Ombudsman
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Ombudsman Report

Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013

"In the Back Room"

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Ombudsman of Ontario
October 2013

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Introduction

1 The *Municipal Act, 2001* requires that municipalities pass by-laws setting out the rules of procedure for their meetings. The law requires public notice of meetings, and that all meetings be open to the public except for those which qualify under the exemptions in s. 239 of the Act. Before holding a meeting or part of a meeting that is to be closed to the public, the municipality, local board, or committee must state by resolution that the meeting is closed and the general nature of the matter to be considered.

2 The *Municipal Act* also empowers citizens by giving them the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities have the option to appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. The City of London chose to appoint the Ontario Ombudsman as its investigator effective January 1, 2008.

3 As an investigator of closed meeting complaints, it is the duty of my Office to consider whether the open meeting requirements of the *Municipal Act* and relevant municipal by-laws have been followed.

Complaints

4 My Office received 60 complaints alleging that on Saturday, February 23, 2013 – five days before a key budget vote – seven members of the Council for the City of London gathered in a secluded backroom at Billy T's Tap and Grill restaurant for an improper closed meeting.

5 The seven council members named were: Mayor Joe Fontana and Councillors Dale G. Henderson, Stephen Orser, Bud Polhill, Joe Swan, Paul Van Meerbergen, and Sandy White.

6 Private gatherings of council members that take place outside of chambers and lack the legally required procedural elements (i.e. public notice, agendas, and minutes) understandably attract public scrutiny. As a closed meeting investigator, one of my tasks is to ensure that city business meetings are not taking place in the guise of social gatherings. I have investigated numerous other cases alleging breakfast, lunch, dinner and other social get-togethers are illegal meetings. In a 2010 investigation, I concluded the Town of Mattawa council violated the open meeting

rules when an improper in-camera discussion took place between council members at the conclusion of a museum tour.[1]

Investigative Process

7 On February 25, 2013, my Office began receiving complaints related to a gathering at Billy T's. Two days later, on February 27, I assigned the Special Ombudsman Response Team to conduct a preliminary review of the complaints.

8 On March 1, 2013, the team made an unannounced visit to Billy T's and took photos of the layout and reservations calendar. They also conducted interviews with members of the public who were at the restaurant on the day of the gathering.

9 Based on this review, our assessment of the case was that it warranted in-depth examination, and on March 7, 2013, I notified the City of London that I would be investigating whether council and committee members had improperly held a closed meeting. The investigation included interviews with staff and patrons of Billy T's, as well as the seven council members, who were issued summonses to give testimony under oath, in interviews on March 20, 2013.[2] Also, committee agendas, reports, meeting minutes, and local media coverage surrounding the issues were monitored and reviewed throughout the investigation.

10 Documentary evidence was provided by council members, including copies of cell phone bills and emails. After investigators cross-referenced and reviewed that material, council members were again issued summonses for a second round of sworn interviews, held on June 19, 2013.

11 At the time of the second interviews, all seven council members involved in the Billy T's gathering were represented by two lawyers from a Toronto law firm. The decision to provide this representation was made at a London council meeting on June 11, 2013.[3] To maintain the integrity of our investigation, witnesses and their lawyers were not provided with copies of the transcripts from the first round of interviews in advance of the second round. The witnesses were permitted, however, to consult the transcripts during their interviews.

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[1] Ombudsman of Ontario, *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings* (December 2010), online: http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf.

[2] *Ombudsman Act*, RSO 1990, c O.6 s 19(2).

[3] City of London, City Council, *Council Minutes*, 11th Meeting (June 11, 2013), online: City of London Meetings https://www.london.ca/d.aspx?s=/meetings/default/meetingpackages.htm.

12 During my investigation, the lawyers representing the seven participants in the Billy T's gathering raised concerns that the publicity it had generated might interfere with the overall integrity of the investigative process. Although my investigations are conducted in private and subject to confidentiality provisions, it is in the public interest that we work as transparently as possible. To that end, at times, I provide information to the public about issues under investigation, as well as the progress of investigations through their procedural stages.

Preliminary Report

13 In accordance with our procedures, all City of London council members – including those who were not present at the Billy T's gathering – were given an opportunity to review a draft of this report containing preliminary investigative findings and analysis, and to offer responses before the report was finalized. They were given the option of receiving a copy of the preliminary report for review on the condition that they signed an undertaking to keep it confidential, per the requirements of the *Ombudsman Act.* The lawyers representing the seven council members who met at Billy T's were also provided with copies of the transcripts from their clients' interviews to be returned with their response. In order to preserve the integrity of our investigation, and protect witness confidentiality, evidentiary records relating to other witnesses were not disclosed.

14 We received 10 confidentiality undertakings from councillors between September 13 and 16, 2013, and provided copies of the report accordingly.

15 On September 27, 2013, we received the response from the lawyers representing the seven council members who met at Billy T's. We did not receive any other responses. I have considered the response from the lawyers in finalizing this report, and have included a copy of it as an appendix.

When is a Lunch Meeting a "Meeting"?

Interpretation of the Law

16 All of the participants at the Billy T's gathering acknowledged that council and committee meetings must comply with procedural by-laws and the open meeting requirements of the *Municipal Act, 2001*. Their assertions throughout remained that they did not participate in a "meeting" on February 23, 2013 at Billy T's. Instead, they claim the mayor-with-six-councillors gathering was a happenstance convergence of councillors for social purposes.

17 The term "meeting" is defined in section 238 of the *Municipal Act* as "any regular, special or other meeting of a council, of a local board or of a committee of either of them." Similarly, City of London Council Procedure By-law A-45 defines the term as a "meeting of the Council, Committee of the Whole or a standing committee."[4] Both definitions are unfortunately circular, and neither gives precise criteria as to what constitutes a "meeting."

18 Recognizing a need for clarity, in my report *Don't Let the Sun Go Down on Me*, on my 2008 investigation into a closed meeting of council for the City of Greater Sudbury (regarding access to tickets to an Elton John concert), I arrived at a more practical definition. After a review of the relevant case law and principles of openness, transparency, and accountability,[5] I formulated a working definition. To constitute a meeting covered by the *Municipal Act*:

> **Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.**[6]

19 This definition remains consistent with leading interpretations of the open meetings concept and upholds the public's right to observe municipal government in process.[7]

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4 City of London, By-law No A-45, Council Procedure By-law, (1 December 2012), s 1.1.

5 Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf at paras. 42-92.

6 *Ibid*., paras. 54-60.

7 *London (City) v. RSJ Holdings Inc*., [2007] 2 S.C.R. 588, 2007 SCC 29 at para. 38; *Southam Inc. v. Ottawa (City)* (1991), 5 O.R. (3d) 726 (Ont. Div. Ct.) at paras. 12-18; *Southam Inc. v. Hamilton-Wentworth Economic Development Committee* (1988), 66 O.R. (2d) 213 (Ont. C.A.) at paras. 9-12; Jason Reynar, *Transparent Municipal Governance: When Must a Meeting be Open*? (2011) 88 M.P.L.R. (4th) 68.

20 In their response to my preliminary report, the lawyers on behalf of the group that gathered at Billy T's submitted that my working definition of "meeting" is overly broad and not supported by the established jurisprudence. They took the position that in order to constitute a meeting, a matter must be "materially" advanced toward a decision. They argued that I should apply the standard of material advancement in assessing whether a meeting of the councillors took place at Billy T's.

21 In *Don't Let the Sun Go Down on Me*, I extensively reviewed the relevant court cases, which have varied in their treatment of this issue. At the time, I considered but rejected a number of approaches, including one requiring proof that matters have "materially moved along." As I wrote in that report:

> In sum, it is clear that each of these approaches – the "arriving at a decision" approach; the "materially moving matters along" approach; and the assessment of whether the protagonists have come together for the purpose of working towards the ultimate resolution of a matter that requires the exercise of their power – derive from a purposive examination of the legislation. These are examples of democratic bodies engaged at various stages in the exercise of the very kinds of power that the voters have a legitimate expectation of having input into, and where the appearance of integrity in the exercise of political power can be affected. The first two approaches are under-inclusive, for the principles can be engaged even without decisions being arrived at or deliberations being productive. I have therefore used these cases as inspiration given that they purport to embrace a principled approach, however imperfectly, but have restyled their standards by examining the broader question of **whether the participants have come together for the purpose of exercising the power or authority of the council or committee or for the purpose of doing the groundwork necessary to exercise that power or authority.**[8]

22 The approach I have adopted reflects the principles of transparency, openness and accountability that underscore the open meeting requirements.

Quorum: Power in Numbers

23 When determining if a meeting has occurred, the concept of a legal quorum is an important consideration. Alone, it is not conclusive, but having a quorum means a sufficient number of members (a majority in this case) are present to legally transact business. It is obvious that once a gathering constitutes a quorum for a council or standing committee, the opportunity and risk of those individuals collectively exercising their authority increases.

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[8] *Ibid.,* footnote 7 at paragraph 85.

24 In many jurisdictions, the open meeting rules are only applied if quorum exists. In Ontario, legislators have not gone so far as to make a quorum necessary to satisfy the definition of a meeting. As such, my interpretation is that the Legislature contemplated, and left open, the possibility that a gathering short of a quorum can still contravene the open meeting rules of the *Municipal Act*. This was my conclusion in 2009 when I found that the Council of the Township of Nipissing engaged in serial telephone meetings to improperly conduct business, despite a quorum never being present when the individual calls occurred.[9]

So, We Can't Talk to Each Other?

25 To be clear, the *Municipal Act, 2001* does not create an absolute prohibition against members of council discussing city business outside chambers. It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.[10]

26 What does threaten the heart of democracy is when a quorum of council or a standing committee improperly gathers outside of council chambers, to the exclusion of the public ear and eye. The problem becomes especially acute as such gatherings progress along a continuum towards secrecy and seclusion, particularly on the eve of influential or controversial council votes.

27 When council members come together informally, there is an increased danger that they, intentionally or otherwise, may obtain information and enter into discussions that lay the groundwork to exercise their power and authority. This type of conduct should be avoided, as it violates the open meeting provisions of the *Municipal Act*.

28 Gatherings of this sort attract public distrust because they can easily drift into areas of improper discussion without the proper transparency safeguards. The mere appearance of this type of gathering is suspect and should be avoided. As I noted in my 2012 report on my investigation of a closed breakfast meeting involving members of Hamilton city council:

> Unlike formal meetings, when minutes are kept, it is difficult to accurately reconstruct the conversational record of informal gatherings. It is challenging in these circumstances to assure the public that no improper discussions have

[9] Ombudsman of Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008* (February 6, 2009), online: http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf.

[10] *Supra* note 7, paras. 81-83.

> taken place… [C]ouncillors should be cautious when meeting informally, especially when they represent a quorum of a decision-making body, to ensure that any discussions do not stray into areas that might constitute laying the groundwork for future decision-making.[11]

Who's Who and Background

29 This is not the first time my Office has investigated a controversial lunch meeting involving members of London council. Almost exactly a year prior to the Billy T's incident, on February 21, 2012, five of these same council members – Mayor Fontana and Councillors Henderson, Orser, Polhill and Van Meerbergen – sparked complaints to my Office when they (and one other councillor, Denise Brown) met for lunch at the Harmony Grand Buffet restaurant, prior to the final budget vote that afternoon. Together with councillors Swan and White, these council members became known in the media as the "Fontana Eight" because they tended to vote as a majority bloc on council.[12]

30 Similar to this case, the Harmony Grand Buffet gathering attracted significant controversy and media attention.

31 I issued my report on that investigation in August 2012. In it, I found there was insufficient evidence to conclude that committee business was discussed, and accordingly the lunch did not constitute a "meeting" violating the open meeting requirements of the *Municipal Act*. I did caution, however, that the "lunch in a local restaurant just before a critical and controversial vote on the budget was ill-conceived."[13]

32 The council of the City of London is made up of 14 councillors and the Mayor, making the total number of voting seats 15. The City also has six standing and 12 advisory committees. One of the six standing committees, the Strategic Priorities and Policy Committee (SPPC), is made up of all council members; the other five committees are made up of subgroupings of five or six councillors each.

33 A summary of the composition of four of the six committees, listing which members were present at Billy T's on February 23, 2013, is set out in **Table 1**.

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[11] Ombudsman of Ontario, *Investigation into whether the City of Hamilton's NHL Proposal Sub-Committee held an improperly closed meeting* (February 2012), online: http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/HamiltonNHL-final-EN-for-web_1.pdf at para. 24.

[12] Patrick Maloney, "Eight-Member Council Bloc Runs City, Henderson Says", *London Free Press* (12 December 2012) online: <http://www.lfpress.com/2012/12/11/london-mayor-joe-fontana-survives-step-aside-vote-8-5>.

[13] Ombudsman of Ontario, *Investigation into whether Council for the City of London held an improper closed meeting at Harmony Grand Buffet on February 21, 2012* (August 2012), online: http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/LondonAugust2012-EN.pdf at para. 59.

Table 1 – London city committees with quorum at Billy T's

Committee[14]	Members at Billy T's on February 23	Members not at Billy T's on February 23
Civic Works Committee Members: 6 Quorum: 4	1. Mayor Fontana 2. Councillor Van Meerbergen 3. Councillor White 4. Councillor Orser	5. Councillor M. Brown 6. Councillor Usher
Corporate Services Committee Members: 5 Quorum: 3	1. Mayor Fontana 2. Councillor Polhill 3. Councillor Swan	4. Councillor Branscombe 5. Councillor Bryant
Investment and Economic Prosperity Committee Members: 6 Quorum: 4	1. Mayor Fontana 2. Councillor Swan 3. Councillor Henderson 4. Councillor Orser 5. Councillor Van Meerbergen	6. Councillor M. Brown
Planning and Environment Committee Members: 6 Quorum: 4	1. Mayor Fontana 2. Councillor Polhill 3. Councillor Henderson 4. Councillor White	5. Councillor Branscombe 6. Councillor Hubert

34 Immediately obvious is that on February 23, 2013, the group of seven who gathered at Billy T's represented a legal quorum with the power and authority to conduct city business in four of the six standing committees of council.[15] The group was also one member shy of the magic number eight – quorum for the entire city council.

35 Each council member who attended the gathering denied in our interviews that it was a council or committee meeting. They insisted the gathering was purely social, unplanned, and occurred by chance.

Summary of Facts and Evidence

36 Sworn accounts provided by the council members in two sets of interviews were confusing and at times conflicted with one another. The following is a summary of the evidence.

[14] Who Does What: Standing and Advisory Committees, online: City of London http://www.london.ca/d.aspx?s=/City_Council/standcom.htm.

[15] City of London, By-law No A-45, Council Procedure By-law, (1 December 2012), Part 8.

Let's Make a Plan: Friday, February 22

Mayor Fontana's Sequential Meetings

37 The Mayor testified that on February 22, 2013, the Friday before the gathering, he made plans to meet at Billy T's with Councillor Orser the next day at 11 a.m., and Councillors Henderson and Swan at noon.[16] He said he and Councillor Orser planned to discuss two matters that included an area known as "the McCormick property" and a personal matter. The topics for the noon meeting included layoffs at Diamond Aircraft and general "ideas" relating to the Investment Economic and Prosperity Committee. The Mayor stated in a media interview February 25 that he made it clear they were not going to discuss the budget.[17]

Councillors Polhill and Van Meerbergen

38 Councillor Polhill testified that at 5:30 p.m. that Friday evening, he called and arranged to meet Councillor Van Meerbergen for lunch – also at Billy T's – to talk about their shared interest in cars.[18] We obtained Councillor Polhill's phone records after his first interview. They reveal that on that Friday, he made six calls over the span of 13 minutes. (Note: In cell phone bills, calls lasting less than a minute are rounded up to 1 minute; this can include attempted calls that are not answered and calls that go to voicemail.) The calls were as follows:

1. **5:47 p.m.** to Mayor Fontana (for 1 minute, 48 seconds)
2. **5:49 p.m.** to Councillor Van Meerbergen (for 2 minutes, 21 seconds)
3. **5:55 p.m.** to Councillor Henderson (for 1 minute, 15 seconds)
4. **5:56 p.m.** to Mayor Fontana again (for 1 minute)
5. **5:58 p.m.** to Councillor Orser (for 1 minute, 11 seconds); and
6. **6:00 p.m.** to Councillor White (for 1 minute, 20 seconds).

[16] Councillors Orser, Swan, Henderson, and Fontana represent quorum for the Investment & Economic Prosperity Committee (IEPC).
[17] *AM980 News* (February 25, 2013), radio program: (London: CFPL FM AM980).
[18] Councillor Polhill operates an auto repair shop and Councillor Van Meerbergen works in the auto parts industry.

Contradictions in Accounts

39 In his first interview, Councillor Polhill told investigators he remembered telling the Mayor on Friday, February 22 that he would be at Billy T's the next day. He said the Mayor responded he would show up there for lunch. The Mayor testified at first that he did not recall having any discussions related to a meeting at Billy T's with Councillor Polhill. When confronted with phone records during his second interview, he then said he recalled speaking with Councillor Polhill, but recalled it was "about the Ford plant." [19]

40 Councillor Polhill testified that on the evening before the gathering, he invited Councillor Van Meerbergen to lunch at Billy T's the next day. He also said he spoke to Councillors Orser and Henderson that evening. He said he did not invite them to Billy T's, but mentioned he would be there for lunch. Councillor Henderson, however, told us Polhill asked him to drop by Billy T's for coffee on Saturday at around 10 or 11 a.m., and indicated the Mayor might be there. Councillor Van Meerbergen's account matched that of Councillor Polhill. Like Henderson, he said he was also told the Mayor would be at Billy T's.

Councillor White and the LMCA Chair

41 Councillor White testified she tentatively arranged to meet a friend – the chair of the London Multicultural Community Association – at Billy T's[20] around noon on Saturday, February 23, to discuss multicultural issues. During her second interview, when confronted with cell phone records showing Councillor Polhill had called her Friday at 6 p.m., she remembered calling Councillor Polhill on Friday, February 22 about fixing her car, and he had called her back. Councillor White recalled they discussed her car repairs, a problem she had involving the London Transit Commission, Summer Fest, and Councillor Polhill's car group, which meets regularly at Billy T's. She said that Councillor Polhill was very supportive of her, as she was distressed about the London Transit Commission issue.

42 Councillor White was adamant that Councillor Polhill did not invite her to lunch at Billy T's during their conversation of one minute and 20 seconds.

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[19] Phone records show that the Mayor called Councillor Polhill on the morning of Friday, February 22, and Councillor Polhill called the Mayor twice, at 5:47 and 5:56 p.m.

[20] Councillor White referred to the restaurant by its former name, Killaly's.

Meeting Day: Saturday, February 23

43 As the accompanying diagram shows (page 16), upon entry through the front doors at Billy T's, there is a dining room on the left and a bar on the right. At the rear of the bar area, there is a windowless meeting room. This back room has three points of access. There is a main sliding door, which is reached via the bar area, and a second door; both can be closed for privacy. The third access point is a fire exit door at the back of the building that is typically locked from the inside. This is where the councillors and the Mayor gathered privately on February 23, 2013. Five members of the public who were in the restaurant that day told us that the backroom doors were closed for most of the council members' gathering.

Taking it to the Back Room

44 Mayor Fontana testified he called Billy T's to make a reservation for 11 a.m. on Saturday, February 23, 2013. He said he told the restaurant he would be meeting Councillor Orser and a couple of other people. His phone records confirm he made a two-minute call to Billy T's at 9:02 a.m. that day.

45 The reservations calendar at Billy T's for February 23, 2013 (photographed by investigators) showed only one handwritten reservation entry. The time "11 o'clock" is noted, along with the number 6, overwritten by a 7, and the words "people, BUD High CHAIR." One manager confirmed to us that he wrote the reservation, but later told our investigators it was not for Mayor Fontana or Councillor Bud Polhill. He was quoted on local radio as saying, "well, [Mayor Fontana] called in the morning, to see if they can use, I have a little banquet room in the back."[21] The manager testified to us that he was misquoted and had instead been referring to a reservation the Mayor made a month earlier. Another manager at Billy T's said the calendar entry referred to a different "Bud," as did Councillor Polhill.

46 The Mayor told us he arrived late to Billy T's – around 11:40 a.m. – and entered through the front door. He said he was surprised first to learn that Councillor White was there, and again when informed Councillors Polhill and Van Meerbergen had "popped in for their own lunch." The Mayor testified that once five or six council members had shown up to Billy T's, someone suggested they move to the back room. He told local media: "We started off with four, and then all of a sudden it was five or six, and so they put us in the back room … it wasn't planned … there was no agenda."[22]

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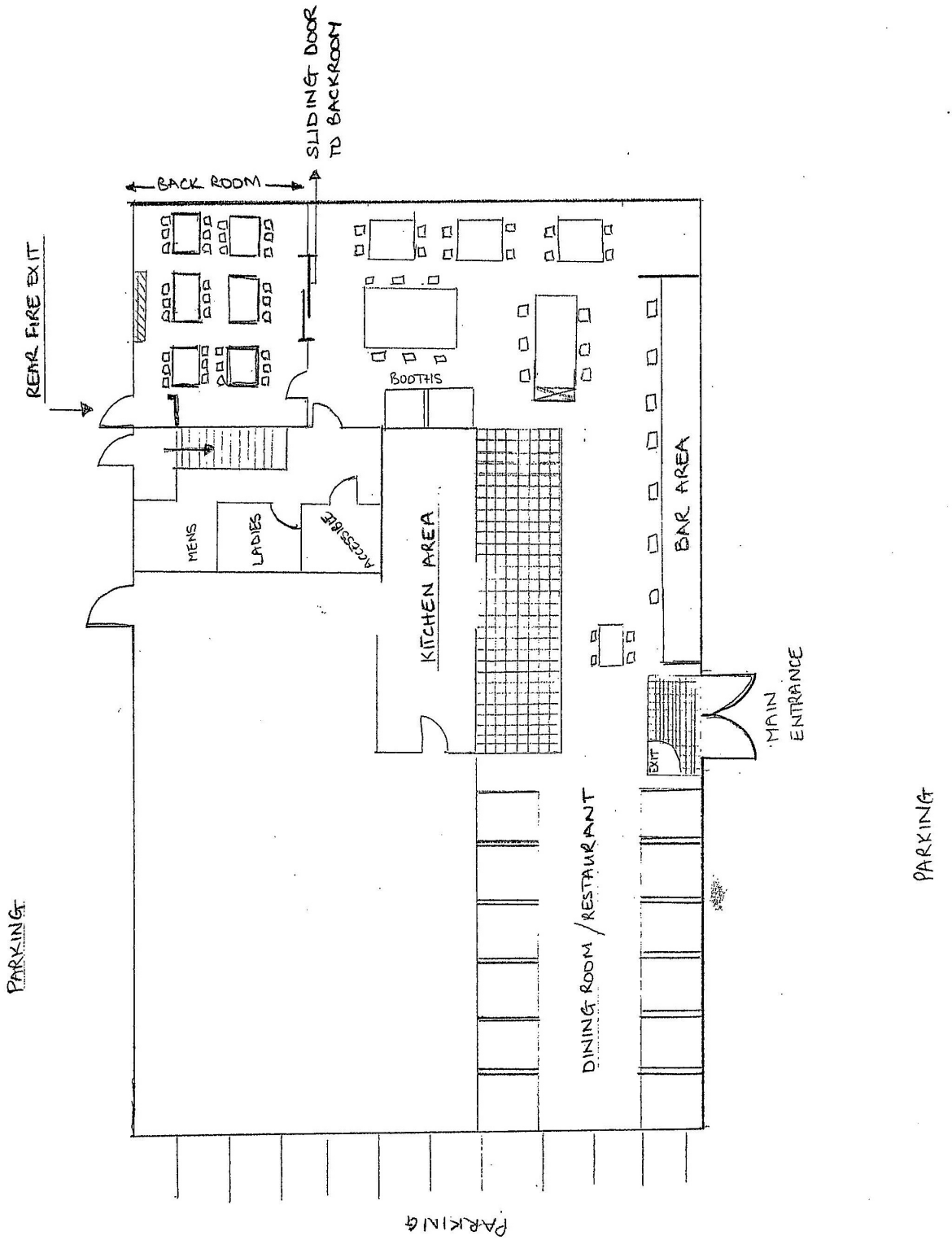
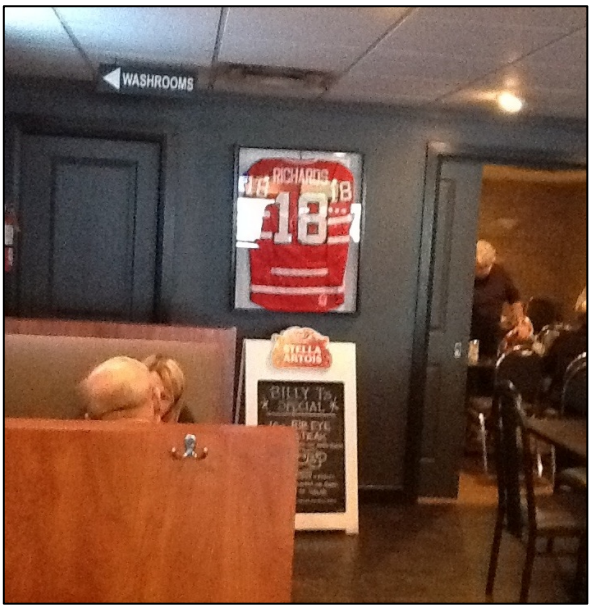
21 *AM980 News* (February 26, 2013), radio program: (London: CFPL FM AM980).

22 Sean Meyer, "Fontana Denies 'Secret' Lunch Meeting with Councillors," *London Community News* (February 26, 2013) online: http://www.londoncommunitynews.com/mobile/news/article/2080199/.

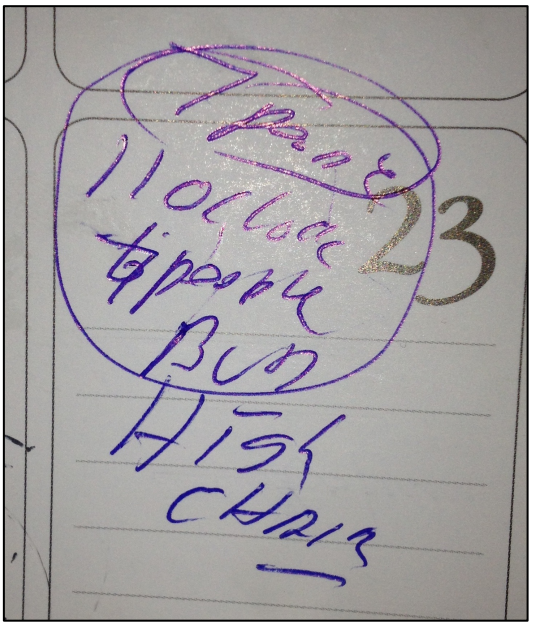
Diagram of Billy T's Tap and Grill (not to scale)



Photos of Billy T's Tap and Grill



Clockwise from top left: Billy T's front door; view into back room – sliding doors are at right, second door (closed) at left; back room and fire exit; reservation calendar for Feb. 23.



47 Councillor Orser told investigators he arrived at Billy T's at 11 a.m. with his school-age daughter. He said a waitress told him the Mayor had not yet arrived but would be sitting in the back room. Orser and his daughter then left and returned approximately 45 minutes later, at which time they joined Mayor Fontana in the back. Councillor Polhill then arrived and told Councillor Orser that Councillor White was in the main restaurant area, sitting with another patron. Councillor Orser left the back room and asked Councillor White if she wanted to meet his daughter in the back room. Councillor Orser said he was surprised to see the other councillors there, since he expected to meet one-on-one with the Mayor that morning.

48 Councillor Polhill's account differed. He testified that he arrived at the restaurant just after noon and parked behind the building because the front parking lot was full. He explained he is a regular at Billy T's and sometimes enters through the back door – the fire exit from the back room. He testified he knocked on the back door and was let in by Councillor Orser. Councillor Van Meerbergen also testified he entered through the back door at around 12:25-12:30 p.m., and Councillor Polhill may have opened it for him. Phone records show that upon arrival at Billy T's, Councillor Polhill made calls to Councillors Van Meerbergen (at 12:08 p.m.), White (12:10 p.m.) and the Mayor (at 12:10 p.m. – when the Mayor was also at Billy T's). Each call lasted one minute or less.

49 When asked about these calls during his second interview, Councillor Polhill said he called Councillor Van Meerbergen to tell him to park in the back parking lot because the front lot was full. He could not recall why he called Councillor White, but thought it could have been in connection with her car. He said the call to the Mayor was an accidental "butt call" – that is, the phone in his pocket might have "dialled itself."

50 Councillor Swan testified he arrived at Billy T's at around 11:45 a.m., entered through the front door and he spent some time talking to patrons in the main restaurant area. He then asked a Billy T's employee if the Mayor was there and was directed to the back room, where six other council members had already assembled. He said he had only expected to see the Mayor.

51 Councillor White told us she arrived at Billy T's at about 11:40 a.m. The chair of the LMCA had called her to say he was running late. She entered Billy T's through the front and joined a table of other patrons. She testified Councillor Orser appeared and invited her to join him and meet his daughter. She said she was surprised when she entered the back room and saw five council members. Two other witnesses told us that while Councillor White was in the bar area, she asked staff whether there was a back door. One quoted her as saying: "I need to get to the back without going through the restaurant… do you have a back door?" These witnesses said Councillor

White later went into the back room through the bar. One witness said she remarked: "Oh, forget it, I'm just going to go back there. Which way is it?"

52 The chair of the LMCA said he and Councillor White made arrangements on the evening of Friday, February 22 to meet around noon the next day, but they did not specify a venue. They both had meetings scheduled for that Saturday morning. At 10 a.m. on February 23, he called Councillor White and agreed to meet her in the "Highbury and Huron area" – about 2 kilometres from Billy T's.

53 He called her again later to say he was running late and offered to meet her at the Fireside Restaurant on Commissioner's Road East, approximately 9.5 kilometres from Billy T's. They finally met up between 12:45 p.m. and 1 p.m. He said Councillor White told him then that she had already eaten, and that she had unexpectedly run into other council members at Billy T's. He told our investigators that at his meeting with Councillor White, he discussed resigning as chair of the LMCA.

Let's Give Them Something to Talk About

54 Accounts of what was discussed at the backroom gathering vary. The participants gave a series of confusing and conflicting accounts to our investigators, maintaining that they carried out separate and parallel conversations on various topics, including personal matters and city-related items, discussed only in a general way. All seven denied discussing city business as a group.

55 The evidence relating to the city-related topics of discussion at Billy T's on February 23, 2013 is summarized in **Table 2**, followed by an explanation of the context of these topics.

Table 2: City-Related Topics of Discussion at Billy T's, February 23, 2013

SOURCE	TOPICS DISCUSSED	BUDGET TALK?	THINGS OVERHEARD
MAYOR FONTANA	▪ Layoffs at Diamond Aircraft (Swan)* ▪ McCormick property (Orser) ▪ Reserve funds ▪ Trillium Foundation grant, multiculturalism (White)	▪ No formal discussion on budget or other city business ▪ Reserve funds	▪ Renewable energy (Polhill, Van Meerbergen) ▪ Ford Plant (Polhill, Van Meerbergen) ▪ "Dale TV"**
HENDERSON	▪ Performing Arts Centre ▪ "Dale TV" ▪ IEPC "ideas"	▪ Ideas for achieving 0% tax increase ▪ Mayor gave "pep talk" on how "we want to get to zero"	▪ McCormick property (Orser) ▪ Someone said: "Oh, oh, someone called the *Free Press*"
ORSER	▪ McCormick property (Mayor)	▪ Did not discuss council business ▪ Mayor warned group not to talk about budget	▪ Chair of LMCA (White) ▪ "Dale TV" (Henderson)
POLHILL	▪ Ford plant (Van Meerbergen) ▪ Highway 401 interchange ▪ Trillium Foundation grant, multiculturalism (White) ▪ McCormick property (Orser)	▪ 1.2% tax increase	▪ "Dale TV" (Henderson)
SWAN	▪ Job loss and creation in his ward (Fontana) ▪ "Dale TV" (Henderson) ▪ Trillium Foundation grant, multiculturalism (White) ▪ Housing Committee (White)		
VAN MEERBERGEN	▪ Reserve funds in the budget (Fontana) ▪ Highway 401 interchange (Polhill)	▪ Reserve funds (Fontana) ▪ Need for 0% tax increase (Polhill) ▪ Mayor reminded them not to discuss city business	▪ "Dale TV" (Henderson) ▪ Someone suggested the gathering might be construed as an official meeting
WHITE	▪ Trillium Foundation grant and multiculturalism (Mayor) ▪ "Dale TV" (Henderson)		▪ Didn't pay attention to other conversations.

*Names in parentheses indicate with whom the discussion occurred.

**"Dale TV" is a series of YouTube videos in which Councillor Henderson discusses various topics, including city-related issues.

Conversation Topics in Context

Budget Strategy

56 The gathering at Billy T's occurred five days before the final budget vote. Prior to the gathering, the Strategic Priorities and Policy Committee (SPPC), comprised of all 15 council members, discussed budget items in a series of meetings in late January and early February. The recommendations from this committee were slated for a vote on February 28, 2013. As the budget vote approached, there was considerable debate surrounding whether the Mayor would deliver a budget with a "zero percent" tax increase and keep his 2010 campaign promise to freeze taxes.[23] To achieve this, he and supporting council members needed to find $11.5 million in new revenue sources or spending cuts by the end of February.[24]

57 Seven of the 15 council members were present at Billy T's – one short of legal quorum. This predictably sparked public concern that their closed-door, backroom gathering was a clandestine budget strategy session. The evidence, in fact, confirms there was general conversation about at least one budget issue, and three of the councillors admitted they talked about a zero percent tax increase.

58 After the Billy T's gathering, the budget included a tax increase of 1.2%, not zero.[25] Mayor Fontana argued that in place of a tax freeze, there should be a greater emphasis on economic prosperity and job creation. This also played to his other key campaign promise, to create 10,000 jobs over five years. The budget ultimately adopted on February 28, 2013 included a 1.2% tax increase.[26] Councillors Henderson, Polhill, and Van Meerbergen voted against the tax increase.

Trillium Foundation Grant/Multiculturalism

59 Five of the council members at the gathering were either engaged in or overheard discussions related to a Trillium Foundation grant, multicultural issues and/or the chair of the London Multicultural Community Association (LMCA). Councillor White had arranged to meet the chair of the LMCA that day, and ultimately did so

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[23] The "Fontana 8" had voted for a 0% tax increase in 2011 and 2012.

[24] "London City Budget: Staff Table a Draft Budget Calling for a 2.5% Property Tax Hike. Now the Political Process Begins," *London Free Press* (4 December 2012) online: http://www.lfpress.com/2012/12/04/london-city-budget-staff-table-a-draft-budget-calling-for-a-25-property-tax-hike--now-the-political-process-begins.

[25] Patrick Maloney, "London Mayor Joe Fontana Might not Deliver Third Straight Tax Freeze," *London Free Press* (28 February 2013) online: http://www.lfpress.com/2013/02/27/london-mayor-joe-fontana-might-not-deliver-third-straight-tax-freeze.

[26] Patrick Maloney, "Fontana's Tax Freeze Promise Crashes to a Halt," *London Free Press* (28 February 2013) online: http://www.lfpress.com/2013/02/28/fontanas-key-campaign-promise-crashes-to-a-halt.

immediately after leaving Billy T's. At the time, an LMCA request for additional funding from the City was a live issue before the Investment and Economic Prosperity Committee (IEPC). Quorum for IEPC was present at the gathering (Fontana, Swan, Henderson, Orser, and Van Meerbergen); in fact, only one voting member of this committee was absent.

60 Approximately two months prior to the Billy T's gathering, the IEPC considered a report assessing the strengths and limitations of a program to help immigrants start their own businesses in London. The program was sponsored by the LMCA, but lacked a feasibility study to show there was a sufficient market for the program. The report said the LMCA had received a $25,000 grant for a feasibility study from the Trillium Foundation – an Ontario government agency that awards grants to non-profit, charitable and community organizations involved in the arts, environment and social service sectors. On January 31, 2013, the Chair of the LMCA wrote to the City Treasurer, asking the city to match the funds provided by the Trillium Foundation to complete the feasibility study.

61 Ten days before the Billy T's gathering (February 13), the Strategic Priorities and Policy Committee, comprised of all of council, voted to receive the LMCA's letter. Five days after Billy T's, at the February 28 council meeting, Councillor White introduced a motion that the city put aside $25,000 to cover any costs of the feasibility study. The Mayor and Councillor Orser supported White's motion. Councillor Swan said it might be helpful for council to support the allocation of $25,000 toward a business plan rather than a feasibility study. Still, there was significant debate about whether council should approve this funding for the LMCA, because a motion was passed earlier that same evening to cut funding to community groups in general. In fact, Councillor Joni Baechler – in an unwittingly appropriate choice of words – criticized Councillor White's motion as a way of:

> …coming in the back door, getting something this council has said no to at the front door.[27]

A motion carried to refer the matter to staff and the issue was scheduled to return to the IEPC on March 25, 2013.

62 On the morning of March 25, 2013, the IEPC received a communication from the Directors of the LMCA, informing them that the chair (Councillor White's friend) had resigned, and as a result, the request for $25,000 was withdrawn.

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[27] City of London Open Meeting Minutes February 28, 2013. 6th Report of the Strategic Priorities & Policy Committee, IV. Items for Direction # 6 – 03:09:50 – 03:40:00 http://sire.london.ca/agdocs.aspx?doctype=minutes&itemid=18456 at 03:30:50

Highway 401 Interchanges

63 Three councillors recalled some discussion at Billy T's about Highway 401 interchanges – a $100-million investment by the Ontario government towards the creation and upgrade of interchanges in London. News of an agreement between the city and the province on the project was public before the Billy T's gathering. Mayor Fontana was quoted in the media as predicting that all four interchanges would be complete by 2016, bringing "tens of thousands of jobs" to the 10-kilometre stretch of the freeway that crosses London.[28] The project has been considered by council and a number of committees, including the Civic Works Committee (CWC), Planning and Environment Committee, and the IEPC.

64 On February 4, 2013, the CWC addressed a draft by-law approving the agreement with the province, and it was passed by council on March 5, 2013. On May 6, 2013, the CWC considered a transportation and environmental study relating to the interchanges. On June 17, the same committee discussed land transfers between the city and the Ontario Ministry of Transportation. On April 23, 2013, the Planning and Environment Committee (PEC) considered the impact and heard from the public in relation to the Highway 401 industrial growth strategy. Additionally, the Highway 401 and 402 corridor was one of the projects and programs that the IEPC directed city staff to consider in the context of the city's Community Improvement Program on April 29, 2013.

McCormick Property

65 Four of the council members present at Billy T's either took part in or overheard others discussing "the McCormick property" – the site of an abandoned cookie and candy factory in London. It was taken over by the city for tax arrears, but before the property could be improved or sold, it was damaged by fire. Councillor Orser has been a vocal and strong proponent for development of the property and commented that his Billy T's discussion "subject matter" was the potential for 200 jobs and the need for a $50-million investment that could "resurrect it and get it going quick."[29]

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[28] New Hwy. 401 underpass predicted to lead to development, jobs, growth By Chip Martin, The London Free Press Wednesday, October 10, 2012 8:04:25 EDT PM http://www.lfpress.com/2012/10/10/hwy-401-interchanges-expected-to-bring-thousands-of-jobs

[29] "Ombudsman investigating complaints over 'improper' London council meeting," CTV News London March 8, 2013 10:31AM EST http://london.ctvnews.ca/ombudsman-investigating-complaints-over-improper-london-council-meeting-1.1187520

66 While the McCormick property was an issue in the fall before the Billy T's gathering, and had come before two of the committees that had quorum at the lunch, neither of these committees has addressed the property since. The issue was, however, back on the council agenda on April 30, and the city issued a request for development proposals for the site that closed July 4, 2013.

The Getaway: Backdoor Exits, Phone Calls and Email

67 Councillors were asked what time and by which exit (back or front) they left Billy T's after lunch on February 23, 3013. **Table 3** is a summary of their evidence.

Table 3 – Departure Information

	TIME OF DEPARTURE	EXIT CHOICE
MAYOR FONTANA	12:50 p.m.	Front door
HENDERSON	Not sure	Back door
ORSER	Last to leave (after 1 p.m.)	Front door
POLHILL	1 p.m. (approx.)	Back door
SWAN	12:25 p.m.	Back door
VAN MEERBERGEN	12:55 p.m.	Back door
WHITE	12:20 p.m.	Back door (then re-entered at front)

68 There were material inconsistencies in the accounts provided. Councillor White recalled she was at Billy T's until about 12:20 p.m. and in the back room for about 20 minutes. Councillor Polhill's recollection differed and had him leaving along with Councillor White through the back door, as they had parked out back. Councillor White said she was the first to leave, left alone, and was not parked out back. Councillor Swan also said he left first, not Councillor White. The Mayor testified that before he left, Councillors White and Polhill left in succession, but he made no mention of them leaving together as in Polhill's account. Councillor Van Meerbergen said he left at 12:55 p.m. and was second to leave, after Councillor Swan.

69 Councillor White said the back door was ajar and she left that way. Then she walked around the restaurant, outside, and re-entered through the front door to look for the patron she had been speaking to earlier. Unable to find him, she left again via the

front and went to meet the LMCA Chair, who had called while she was at Billy T's and arranged to meet her elsewhere.

70 The gathering at Billy T's broke up quickly after word spread that the *London Free Press* had been contacted. Councillor Henderson recalled overhearing someone say, "Oh, oh, someone called the *Free Press*," about an hour into the gathering. He left by the back door shortly afterwards. Councillor Orser, the last to leave Billy T's, told us he was "cornered" by a *Free Press* reporter in the parking lot as he left. Phone records show that Councillor Orser then made seven phone calls shortly after the meeting, between 1:49 p.m. and 2:54 p.m. He contacted every council member who was present at the gathering (Henderson twice). Those calls and other councillor phone activity is summarized in **Table 4**.

Table 4 – Phone Activity after Billy T's

TIME		CALLER		RECIPIENT	LENGTH
1:49	p.m.	Orser	to	Mayor	1 min, 44 secs
1:55	p.m.	Orser	to	Polhill	1 minute
2:00	p.m.	Orser	to	Van Meerbergen	5 mins, 12 secs
2:10	p.m.	Orser	to	Henderson	1 minute
2:10	p.m.	Orser	to	White	1 minute
2:16	p.m.	Orser	to	Henderson	1 min, 42 secs
2:54	p.m.	Orser	to	Swan	1 minute
4:35	p.m.	Mayor	to	Billy T's	2 minutes
4:38	p.m.	Mayor	to	Manager's Cell (Billy T's)	2 minutes
4:44	p.m.	Polhill	to	Mayor	1 min, 24 secs
4:45	p.m.	Polhill	to	Van Meerbergen	9 mins, 29 secs
5:57	p.m.	Mayor	to	White	3 minutes
8:00	p.m.	Orser	to	Henderson	1 minute

71 Mayor Fontana's cell phone records show a two-minute call at 4:35 p.m. to Billy T's, and a two-minute call at 4:38 p.m. to the personal cell phone of a manager at the restaurant. The Mayor recalled he received a call from Billy T's management because of the media and public attention the gathering was already causing, and he returned the call to discuss it. The Billy T's manager, however, gave a different story. Initially, he said he likely missed the Mayor's calls that afternoon. Later, when confronted with records showing the length of the call to his private cell (2 minutes),

he remembered they spoke on the phone, but said it was about a municipal zoning issue relating to a property. The Mayor also called Councillor White at 5:57 p.m., to inquire about her meeting with the LMCA chair that afternoon.

72 After the gathering, at 2:06 p.m., Councillor Henderson sent an email to Councillor Van Meerbergen, copied to Mayor Fontana and Councillors Swan and Polhill. The subject line read "0% POSSIBILITY AT THIS LATE DATE." The email said: "Have [the city treasurer] cancel any project more than 2 years old and put money back into surplus and be required to re approve. I believe we can find at least $10 million." Councillor Henderson explained that he raised this idea as a way of achieving a zero percent tax increase in the budget. All of the recipients told us they did not read the email.

Was the Lunch an Illegal Meeting?

73 It is not disputed that those who gathered were members of council. The issue I must consider is whether they violated section 239 of the *Municipal Act* by improperly gathering in a closed meeting for the purpose of exercising their power and authority or for laying the ground work necessary to exercise that power or authority.

Was it a Purposeful Gathering?

74 For the following reasons, I do not accept the explanations that it was mere chance or accident that brought seven members of London council – all well-publicized members of the "Fontana Eight" – together in a backroom gathering at Billy T's on February 23, 2013, just five days before a key budget vote. On the totality of the evidence, both direct and circumstantial, I find that it is more likely than not that the gathering of the seven councillors in the backroom at *Billy T's* on February 23, 2013 was both purposeful and planned.

75 It was admitted by witnesses that there were at least three pre-arranged meetings that were to take place at Billy T's that Saturday morning between six of the seven council members:

1. Mayor Fontana to meet Councillor Orser;
2. Mayor Fontana to meet Councillors Henderson and Swan; and
3. Councillor Polhill to meet Councillor Van Meerbergen.

76 Councillor Polhill admitted that, armed with information that the Mayor might be at Billy T's, he contacted Councillors Henderson, Orser, and Van Meerbergen and

passed that information along. Councillor White is the only one of the group who was not involved in any of the admitted pre-arranged meetings with council colleagues, but she did know Councillors Van Meerbergen and Polhill would be having lunch at Billy T's that morning, because Councillor Polhill had told her. Although she said she was not officially invited to meet at Billy T's, she nonetheless arrived and was present at the same time as the other councillors.

77 Moreover, Councillor Polhill's phone records show that just before 6 p.m. the night before the gathering, he made two phone calls to Mayor Fontana, and one each to Councillors Van Meerbergen, Henderson, Orser and White, in a span of 13 minutes. The next morning, Councillor Polhill also made three calls in quick succession to Councillors Van Meerbergen, White, and Mayor Fontana around the time he arrived in the back lot of Billy T's.

Backdoor Service

78 Evidence suggests that two of the seven councillors joined the backroom gathering via the back door, and there is also evidence that Councillor White was overheard asking how to access the back room without going through the restaurant, before remarking, "Oh forget it, I'm just going to go back there." In addition, bystander witnesses recalled that the doors to the back room were shut most of the time.

The Reservation

79 The Mayor's explanation was that once five or six council members had shown up at Billy T's, "someone" suggested that they move to the back room. Evidence shows the Mayor made a two-minute call to Billy T's at 9:02 a.m. on Saturday, February 23, to reserve a table. He denies specifically reserving the backroom, but his version of events appears contradicted by other witnesses. One was aware by 10:30 a.m. that the back room had been reserved for a noon meeting. Councillor Orser also advised us that when he arrived at 11 a.m., staff told him the Mayor would be sitting in the back room. In addition, one manager at Billy T's testified that the Mayor asked to go into the back room when he arrived at 11:40 a.m., while another said the Mayor was initially alone in the back room, "sitting at a table by himself."

80 A Billy T's manager was also quoted on local radio as saying the Mayor "called in the morning, to see if they can use, I have a little banquet room in the back. Which it's not the first time. Joe's a good patron here of Billy T's."[30] He later informed our investigators that he was misquoted and that he had been referring to a previous reservation a month earlier.

[30] *AM980 News* (February 26, 2013), radio program: (London: CFPL FM AM980).

The Lunch was Purposed and Planned

81 Between Mayor Fontana and Councillor Polhill, all of those involved in the backroom gathering had been notified that there would be some form of get-together involving council members at Billy T's. In addition, the significant phone activity the night before and the morning of the gathering, in conjunction with admitted backdoor entries and exits, are all individual threads of evidence that, when interpreted as a whole, come together to support this conclusion.

82 I am unable to accept Councillor Polhill's explanation that three successive calls made among different councillors at the time he arrived at Billy T's were unrelated to the gathering and instead were calls about parking, car repairs, or the result of accidental "butt" dialing. A scenario that is more likely, and supported by the evidence, is that Councillor Polhill had foreknowledge that the other councillors would be at Billy T's and wanted to confirm attendance, announce his arrival, and/or have someone let him in through the locked back door.

83 I am also unable to accept the testimony surrounding the details of the reservation. The manager's assertion that he was misquoted by media about the reservation does not ring true, lacks credibility, and defies common sense when considered amidst the other evidence available. Furthermore, inconsistent witness accounts by the Mayor and others in conjunction with all the phone records lead me to conclude that it is more likely than not that a reservation was specifically made for the back room at Billy T's in preparation for the gathering on February 23, 2013.

84 The seven participants claim the gathering was not planned or intended to be a council or committee meeting directed at furthering city business. They maintain that coming together was a coincidence and the lunch was purely social. The available evidence, however, indicates that this innocent explanation also defies common sense and lacks credibility – especially given that upon arrival at Billy T's, all seven chose to congregate behind a closed door in the back room. This was a literal backroom, backdoor, closed-door meeting of seven council members.

85 The explanations provided by the council members are permeated with implausibility and lack credibility. It is both disappointing and deeply concerning that although they were in public at Billy T's, they made deliberate and calculated attempts (individually and in concert) to conceal their behaviour from the public.

Groundwork Necessary to Exercise Power and Authority?

86 I accept that participants at the lunch discussed a variety of personal and business topics, and their testimony that there was no express agenda or notice typical of a

council meeting. However, overlapping and corroborated evidence of the topics discussed (the Trillium Foundation grant, McCormick property, Highway 401 interchanges, zero percent tax increase, etc.) demonstrates the existence of an informal agenda. Clearly, some past and future council and committee issues were discussed. And according to the Mayor and two witnesses, the Mayor found it necessary to remind the group not to talk about the budget or city business, as it was a social gathering.

87 The timing of Councillor White's meeting with the Chair of the London Multicultural Community Association immediately after the Billy T's gathering raises concerns. There were various accounts, including her own, confirming she discussed the Trillium Foundation funding issue at Billy T's. There was also the Mayor's call to Councillor White after Billy T's about her meeting with the LMCA Chair, which was followed by attempts by Councillor White a few days later to secure funding for the LMCA from council.

88 I therefore conclude, considering all the evidence, that discussions did occur on February 23, 2013 at a closed lunch meeting at Billy T's in relation to the Trillium Fund grant and a request for additional city funding by the LMCA. In doing so, I find members of the Investment and Economic Prosperity Committee (IEPC) purposefully gathered and engaged in conduct that – at minimum – laid the groundwork for council members to exercise their power and authority in contravention of the open meeting requirements of the *Municipal Act, 2001*.

89 To conduct business, the IEPC must have a quorum of four members present. On February 23, 2013 at Billy T's, there were five. Three – Mayor Fontana and Councillors Orser and Swan – recall discussion involving Councillor White about the Trillium Fund grant, multiculturalism and/or the Chair of the LMCA. Once a quorum of the committee was present, and a topic of committee business discussed, the gathering was caught by the open meeting requirements of the *Municipal Act*. There was an exchange of information that – at minimum – laid the groundwork for IEPC members to exercise their power and authority in making decisions.

90 A determination of whether a meeting has occurred does not require polling of attendees to assess whether they were paying attention while business was transacted. It is also not necessary to determine that councillors who meet in improper closed sessions actually exercise their power and authority at some later date. In this case, however, there is evidence that links the Trillium Foundation grant issue with actions actually taken by those at the Billy T's gathering. This is precisely the sort of mischief the open meeting requirements of the *Municipal Act* seek to prevent.

91 The Trillium Foundation grant and the quest to have the city match those funds for the LMCA was an issue that was obviously on Councillor White's agenda. I believe

that she raised this topic at the lunch with members of the committee who could ultimately influence how this matter was addressed in future meetings.

92 It is quite understandable, then, that this backroom meeting generated strong public concern and 60 complaints to my Office – a record for a single closed meeting complaint. The evidence as a whole is both clear and disturbing. To recap, it includes:

- Seven individuals;
- In a sealable back room;
- All of whom are members of city council – five of whom were previously reprimanded and advised by this Office to avoid similar conduct;
- Representing 47% of the entire city council and quorum for four of its six standing committees;
- With authority to conduct the business of those four committees;
- Punctuated by backdoor entries, backdoor exits, and significant phone activity the day before and of the gathering;
- Conflicting and sometimes contradictory accounts; and
- Attempts to conceal the entirety of the truth.

These facts, taken together, paint a picture reminiscent not of democratic government but of movie-like organized backroom dealing – except this was no movie.

93 Backroom, backdoor, closed-door meetings – organized by and participated in by elected officials – are inimical to the democratic process. This is so not only because they violate the law, but because the public perception of such behaviour by elected officials is profoundly negative.

Arguments by Councillors' Lawyers

94 Unsurprisingly, the lawyers for the seven council members disagree that the gathering involved an improper meeting of the IEPC and have attempted to cast what occurred in its most positive and innocent light. They take issue with the definition of "meeting" I apply, and they raise the following points in support of their position (attached in full as an appendix to this report):

- Councillor White was not invited to the alleged meeting;
- She is not a member of the IEPC;
- She was the one to raise the matter of the Trillium Foundation grant;
- Quorum of the IEPC is four councillors and councillor White only told two of them about the grant;

- There is no evidence how many members of the IEPC were actually collectively present during the alleged discussion of the Trillium Foundation grant;
- The IEPC never dealt with the grant – rather, it was council that later decided on the matter, and there was no quorum of council at Billy T's.

95 The fact that Councillor White was not expressly invited to the gathering is not determinative. While evidence of prior planning is one factor to consider in assessing whether a meeting has been held in contravention of the open meeting requirements, advance planning is not a conclusive feature. Impromptu gatherings involving a spontaneous decision to deal with business are equally against the law. In this case, three discussions amongst council members were prearranged. At a minimum, councillor White took advantage of the opportunity presented by the gathering of other council members to bring up a subject of particular interest to her.

96 Similarly, the fact that Councillor White is not a member of the IEPC is not relevant. Five members of the IEPC were present at the gathering. Two members, Mayor Fontana and Councillor Swan, recall discussing the Trillium Foundation Grant with Councillor White. Councillor Orser recalled overhearing Councillor White discussing the Chair of the London Multicultural Community Association, which had received the grant. It would be virtually impossible to find positive proof that the requisite number of council members constituting quorum were present at the exact moment that councillor White raised the issue of the grant. As I have often observed in connection with these informal private gatherings, there is no proper and complete record kept of discussions, so much is left to speculation. However, given the suspicious circumstances surrounding this gathering, and my assessment of witness credibility, I believe it is not unreasonable to find that it is more likely than not that councillor White raised this issue while there were at least four members of the IEPC present.

97 In addition, the IEPC clearly had some interest in connection with the Trillium Foundation grant issue. At a meeting on December 18, 2012, the IEPC addressed issues relating to the London Multicultural Community Association. At a council meeting on February 28, 2013, five days after the Billy T's gathering, councillor White introduced a motion to set aside $25,000 in connection with the Association's request for funds. The IEPC was scheduled to address this issue at its March 25, 2013 meeting, when at the last minute the request was withdrawn. The fact that the IEPC never made a decision relating to the grant is irrelevant. In my view, the Billy T's discussion laid the groundwork for exercising the committee's authority in connection with this issue.

98 Finally, the lawyers have taken issue with my findings of their clients' credibility. I am not persuaded to revisit my assessment of witness credibility, which is amply substantiated by the totality of circumstantial and direct evidence in this case.

99 It is of great concern that these seven council members appear to have learned nothing from last year's investigation involving a similar set of facts.

Conclusion: A Clear Violation

100 I conclude that an illegal closed meeting occurred on February 23, 2013, in violation of the *Municipal Act, 2001*.

101 This case is a cautionary tale for municipal governments, underscoring the risks of so-called social gatherings that are really a shield for clandestine meetings to further city business away from public scrutiny. The February 23, 2013 backroom lunch at Billy T's Tap and Grill was not a social gathering or happenstance coming together of council members for a friendly lunch. It was a betrayal of public trust, and diminished the credibility of the council participants in the eyes of London citizens, other council colleagues and all Ontarians.

102 The City of London and council should take steps to ensure that the danger of illegal informal meetings is minimized through adopting a clear policy and procedures to discourage this conduct.

103 I am making the following recommendations, which I trust will help council members meet their legal obligations with respect to closed meetings in future.

Recommendations

Recommendation 1
The City of London should adopt a written policy and/or written guidelines and ensure that council and committee members are educated on the open meeting requirements of the *Municipal Act, 2001*. This should include a definition of what constitutes a "meeting" that upholds the public's right to observe municipal government in process, and an explanation of how it applies to informal discussions of council and committee business.

Recommendation 2
All members of council for the City of London should refrain from using the pretext of social gatherings to conduct city business behind closed doors.

Recommendation 3
All members of council for the City of London should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its statutory responsibilities under the *Municipal Act, 2001* as well as its own procedures and by-laws.

Report

104 My report should be shared with Council for the City of London and made available to the public as soon as possible, and no later than the next council meeting.

André Marin
Ombudsman of Ontario

Appendix: Response from Councillors

Letter from John Mascarin and Christopher J., Williams of Aird & Berlis, lawyers representing Mayor Fontana and Councillors Henderson, Orser, Polhill, Van Meerbergen and White

September 27, 2013

AIRD & BERLIS LLP

Barristers and Solicitors

John Mascarin
Direct: 416.865.7721
E-mail:jmascarin@airdberlis.com

September 27, 2013

Our File No. 116869

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Dear Mr. Buggle and Ms. Ray:

Re: City of London Council – Investigation
Preliminary Report (September 2013)
Your File No. 207860-002 et al.

Further to the above-noted matter, we thank you for the opportunity to review and comment upon your Preliminary Report of the investigation into whether members of Council for the City of London held an improper closed meeting at Billy T's Tap & Grill on February 23, 2013.

Attached is our letter setting out our detailed comments on the Preliminary Report.

Also included herewith are the two (2) copies of the Preliminary Report that you provided to Chris Williams and me pursuant to our signed Undertakings.

We are also returning to you all of the transcripts of interviews of our clients which were very helpful to us in providing our comments.

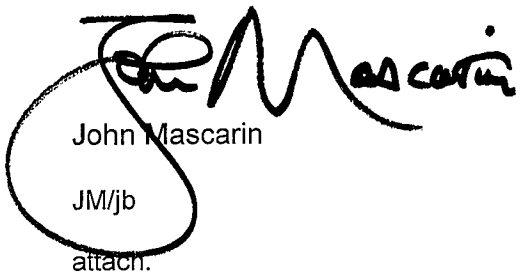
We had earlier notified all of our clients that were provided with a copy of the Preliminary Report that they were to return their respective copies directly to your office no later than 4:30 p.m. on September 27, 2013.

We kindly request that, when available, a copy of the Final Report in respect of the above-noted investigation be provided to us.

If you or your staff have any questions whatsoever please do not hesitate to contact Chris Williams or me.

Yours truly,

AIRD & BERLIS LLP



John Mascarin

JM/jb

attach.

c. Mayor Joe Fontana
Councillor Dale Henderson
Councillor Stephen Orser
Councillor Bud Polhill
Councillor Paul Van Meerbergen
Councillor Sandy White

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September 27, 2013

Our File No. 116869

DELIVERED

Mr. André Marin
Ombudsman of Ontario
Bell Trinity Square
483 Bay Street
10th Floor, South Tower
Toronto, ON M5G 2C9

Dear Mr. Marin:

Re: Preliminary Report - Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013

Thank you for providing our clients with the opportunity to provide comments on the Preliminary Report (the "Report") of the investigation into a gathering of various City of London councillors at Billy T's Tap & Grill ("Billy T's") on Saturday February 23, 2013.

We acknowledge the effort of your office in carrying out its work for the investigation. We understand that two teams comprising of four (4) investigators were dispatched to carry out the investigation into the above-noted matter pursuant to s. 239.2 of the *Municipal Act, 2001*.[1] We hope that the comments we provide may be of assistance to you and your investigators in the preparation of the Final Report.

As agreed, we are returning our copies of the Preliminary Report as well as the interview transcripts of our clients that were prepared as part of the investigation.

Introduction

We have carefully reviewed the Report and transcripts with our clients who were present at the gathering at Billy T's. We have also reviewed the case law and authorities cited in the Report. In making our comments, we note that other than transcripts of our clients' interviews, we were not provided with any other evidence from your office.

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[1] S.O. 2001, c. 25, as amended.

While we have a number of comments, they may be summarized into the four following observations:

1. The Report correctly concludes that the gathering of the councillors who are members of Council as well as the Civic Works Committee, the Corporate Services Committee and the Planning and Environment Committee acted in compliance with their obligations under the *Municipal Act, 2001* and did not hold any improper meetings;

2. The Report's working definition of "meeting" is overly broad and is not supported by the established jurisprudence. We have serious concerns with regard to the test for determining whether a meeting has been held and as applied in the Report;

3. The Report's findings as to the credibility of the councillors are inappropriate, inaccurate and are not supported in any of the evidence; and

4. The Report incorrectly concludes that the Investment and Economic Prosperity Committee ("IEPC") held a meeting contrary to the *Municipal Act, 2001*.

It is our position that no improper meetings were held at Billy T's on February 23, 2013. While the Report exonerates the councillors present at the restaurant as members of Council and three City committees, the Report nonetheless concludes that an improper meeting was held by one committee, the IEPC. It is our submission that such a conclusion is unfounded based on the evidence as set out in the Report.

Our reasons for each of our four comments are set out in detail below.

Analysis

1. Findings of No Meeting

The Report determines that council members representing four City committees were present and had quorum at Billy T's restaurant on February 23, 2013. As listed in the Report at Paragraph 29, the committees present were the Civic Works Committee, the Corporate Services Committee, the Planning and Environment Committee and the IEPC. Six councillors and the Mayor were in attendance but this number did not constitute a quorum of Council.

The Report examines four alleged discussions to determine whether a meeting or meetings took place at the restaurant. At Paragraphs 52 through 62, the four discussion topics are set out as: Budget Strategy, Trillium Foundation Grant, the Highway 401 Interchanges and the McCormick Property. These alleged discussions concerned matters of potential interest to various committees or to Council itself.

As noted above, the Report correctly determines that there was no meeting or meetings with respect to three of the four committees of which the councillors in attendance were members. The Report also concludes that Council did not hold a meeting. Accordingly, the outcome of the investigation is that Council and every committee present – other than

the IEPC – acted in compliance with the open meeting obligations under the *Municipal Act, 2001*.

Save for the conclusion with respect to the IEPC (which will be commented in greater detailed below), we are in complete agreement with the determinations that the councillors complied with their statutory open meeting requirements and concur that there is a valid evidentiary basis for these conclusions.

2. Definition of "Meeting"

As an investigator appointed under s. 239.1 of the *Municipal Act, 2001*, your role in conducting an investigation is to determine whether a municipality has acted in compliance with the open meeting requirement under the statute. Crucial to this exercise is an understanding of the definition of "meeting" as it relates to the *Municipal Act, 2001*. The Report asserts at Paragraph 17 that to constitute a meeting:

> Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.

We note that the definition adopted is not the statutory definition contained in s. 238 of the *Municipal Act, 2001* nor is it a direct quote or a proper extrapolation from any judicial pronouncements. Indeed, it is acknowledged at Paragraph 17 that the above-quoted definition is a "working definition" of your own formulation. We expressly do not agree with your statement in Paragraph 18 that the working definition is "consistent with leading interpretations of the open meeting concept."

In fact, it is our position that your adopted definition is overly broad and is not at all supported by the established case law. If accepted, the working definition would impose an unworkable standard whereby the mere mention of anything to do with a council or committee matter could potentially fall within the ambit of "doing the groundwork necessary." Such a standard is unwarranted and, in our view, unnecessary with respect to ensuring that the important principles of openness, transparency and accountability in local governmental decision-making are met. Indeed, we have reviewed the cases cited in the Report for the definition of "meeting" and find that the working definition that has been adopted establishes a very different standard for what constitutes a meeting than what is set out in established jurisprudence.

In *Southam Inc. v. Ottawa (City)*,[2] which is relied upon as an authority for the working definition, Justice Farley of the Ontario General Division outlined that, in assessing whether a meeting is taking place, it is not sufficient that a matter be discussed or dealt with but that it be "materially" advanced toward a decision. As Farley J. wrote:

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[2] [1991] O.J. No. 3659, 5 O.R. (3d) 726 (Ont. Gen. Div.).

> Clearly, it is not a question of whether all or any of the ritual trappings of a formal meeting of council are observed .... The key would appear to be whether the councillors are requested to attend (or do, in fact, attend without summons) a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?[3] [emphasis added]

The requirement of material advancement is completely absent from your working definition. Instead, the working definition sets the threshold at "doing the groundwork necessary" for council or committee to exercise power or authority. It is our position that materially advancing a matter constitutes substantive action, such as the members agreeing to support a vote in a certain way or to agreeing to take certain collective engagement in the future by establishing a process.

In contrast, "doing the groundwork" potentially encompasses any discussion or mention of a matter however remotely related to council or committee business, regardless of whether that matter is actually materially moved along as a result. This is evident in Paragraph 85 where the Report concludes that an improper closed meeting crystallized as soon as certain "information" was exchanged:

> Once a quorum of the committee was present, and a topic of committee business discussed, the gathering was caught by the open meeting requirements of the *Municipal Act.*

Absent from this analysis is anything to do with whether the discussion advanced council or committee business as is required under the test in *Southam Inc. v. Ottawa (City)*. The conclusion in the Report, given the adopted working definition, is that once a mention of a matter arises, the open meeting rule has been breached. Such a definition of meeting constitutes a significant departure from the standard set out in jurisprudence. It establishes a threshold that is much lower than what has been accepted in the established case law. Moreover, it is a definition that will inextricably lead to a finding of a contravention of the open meeting rule no matter how innocent or innocuous the comment.

We acknowledge the authority of the Ombudsman to undertake and conduct an investigation pursuant to s. 239.1 of the *Municipal Act, 2001*. However, the engagement as an investigator in the matter is to assess compliance with the open meeting requirement as it is set out in the statute. The correct standard of analysis is one based on a proper reading of the *Municipal Act, 2001*.

We submit that it is not the role of an investigator under s. 239.1 to devise a definition of meeting that is "more practical." The task of an investigator is to assess whether the requirements of the statute have been complied with. It is our submission that having

[3] *Ibid.* at para. 12.

formulated and imported a definition of "meeting" that is not supported in law, the conclusions set out in the Report do not provide a correct answer to the very issue that was being investigated.

We submit that the Report's conclusion that a meeting took place with respect to the IEPC is improper because it is not based on the correct legal test or common sense. It is our view that a proper analysis would have assessed whether any collective discussions amongst the members present took place and whether those discussions resulted in a material advancement of any matters that would ordinarily form the business of a council or committee meeting.

The Report should be amended, and the analysis revised, to reflect the standard of material advancement in assessing whether a meeting of the councillors had taken place at Billy T's.

3. IEPC - A Meeting?

Based on our close review of the facts as set out in the Report and in the transcripts provided of the councillors' interrogations, it is impossible to conclude that the IEPC held a meeting at Billy T's on February 23, 2013. The Report concluded that the councillors did not hold a meeting as Council or as any of the other three committees for which there was quorum present on at the gathering at Billy T's. Although the facts are indistinguishable, the Report nevertheless concludes at Paragraph 84 that "discussions" in relation to the Trillium Foundation Grant resulted in an improper closed meeting of the IEPC. We categorically reject this conclusion.

The basis for our position is that none of the evidence establishes that any of the alleged discussions materially advanced the business of the IEPC. Furthermore, none of the evidence shows that any of the alleged discussions materially advanced the business of Council, which is the body that ultimately made a decision related to the Trillium Foundation Grant at a later time.

There is substantial evidence in the Report that militates against the conclusion that an improper closed meeting of the IEPC took place. We ask you to consider:

- Councillor White was not invited to the alleged meeting. At most, she knew that Councillors Polhill and Van Meerbergen might be at the restaurant for lunch;
- Councillor White is not a member of the IEPC;
- Councillor White raised the matter of the Trillium Foundation Grant;
- Quorum for the IEPC is four (4) councillors;
- Only two (2) members of the IEPC were told of the Trillium Foundation Grant by Councillor White;
- There is no evidence as to how many members of the IEPC were actually collectively present during any of the alleged discussions of the Trillium Foundation Grant;

- The IEPC never dealt with the Trillium Foundation Grant; it was Council that later made a decision on the matter;
- There was no quorum of Council when mention of the Trillium Foundation Grant occurred.

To conclude on the facts as clearly set out in the Report that a meeting of IEPC took place at Billy T's is tantamount to determining a meeting may manifest itself through the actions of someone who is external to the committee. Councillor White is not a member of the IEPC. Her attendance at the gathering was not planned. Yet the Report suggests that her actions in showing up and mentioning having secured the Trillium Foundation Grant in the presence of only two (2) IEPC members elevated the gathering into an improper closed meeting of the IEPC.

A review of the evidence in the transcripts of Councillors White, Swan, Polhill and Mayor Fontana reveal that the Trillium Foundation Grant was not discussed in a material way or, we would submit, even in any manner that laid the groundwork for any future decision or action, or by a quorum of IEPC.[4] The evidence is clear that Councillor White told two councillors at various points in time during the gathering at Billy T's that she had obtained funding from the Province of Ontario and that she was happy about it. There was no announcement; there was no collective statement; and there is nothing in any of the transcripts describing any discussion of strategy, eliciting vote support or next steps with respect to the Trillium Foundation Grant. It does not appear that Councillor White even believed there were any next steps. In fact, Councillor White who was not a member of the IEPC, did not know whether the IEPC had any role with respect to the Trillium Foundation Grant.

Councillor Swan is the Chair of IEPC. He was clear and consistent in his responses to interview questions from your Office that the extent of Councillor White's communication on the Trillium Foundation Grant was a mention that she had received funding. Councillor Swan does not indicate that there was any "announcement" to the councillors. Councillor Swan was not even clear as to which project the Trillium Foundation Grant related to. The conversation between Councillor Swan and Councillor White was brief, involved a number of matters and no one else participated in it.

Likewise, Mayor Fontana's interview transcript indicates that Councillor White mentioned the Trillium Foundation Grant in relation to her meeting with a representative of a local multicultural group and nothing further. This conversation took place only between Mayor Fontana and Councillor White. Similarly, Councillor Polhill gave testimony that he recalled Councillor White telling him she had received the Trillium Foundation Grant but that she did not discuss what the funding related to.

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[4] Table 2 in the Report sets out that the Trillium Foundation Grant was only "discussed" by two members of IEPC and the Report makes it clear that it was Councillor White (not a member of the IEPC) who initiated mention that she had secured the funding. The Trillium Foundation Grant was not even overhead as a topic by three councilors present at Billy T's.

An application of the definition of meeting using the test from *Southam Inc. v. Ottawa (City)* would take into account whether there was a material advancement of the Trillium Foundation Grant as a result of the discussions that took place. Based on the facts in the Report and the transcripts we have reviewed, there is simply no evidence that any of the alleged discussions had any material impact or advancement whatsoever.

Even when applied against the working definition of "meeting" as adopted in the Report, the evidence presented establishes that a meeting of the IEPC did not take place. At most, Councillor White mentioned in a general way that she had secured some funding to only three councillors at different times. No groundwork was laid for the exercise, or even the potential exercise, of any power or authority of the IEPC in relation to the Trillium Foundation Grant. A mere exchange of information, contrary to what the Report concludes, does not materially advance nor lay the groundwork necessary for IEPC to exercise its power and authority.

It is our submission that regardless of whether the definition of "meeting" from the established case law or from working definition from the Report is used, the proper conclusion on the facts is that no meeting of the IEPC took place.

4. Unfounded Credibility Findings

We acknowledge that the Report provides a generally accurate recital of the facts based on our individual meetings with six of the seven councillors who were present at Billy T's, our attendance at the second round of interviews with six of these seven councillors and our review of the transcripts. In particular, we agree entirely with the description of events as provided in Paragraph 50 of the Report:

> Accounts of what was discussed at the backroom gathering vary. The participants gave a series of confusing and conflicting accounts to our investigators, maintaining that they carried out separate and parallel conversations on various topics, including personal matters and city-related items, discussed only in a general way. All seven denied discussing city business as a group.

However, we note that many facts are missing from the Report. We further note that the Report makes improper findings as to the credibility and motivation of the individuals involved that are not supported by the evidence. The most dramatic example of this occurs at Paragraph 81 where the Report reaches conclusions as to the overall credibility and motives of the councillors involved:

> The explanations provided by the council members are permeated with implausibility and lack credibility. It is both deeply disappointing and deeply concerning that although they were in public at Billy T's, they made deliberate and calculated attempts (individually and in concert) to conceal their behaviour from the public.

The language employed above is simply not appropriate – it is not correct based on the facts and appears to be utilized only for the purposes of embarrassment or ridicule. Similar inflammatory wording sprinkled throughout the Report appears similarly intended

to elicit strong visceral reactions (for example, Paragraph 80 alone makes reference to: "defies common sense"; "lacks credibility"; "congregate behind a closed door in the back room") against the members of council.

Moreover, the conclusion at Paragraph 81 (quoted above) is itself not credible and is not supported at all in the factual record. The Report concludes that of all the committees with members present at Billy T's in the late morning and early afternoon of February 23, 2013, only one committee – the IEPC – engaged in conduct that amounted to a meeting. This alleged meeting was precipitated by the remarks of Councillor White in relation to Trillium Foundation Grant, yet the Report describes Councillor White (at Paragraph 72) as the one attendee who was "not involved in any of the admitted pre-arranged meetings of council colleagues" at the restaurant.

We cannot reconcile the conclusion that the gathering was purposeful and planned when it is accepted as fact that Councillor White was not invited, and it was Councillor White who ultimately elevated the gathering at Billy T's into a meeting on a matter that was not on any planned business of the IEPC, which itself was a committee that Councillor White was not a member. Furthermore, the conclusion that, as a whole, the councillors in attendance made "deliberate and calculated" efforts to hide their behaviour from the public does not follow from the evidence.

Indeed, it defies common sense that councillors, in seeking to hold a supposedly secret closed-door meeting, would convene at a busy public restaurant over lunch on a Saturday morning and afternoon in view of restaurant patrons and staff.

Other Considerations

The Reports notes at Paragraph 6 that our firm objected to the jurisdiction of the Office of the Ombudsman to investigate the complaints regarding the gathering at Billy T's. Our issue at the time related to publicity generated by the Office of the Ombudsman concerning the investigation. Our concern related to the potential impact the publicity could have upon the overall integrity of the investigative process. We would like to clarify that we have no dispute with respect to statutory authority of the Office of the Ombudsman to conduct an investigation into this matter pursuant to s. 239.1 of the *Municipal Act, 2001*.

We also find it very interesting that the Report seeks to utilize statements made by Mayor Fontana at the gathering for the purpose of imputing improper conduct of the councillors. At Paragraph 82 it is noted that "the Mayor found it necessary to remind the group not to talk about the budget or city business, as it was a social gathering." In our view, any statements made by Mayor Fontana indicate that he was cognizant of his open meeting obligations. Mayor Fontana diligently reminded the councillors in attendance not to discuss the city budget or any city business. We fail to see how such evidence supports an adverse conclusion as to the motives of Mayor Fontana. To the contrary, it suggests a recognition of the rules and a desire to see them followed fully by the councillors. Imputing improper motives to Mayor Fontana's statements is completely unfounded and wholly inappropriate.

A Chilling Effect

Our firm acts for a large number of municipalities across Ontario. A consistent concern in municipal governance is the difficulty of attracting viable, responsible and meritorious ordinary citizens to run for municipal office. A recurring theme is the perceived notion that the rules governing how elected officials are to conduct themselves in their personal life, businesses, during elections and at council are arduous and unforgiving. While these rules are predicated on enhancing open, transparent and accountable local governance, when misinterpreted and misapplied they serve to undermine democracy as more and more worthwhile candidates are discouraged from seeking office.

The Ombudsman has stated in many previous occasions and reports something that is repeated at Paragraph 21 of the Report:

> To be clear, the *Municipal Act, 2001* does not create an absolute prohibition against members of council discussing city business outside chambers. It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.

And yet the findings and conclusions in the Report itself undermine the very statements set out above.

Conclusions

The conclusions in the Report are not trivial. The restrictive and chilling implications of the conclusions in the Report will only serve to further discourage public participation in municipal governance. Discourse and debate are hallmarks of a democratic society. A certain type must occur in a public forum; other types may occur in a more private forum. There is no outright ban on councillors talking privately to each other about the issues affecting their communities (as noted in the Report). Councillors are not expected to maintain absolute silence outside of the council chambers. We note that freedom of peaceful assembly and freedom of association are fundamental rights available to everyone under the *Canadian Charter of Rights and Freedoms*. Should our law adopt a standard of conduct such as the one adopted in your Report, it would amount to a serious stifling of discourse and debate across the Province of Ontario and potentially in other jurisdictions as well.

At its core, the Report applies a fundamentally flawed analysis. The Report is based on a definition of "meeting" for the purposes of the *Municipal Act, 2001* that is much broader than what is set out in the statute or in the case law. It is our position that the gathering of the councillors at Billy T's on February 23, 2013 was indeed, as each and every councillor who was present indicated, a social gathering – nothing more. No illegal meetings took place on February 23, 2013. The Report largely confirms this, except for the alleged meeting of the IEPC, which the Report wrongly concludes constituted an illegal meeting. We believe that had the proper legal analysis been applied, the Report would share our

conclusion that no meetings took place at Billy T's. We request that the Report be amended accordingly.

As we agreed with the Preliminary Report, we will not disclose this letter to anyone outside of our client group until your Final Report is released. If you have any questions regarding these comments, please do not hesitate to contact either of us.

Yours truly,

AIRD & BERLIS LLP

Per: Christopher J. Williams

John Mascarin

c. Mayor Joe Fontana
Councillor Dale Henderson
Councillor Stephen Orser
Councillor Bud Polhill
Councillor Joseph Swan
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