cost of the ombudsman investigation would vary significantly depending on who is appointed to conduct the investigation. By way of comparison, in our view, it would cost approximately \$300,000 for a Bay street firm to investigate why Council, and consequently the public, were not made aware of the information and recommendations contained in the Report.

D. Auditor General Investigation

Under the Municipal Act, a municipality can appoint an auditor general to assist Council in holding itself and its administrators accountable for the quality of stewardship over public funds and for ensuring municipal operations achieve value for money.

Although there is no specific provision in the Municipal Act authorizing an auditor general to conduct investigations, a municipality is entitled to assign the auditor general specific duties, which could include requiring the auditor general to investigate a certain matter.

Once the municipality appoints an auditor general, it can direct the auditor general to delegate his or her authority to an independent, external investigator to conduct an investigation.

1. Who sets the scope of the investigation?

As is the case with the ombudsman investigation, the scope of the auditor general's investigation can be set by the municipality. The Municipality Act expressly authorizes the municipality to establish the auditor general's duties and powers.

2. Who can be appointed as an auditor general?

As is the case with the ombudsman, anyone can be appointed by the municipality and he or she need not be an employee of the municipality. The municipality may engage external investigators, such as lawyers or auditors to perform the investigation.

The auditor general can also delegate his or her powers and duties to any person, other than a member of Council.

3. What is the procedure in an auditor general's investigation?

Like the ombudsman investigation, there is no prescribed investigative procedure by which an auditor general must abide. At a minimum, the investigation procedure will involve the review of documents, witness interviews, retention of experts, if necessary, and the production of a final report.

4. What are the powers of an auditor general?

The auditor general's procedural powers are enumerated in s. 33 of the Public Inquiries Act (as opposed to the Ombudsman Act, which confers procedural powers on the ombudsman). This is significant because while in both cases, the investigator can summon witnesses and compel production of documents from third parties, only the auditor general has the power to apply to the Court to apprehend a witness who failed to appear upon receiving a summons. This power is not afforded to the ombudsman under the Ombudsman Act.

5. What findings can an auditor general make?

As is the case with the ombudsman, the auditor general, or the external investigator to whom the auditor general has delegated his or her authority, can make:

- findings of fact. For example, he or she can make findings as to when an individual became aware of the Report;
- findings of misconduct. For example, he or she can find that an individual ought to have circulated the Report upon becoming aware of its existence; and
- recommendations on policy changes and protocols.

The auditor general, or the external investigator, cannot make legal findings or conclusions. Any findings of fact or misconduct in his or her report cannot be used to establish civil or criminal liability.

6. What is the projected time frame and expected costs?

The cost and time projections for the auditor general investigation are the same as the ombudsman investigation.

We believe it would take approximately 2 to 4 months to investigate why the Report was not disclosed to Council or the public and up to 9 months for the broader investigation as to whether the City appropriately addressed safety concerns relating to the RHVP.

The cost of the investigation will vary greatly depending on who conducts the investigation. By way of comparison, in our view, it would cost approximately \$300,000 for a Bay street firm to investigate why Council, and consequently the public, were not made aware of the information and recommendations contained in the Report.

IV. Recommendation

Based on the information we have been provided, we do not recommend commencing a judicial inquiry to investigate why the Report was not disclosed to Council or the public. As detailed above, judicial inquiries are better suited for large, complex investigations and, as such, tend to be expensive and lengthy. Furthermore, while the municipality will bear all costs associated with the inquiry, it will have no control of the investigation process.

An investigation by the ombudsman or auditor general is better suited to investigate the failure to disclose the Report as it is a discrete issue that can efficiently be investigated through the production of documents and examination of witnesses. Council can devise the structure of the investigation to allow for public accountability and involvement, while ensuring the investigation is cost-effective and completed in a timely fashion.

Council can also direct the ombudsman or auditor general to delegate their powers to an independent, external investigator, such as lawyers or auditors, to conduct the investigation.

As a next step, we recommend that Council confirm the precise nature and scope of the investigation it wishes to commence. Following this, we would be please to provide a follow up report to confirm what kind of investigation Council should commence and address any questions that may remain after our presentation on March 20, 2019.

Ontario Statutes
Municipal Act, 2001
Part VI — Practices and Procedures (ss. 224-284.1)
Judicial Investigation

Most Recently Cited in: [RSJ Holdings Inc. v. London \(City\)](#), 2007 SCC 29, 2007 CarswellOnt 3919, 2007 CarswellOnt 3920, 36 M.P.L.R. (4th) 1, 36 M.P.L.R. (4th) 2, J.E. 2007-1242, 283 D.L.R. (4th) 257, [2007] S.C.J. No. 29, 364 N.R. 362, 226 O.A.C. 375, [2007] 2 S.C.R. 588, 157 A.C.W.S. (3d) 842 | (S.C.C., Jun 21, 2007)

S.O. 2001, c. 25, s. 274

s 274.

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274.

274(1) Investigation by judge

If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

- (a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;
- (b) inquire into any matter connected with the good government of the municipality; or
- (c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors.

274(2) Application of *Public Inquiries Act, 2009*

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

274(3) Report

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

274(4) Counsel

The council may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry.

274(5) Representation by counsel

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

274(6) Costs

The judge may engage counsel and other persons to assist in the investigation or inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the municipality.

Amendment History

2009, c. 33, Sched. 6, s. 72(5)

Currency

Ontario Current to Gazette Vol. 152:07 (February 16, 2019)

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Ontario Statutes
Public Inquiries Act, 2009
Procedures under Other Acts

Most Recently Cited in: [Ontario \(College of Physicians and Surgeons of Ontario\) v. Mrozek](#), 2018 ONCPSD 17, 2018 CarswellOnt 5402 | (Ont. C.P.S.D.C., Apr 6, 2018)

S.O. 2009, c. 33, Sched. 6, s. 33

s 33. Former Part II inquiries

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33. Former Part II inquiries

33(1) Definition

In this section,

"**inquiry**" includes a determination, examination, hearing, inquiry, investigation, review or other activity to which this section is applicable.

33(2) Standard procedure

This section applies where another Act or a regulation confers on a person or body the power to conduct an inquiry in accordance with this section or certain provisions of this section.

33(3) Power to summon witnesses, papers, etc.

The person or body conducting the inquiry may require any person by summons,

- (a) to give evidence on oath or affirmation at the inquiry; or
- (b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13).

33(4) Form and service of summons

A summons issued under subsection (3) shall be in either the English or French version of the form prescribed by the regulations and shall be served personally on the person summoned and he or she shall be paid at the time of service the like fees and allowances for attendance as a witness before the person or body conducting the inquiry as are paid for the attendance of a witness summoned to attend before the Superior Court of Justice.

33(5) Stated case for contempt for failure to attend hearing, etc.

Where any person without lawful excuse,

- (a) on being duly summoned under subsection (3) as a witness at an inquiry makes default in attending at the inquiry; or
- (b) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the person or body conducting the inquiry to be taken or made, or to produce any document or thing in his or

her power or control legally required by the person or body conducting the inquiry to be produced, or to answer any question to which the person or body conducting the inquiry may legally require an answer; or

(c) does any other thing that, if the person or body conducting the inquiry had been a court of law having power to commit for contempt, would have been contempt of that court,

the person or body conducting the inquiry may state a case to the Divisional Court setting out the facts and that court may, on the application of the person or body conducting the inquiry or of the Attorney General, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

33(6)Protection of witnesses

A witness at an inquiry shall be deemed to have objected to answer any question asked him or her upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him or her in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence.

33(7)Right to object

A witness shall be informed by the person or body conducting the inquiry of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*.

33(8)No discipline of employees

No adverse employment action shall be taken against any employee of any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a person or body conducting the inquiry under the applicable Act or to the staff of a person or body conducting the inquiry.

33(9)Offence

Any person who, contrary to subsection (8), takes adverse employment action against an employee is guilty of an offence and on conviction is liable to a fine of not more than \$5,000.

33(10)Application

This section applies despite any other Act and the oath of office of a public servant within the meaning of the *Public Service of Ontario Act, 2006* is not breached where information is disclosed as described in subsection (8).

33(11)Effective date

This section applies to representations made, and information disclosed, on or after June 12, 2000.

33(12)Unsworn evidence admissible

A person or body conducting the inquiry may admit at an inquiry evidence not given under oath or affirmation.

33(13)Privilege

Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

33(14)Release of documents

Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to the person by the person or body conducting the inquiry within a reasonable time.

33(15)Photocopies of documents

Where a document has been produced in evidence before a person or body conducting the inquiry, the person or body conducting the inquiry may or the person producing it may with the leave of the person or body conducting the inquiry,

cause the document to be photocopied and the photocopy may be filed in evidence in the place of the document produced, and a copy of a document produced in evidence, certified to be a true copy thereof by the person or body conducting the inquiry, is admissible in evidence in proceedings in which the document produced is admissible, as evidence of the document produced.

33(16) Power to administer oaths and require evidence under oath

A person or body conducting an inquiry has power to administer oaths and affirmations for the purpose of the inquiry and may require evidence to be given under oath or affirmation.

33(17) Powers of multiple appointees

Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by subsection (3), (4), (14), (15) or (16).

Currency

Ontario Current to Gazette Vol. 152:07 (February 16, 2019)

Ontario Statutes

Municipal Act, 2001

Part V.1 — Accountability and Transparency (ss. 223.1-223.24) [Heading added 2006, c. 32, Sched. A, s. 98.]

S.O. 2001, c. 25, s. 223.13

S 223.13

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223.13

223.13(1) Ombudsman

Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Ombudsman who reports to council and whose function is to investigate in an independent manner any decision or recommendation made or act done or omitted in the course of the administration of the municipality, its local boards and such municipally-controlled corporations as the municipality may specify and affecting any person or body of persons in his, her or its personal capacity.

223.13(2) Powers and duties

Subject to this Part, in carrying out the functions under subsection (1), the Ombudsman may exercise the powers and shall perform the duties assigned to him or her by the municipality.

223.13(3) Matters to which municipality is to have regard

In appointing the Ombudsman and in assigning powers and duties to him or her, the municipality shall have regard to, among other matters, the importance of the matters listed in subsection (5).

223.13(4) Same, Ombudsman

In carrying out his or her functions under subsection (1), the Ombudsman shall have regard to, among other matters, the importance of the matters listed in subsection (5).

223.13(5) Same

The matters referred to in subsections (3) and (4) are,

- (a) the Ombudsman's independence and impartiality;
- (b) confidentiality with respect to the Ombudsman's activities; and
- (c) the credibility of the Ombudsman's investigative process.

223.13(6) Powers paramount

The powers conferred on the Ombudsman under this Part may be exercised despite any provision in any Act to the effect that any such decision, recommendation, act or omission is final, or that no appeal lies in respect of them, or that no proceeding or decision of the person or organization whose decision, recommendation, act or omission it is shall be challenged, reviewed, quashed or called in question.

223.13(7) Decisions not reviewable

Nothing in this Part empowers the Ombudsman to investigate any decision, recommendation, act or omission,

(a) in respect of which there is, under any Act, a right of appeal or objection, or a right to apply for a hearing or review, on the merits of the case to any court, or to any tribunal constituted by or under any Act, until that right of appeal or objection or application has been exercised in the particular case, or until after any time for the exercise of that right has expired; or

(b) of any person acting as legal adviser to the municipality, a local board or a municipally-controlled corporation or acting as counsel to any of them in relation to any proceedings.

223.13(8) Delegation

The Ombudsman may delegate in writing to any person, other than a member of council, any of the Ombudsman's powers and duties under this Part.

223.13(9) Same

The Ombudsman may continue to exercise the delegated powers and duties, despite the delegation.

223.13(10) Status

The Ombudsman is not required to be a municipal employee.

Amendment History

2006, c. 32, Sched. A, s. 98

Currency

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Ontario Statutes

Municipal Act, 2001

Part V.1 — Accountability and Transparency (ss. 223.1-223.24) [Heading added 2006, c. 32, Sched. A, s. 98.]

S.O. 2001, c. 25, s. 223.14

S 223.14

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223.14**223.14(1) Investigation**

Every investigation by the Ombudsman shall be conducted in private.

223.14(2) Opportunity to make representations

The Ombudsman may hear or obtain information from such persons as he or she thinks fit, and may make such inquiries as he or she thinks fit and it is not necessary for the Ombudsman to hold any hearing and no person is entitled as of right to be heard by the Ombudsman, but if at any time during the course of an investigation it appears to the Ombudsman that there may be sufficient grounds for him or her to make any report or recommendation that may adversely affect the municipality, a local board, a municipally-controlled corporation or any other person, the Ombudsman shall give him, her or it an opportunity to make representations respecting the adverse report or recommendation, either personally or by counsel.

223.14(3) Application of *Ombudsman Act*

Section 19 of the *Ombudsman Act* applies to the exercise of powers and the performance of duties by the Ombudsman under this Part and, for the purpose, references in section 19 of that Act to "any public sector body" are deemed to be references to "the municipality, a local board or a municipally-controlled corporation".

223.14(4) [Repealed 2014, c. 13, Sched. 9, s. 21.]**Amendment History**

2006, c. 32, Sched. A, s. 98; 2006, c. 35, Sched. C, s. 134(3); 2014, c. 13, Sched. 9, s. 21

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Ontario Statutes**Municipal Act, 2001**

Part V.1 – Accountability and Transparency (ss. 223.1-223.24) [Heading added 2006, c. 32, Sched. A, s. 98.]

S.O. 2001, c. 25, s. 223.15

s 223.15**Currency****223.15****223.15(1)Duty of confidentiality**

Subject to subsection (2), the Ombudsman and every person acting under the instructions of the Ombudsman shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

223.15(2)Disclosure

The Ombudsman may disclose in any report made by him or her under this Part such matters as in the Ombudsman's opinion ought to be disclosed in order to establish grounds for his or her conclusions and recommendations.

223.15(3)Section prevails

This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

Amendment History

2006, c. 32, Sched. A, s. 98

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[Ontario Statutes](#)[Municipal Act, 2001](#)[Part V.1 – Accountability and Transparency \(ss. 223.1-223.24\) \[Heading added 2006, c. 32, Sched. A, s. 98.\]](#)

Most Recently Cited in: [Georgina \(Town\) v. Blanchard](#), 2016 ONCA 122, 2016 CarswellOnt 2112, 55 M.P.L.R. (5th) 228, 263 A.C.W.S. (3d) 776 | (Ont. C.A., Feb 12, 2016)

S.O. 2001, c. 25, s. 223.16

s 223.16 No review, etc.

[Currency](#)**223.16 No review, etc.**

No proceeding of the Ombudsman under this Part shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of the Ombudsman is liable to be challenged, reviewed, quashed or called in question in any court.

Amendment History

2006, c. 32, Sched. A, s. 98

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Ontario Statutes

Municipal Act, 2001

Part V.1 – Accountability and Transparency (ss. 223.1-223.24) [Heading added 2006, c. 32, Sched. A, s. 98.]

S.O. 2001, c. 25, s. 223.17

s 223.17

Currency

223.17

223.17(1) Testimony

The Ombudsman and any person acting under the instructions of the Ombudsman shall not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to his or her knowledge in the exercise of his or her functions under this Part.

223.17(2) Same

Anything said or any information supplied or any document or thing produced by any person in the course of any investigation by or proceedings before the Ombudsman under this Part is privileged in the same manner as if the inquiry or proceedings were proceedings in a court.

Amendment History

2006, c. 32, Sched. A, s. 98

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Municipal Act, 2001

Part V.1 – Accountability and Transparency (ss. 223.1-223.24) [Heading added 2006, c. 32, Sched. A, s. 98.]

S.O. 2001, c. 25, s. 223.18

s 223.18 Effect on other rights, etc.

Currency

223.18 Effect on other rights, etc.

The rights, remedies, powers, duties and procedures established under sections 223.13 to 223.17 are in addition to the provisions of any other Act or rule of law under which any remedy or right of appeal or objection is provided for any person, or any procedure is provided for the inquiry into or investigation of any matter, and nothing in this Part limits or affects any such remedy or right of appeal or objection or procedure.

Amendment History

2006, c. 32, Sched. A, s. 98

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Ontario Statutes
Ombudsman Act

Most Recently Cited in: [Iluymade v. Toronto Community Housing Corp.](#), 2018 ONSC 7727, 2018 CarswellOnt 22060 | (Ont. S.C.J., Dec 31, 2018)

R.S.O. 1990, c. O.6, s. 19

S 19.

Currency

19.

19(1)Evidence

The Ombudsman may from time to time require any officer, employee or member of any public sector body who in his or her opinion is able to give any information relating to any matter that is being investigated by the Ombudsman to furnish to him or her any such information, and to produce any documents or things which in the Ombudsman's opinion relate to any such matter and which may be in the possession or under the control of that person.

19(2)Examination under oath

The Ombudsman may summon before him or her and examine on oath,

- (a) any complainant;
- (b) any person who is an officer or employee or member of any public sector body and who, in the Ombudsman's opinion, is able to give any information mentioned in subsection (1); or
- (c) any other person who, in the Ombudsman's opinion, is able to give any information mentioned in subsection (1),

and for that purpose may administer an oath.

19(3)Secrecy

Subject to subsection (4), no person who is bound by the provisions of any Act, other than the *Public Service of Ontario Act, 2006*, the *Municipal Act, 2001* or the *City of Toronto Act, 2006*, as the case may be, to maintain secrecy in relation to, or not to disclose, any matter shall be required to supply any information to or answer any question put by the Ombudsman in relation to that matter, or to produce to the Ombudsman any document or thing relating to it, if compliance with that requirement would be in breach of the obligation of secrecy or non-disclosure.

19(3.1)Providing personal information despite privacy Acts

A person who is subject to the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act* or the *Personal Health Information Protection Act, 2004* is not prevented by any provisions in those Acts from providing personal information to the Ombudsman, when the Ombudsman requires the person to provide the information under subsection (1) or (2).

19(4)Idem

With the previous consent in writing of any complainant, any person to whom subsection (3) applies may be required by the Ombudsman to supply information or answer any question or produce any document or thing relating only to the complainant, and it is the duty of the person to comply with that requirement.

19(5)Privileges

Every person has the same privileges in relation to the giving of information, the answering of questions, and the production of documents and things as witnesses have in any court.

19(6)Protection

Except on the trial of any person for perjury in respect of the person's sworn testimony, no statement made or answer given by that or any other person in the course of any inquiry by or any proceedings before the Ombudsman is admissible in evidence against any person in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Ombudsman shall be given against any person.

19(7)Right to object to answer

A person giving a statement or answer in the course of any inquiry or proceeding before the Ombudsman shall be informed by the Ombudsman of the right to object to answer any question under section 5 of the *Canada Evidence Act*.

19(8)Prosecution

No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with any requirement of the Ombudsman under this section.

19(9)Fees

Where any person is required by the Ombudsman to attend before him or her for the purposes of this section, the person is entitled to the same fees, allowances, and expenses as if he or she were a witness in the Superior Court of Justice, and the provisions of any Act, regulation or rule in that behalf apply accordingly.

Amendment History

2004, c. 3, Sched. A, s. 94; 2006, c. 19, Sched. C, s. 1(1); 2006, c. 35, Sched. C, s. 94(3); 2014, c. 13, Sched. 9, s. 11

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Most Recently Cited in: [Inzola Group Limited v. City of Brampton](#), 2019 ONSC 7632, 2019 CarswellOnt 452 | (Ont. S.C.J., Jan 11, 2019)

S.O. 2001, c. 25, s. 223.19

S 223.19

Currency

223.19

223.19(1) Auditor General

Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Auditor General who reports to council and is responsible for assisting the council in holding itself and its administrators accountable for the quality of stewardship over public funds and for achievement of value for money in municipal operations.

223.19(1.1) Same

The Auditor General shall perform his or her responsibilities under this Part in an independent manner.

223.19(2) Exceptions

Despite subsection (1), the responsibilities of the Auditor General shall not include the matters described in clauses 296(1) (a) and (b) for which the municipal auditor is responsible.

223.19(3) Powers and duties

Subject to this Part, in carrying out his or her responsibilities, the Auditor General may exercise the powers and shall perform the duties as may be assigned to him or her by the municipality in respect of the municipality, its local boards and such municipally-controlled corporations and grant recipients as the municipality may specify.

223.19(4) Grant recipients

The authority of the Auditor General to exercise powers and perform duties under this Part in relation to a grant recipient applies only in respect of grants received by the grant recipient directly or indirectly from the municipality, a local board or a municipally-controlled corporation after the date on which this section comes into force.

223.19(5) Delegation

The Auditor General may delegate in writing to any person, other than a member of council, any of the Auditor General's powers and duties under this Part.

223.19(6) Same

The Auditor General may continue to exercise the delegated powers and duties, despite the delegation.

223.19(7) Status

The Auditor General is not required to be a municipal employee.

Amendment History

2006, c. 32, Sched. A, s. 98; 2009, c. 33, Sched. 21, s. 6(11)

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[Ontario Statutes](#)[Municipal Act, 2001](#)[Part V.1 – Accountability and Transparency \(ss. 223.1-223.24\) \[Heading added 2006, c. 32, Sched. A, s. 98.\]](#)

Most Recently Cited in: [Greater Sudbury \(City\), Re](#) , 2014 CarswellOnt 19392 | (Ont. Information & Privacy Comm., May 26, 2014)

S.O. 2001, c. 25, s. 223.20

S 223.20

[Currency](#)

223.20

223.20(1) Duty to furnish information

The municipality, its local boards and the municipally-controlled corporations and grant recipients referred to in subsection 223.19(3) shall give the Auditor General such information regarding their powers, duties, activities, organization, financial transactions and methods of business as the Auditor General believes to be necessary to perform his or her duties under this Part.

223.20(2) Access to records

The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality, the local board, the municipally-controlled corporation or the grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Part.

223.20(3) No waiver of privilege

A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege.

Amendment History

2006, c. 32, Sched. A, s. 98

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Most Recently Cited in: [Greater Sudbury \(City\), Re](#) , 2014 CarswellOnt 19392 | (Ont. Information & Privacy Comm., May 26, 2014)

S.O. 2001, c. 25, s. 223.21

§ 223.21

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223.21

223.21(1) Powers re examination

The Auditor General may examine any person on oath on any matter pertinent to an audit or examination under this Part.

223.21(2) Application of *Public Inquiries Act, 2009*

Section 33 of the *Public Inquiries Act, 2009* applies to an examination by the Auditor General.

Amendment History

2006, c. 32, Sched. A, s. 98; 2009, c. 33, Sched. 6, s. 72(3)

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Most Recently Cited in: [Greater Sudbury \(City\), Re](#) , 2014 CarswellOnt 19392 | (Ont. Information & Privacy Comm., May 26, 2014)

S.O. 2001, c. 25, s. 223.22

S 223.22

[Currency](#)

223.22

223.22(1) Duty of confidentiality

The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

223.22(2) Same

Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

(a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

(b) under the *Criminal Code* (Canada).

223.22(3) Same

A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 223.20 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

223.22(4) Section prevails

This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

Amendment History

2006, c. 32, Sched. A, s. 98

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[Part V.1 – Accountability and Transparency \(ss. 223.1-223.24\) \[Heading added 2006, c. 32, Sched. A, s. 98.\]](#)

Most Recently Cited in: [McCartney v. Ottawa \(City\)](#), 2010 ONSC 2690, 2010 CarswellOnt 2938, 71 M.P.L.R. (4th) 286, 188 A.C.W.S. (3d) 66 | (Ont. S.C.J., May 7, 2010)

S.O. 2001, c. 25, s. 223.23

s 223.23 Testimony

[Currency](#)

223.23 Testimony

Neither the Auditor General nor any person acting under the instructions of the Auditor General is a competent or compellable witness in a civil proceeding in connection with anything done under this Part.

Amendment History

2006, c. 32, Sched. A, s. 98

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Ontario Statutes
Public Inquiries Act, 2009
Procedures under Other Acts

Most Recently Cited in: [Ontario \(College of Physicians and Surgeons of Ontario\) v. Mrozek](#), 2018 ONCPSD 17, 2018 CarswellOnt 5402 | (Ont. C.P.S.D.C., Apr 6, 2018)

S.O. 2009, c. 33, Sched. 6, s. 33

s 33. Former Part II inquiries

Currency

33. Former Part II inquiries

33(1) Definition

In this section,

"**inquiry**" includes a determination, examination, hearing, inquiry, investigation, review or other activity to which this section is applicable.

33(2) Standard procedure

This section applies where another Act or a regulation confers on a person or body the power to conduct an inquiry in accordance with this section or certain provisions of this section.

33(3) Power to summon witnesses, papers, etc.

The person or body conducting the inquiry may require any person by summons,

- (a) to give evidence on oath or affirmation at the inquiry; or
- (b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13).

33(4) Form and service of summons

A summons issued under subsection (3) shall be in either the English or French version of the form prescribed by the regulations and shall be served personally on the person summoned and he or she shall be paid at the time of service the like fees and allowances for attendance as a witness before the person or body conducting the inquiry as are paid for the attendance of a witness summoned to attend before the Superior Court of Justice.

33(5) Stated case for contempt for failure to attend hearing, etc.

Where any person without lawful excuse,

- (a) on being duly summoned under subsection (3) as a witness at an inquiry makes default in attending at the inquiry; or
- (b) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the person or body conducting the inquiry to be taken or made, or to produce any document or thing in his or

her power or control legally required by the person or body conducting the inquiry to be produced, or to answer any question to which the person or body conducting the inquiry may legally require an answer; or

(c) does any other thing that, if the person or body conducting the inquiry had been a court of law having power to commit for contempt, would have been contempt of that court,

the person or body conducting the inquiry may state a case to the Divisional Court setting out the facts and that court may, on the application of the person or body conducting the inquiry or of the Attorney General, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

33(6)Protection of witnesses

A witness at an inquiry shall be deemed to have objected to answer any question asked him or her upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him or her in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence.

33(7)Right to object

A witness shall be informed by the person or body conducting the inquiry of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*.

33(8)No discipline of employees

No adverse employment action shall be taken against any employee of any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a person or body conducting the inquiry under the applicable Act or to the staff of a person or body conducting the inquiry.

33(9)Offence

Any person who, contrary to subsection (8), takes adverse employment action against an employee is guilty of an offence and on conviction is liable to a fine of not more than \$5,000.

33(10)Application

This section applies despite any other Act and the oath of office of a public servant within the meaning of the *Public Service of Ontario Act, 2006* is not breached where information is disclosed as described in subsection (8).

33(11)Effective date

This section applies to representations made, and information disclosed, on or after June 12, 2000.

33(12)Unsworn evidence admissible

A person or body conducting the inquiry may admit at an inquiry evidence not given under oath or affirmation.

33(13)Privilege

Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

33(14)Release of documents

Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to the person by the person or body conducting the inquiry within a reasonable time.

33(15)Photocopies of documents

Where a document has been produced in evidence before a person or body conducting the inquiry, the person or body conducting the inquiry may or the person producing it may with the leave of the person or body conducting the inquiry,

cause the document to be photocopied and the photocopy may be filed in evidence in the place of the document produced, and a copy of a document produced in evidence, certified to be a true copy thereof by the person or body conducting the inquiry, is admissible in evidence in proceedings in which the document produced is admissible, as evidence of the document produced.

33(16) Power to administer oaths and require evidence under oath

A person or body conducting an inquiry has power to administer oaths and affirmations for the purpose of the inquiry and may require evidence to be given under oath or affirmation.

33(17) Powers of multiple appointees

Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by subsection (3), (4), (14), (15) or (16).

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