



Ombudsman Report

**Investigation into whether members of
Council for the City of London held an
improper closed meeting on June 24, 2014**

“Turning Tables”

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Complaint

- 1 On June 26, 2014, my Office received a closed meeting complaint from a member of Council for the City of London who claimed to have taken part in an improper closed meeting with 11 other members of London Council two days earlier. The gathering allegedly took place during the break between the regularly scheduled Tuesday council meeting and a special open session of council on the evening of June 24, 2014 – in a cafeteria at the top of London City Hall. The cafeteria was closed to the public at the time.
- 2 The complaint indicated that at this improper meeting, those present agreed to appoint Mr. Russell Monteith to fill the vacant Ward 5 council seat until the end of council’s term; a decision confirmed by council in open session the next day.
- 3 On July 10, 2014, we received a second complaint from another council member who had been in the cafeteria for dinner, about the same issue and making similar allegations.
- 4 The 12 members of council alleged to have attended the meeting are: Mayor Joni Baechler and councillors Bill Armstrong, Denise Brown, Judy Bryant, Dale Henderson, Paul Hubert, Stephen Orser, Bud Polhill, Joe Swan, Harold Usher, Paul Van Meerbergen, and Sandy White.

Ombudsman jurisdiction

- 5 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public unless they fall within prescribed exceptions. This is sometimes referred to as the “sunshine law.”
- 6 As of January 1, 2008, the *Municipal Act* gives citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities can 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.
- 7 The City of London chose to appoint the Ontario Ombudsman as its investigator effective January 1, 2008.
- 8 In investigating closed meeting complaints, my Office considers whether or not the open meeting requirements of the *Municipal Act* and the relevant municipal procedure by-law have been observed.

Investigative process

- 9 In view of the serious allegations raised by two members of council purporting to have firsthand knowledge of an improper meeting on the issue of filling a vacant council seat, I determined that it was necessary to canvass the relevant facts thoroughly. Accordingly, on July 17, 2014, my Office notified the city that we would be investigating complaints that members of council met in violation of section 239 of the *Municipal Act, 2001*, on the evening of June 24, 2014, in the cafeteria at the top of City Hall prior to a special open session of council at 8 p.m.
- 10 We conducted 23 interviews, including with all 15 council members, city staff and other persons present in the cafeteria at the relevant time. We also reviewed committee agendas, reports and meeting minutes, and monitored local media coverage. Video surveillance of the cafeteria was unavailable because, consistent with the city's normal practice, the security recordings were destroyed after seven days.
- 11 Members of council and city staff co-operated fully with our investigation.

Previous Investigations

- 12 This is not the first time our Office has investigated a controversial mealtime gathering involving members of London council.
- 13 On February 21, 2012, six council members – then-Mayor Joe Fontana and councillors Denise Brown, Henderson, Orser, Polhill and Van Meerbergen – sparked complaints when they met for lunch at the Harmony Grand Buffet restaurant prior to a final budget vote that afternoon. In my investigative report issued in August 2012, I found that no committee business was considered during the lunch. While I did not find that the gathering violated the open meeting requirements of the *Municipal Act*, I cautioned that:

[Councillors having] lunch in a local restaurant just before a critical and controversial vote on the budget was ill conceived.

- 14 Nearly a year to the day after the Harmony Grand Buffet lunch, another informal gathering of seven council members (five of whom were involved in my previous investigation) led to my Office receiving a record 60 complaints about another illegal closed meeting outside of City Hall. On Saturday, February 23, 2013, then-Mayor Fontana and councillors Henderson, Orser, Polhill, Swan, Van Meerbergen and White met around noon at Billy T's Tap and Grill. In October 2013, I issued my report *In the Back Room*, in which I concluded that the group was in clear violation of the open meetings law. I found that the seven council members came together in a planned and purposive way, in a back room at the restaurant, and that a quorum of a

committee discussed an item of current business. Although the attendees protested otherwise, I found that:

[This] 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.

When is a Dinner Meeting a “Meeting”?

Interpretation of the Law

- 15** 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.”¹ Both definitions are unfortunately circular, and neither provides a clear description of what constitutes a “meeting”.
- 16** The definitions may be helpful when dealing with regularly scheduled meetings of councils, local boards, and committees, which observe procedural formalities. However, they provide little guidance when allegations are made that a secret meeting has taken place in the guise of an informal gathering. In one of my earliest reports, in 2008, I considered whether a discussion amongst council members for the City of Greater Sudbury, after a formal Priorities Committee meeting and outside of council chambers, contravened the open meeting rules. The group met spontaneously with the general manager of Community Development to discuss how they could return tickets to an Elton John concert to which they were given special access (ahead of the general public). I found that this gathering was in compliance with the law – barely. In doing so, I adopted a practical approach to the question, “when is a gathering a meeting?” After a review of the relevant case law and principles of openness, transparency, and accountability,² I formulated this working definition:

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.³

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

² 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.

³ *Ibid.*, paras 54-60

- 17** This definition remains consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.⁴

Quorum

- 18** 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 committee, the opportunity and risk of those individuals collectively exercising their authority increases.

Individual Discussions and Serial Meetings

- 19** The *Municipal Act, 2001* does not prohibit members of council, committees and local boards from ever discussing city business outside of a formal meeting. It is expected that some informal conversations about municipal business will take place amongst individual members of such bodies, and as I observed in *In the Back Room*:

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.⁵

- 20** However, municipal officials must be cautious to ensure that informal private discussions do not transform into improper meetings. It is of particular concern when a quorum of a body is involved. As I noted in the same report:

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.⁶

⁴ *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, 2007 SCC 29 at para. 32; *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.

⁵ Ombudsman of Ontario, *In the Back Room: Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013* (October 2013), online: https://ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf

⁶ *Supra* Footnote 5 at para. 26

- 21** A problem also arises if, through serial individual discussions, members of a municipal body collectively engage in decision-making or in laying the groundwork for the future exercise of the body’s authority. In an April 2008 investigation, I considered whether sequential phone calls between the Mayor and individual councillors for the Township of Nipissing could be considered a “meeting” for the purpose of the open meeting requirements.⁷
- 22** In that case, the Mayor convened a special meeting of council and proceeded to telephone one councillor at a time. A quorum of council was never present in the same room or on the phone during any of the conversations. However, as a result of the calls, council collectively came to a consensus to approve additional costs related to the purchase of a fire vehicle. In considering these circumstances, I observed:

It is not necessarily the form that a meeting takes that should be determinative, but its substance. In my view, a meeting of council is not limited to a physical gathering of its members. Sequential telephone conversations of council members, for the purpose of exercising the power or authority of the council or for the purpose of doing the groundwork necessary to exercise that power or authority, may constitute a meeting...⁸

Social gatherings

- 23** The *Municipal Act, 2001* also does not prevent council members from meeting socially outside of council chambers.
- 24** However, when a group of council members comes 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.
- 25** Gatherings of this sort can also attract public distrust because of their timing, particularly if they occur close to influential or controversial decision making. It is challenging to confirm after the fact whether or not discussions in informal drifted into improper areas. As I noted in my 2012 report on an investigation of a private breakfast meeting involving members of a Hamilton city committee:

⁷ Ombudsman Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008* (February 6th, 2009), online: <https://ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>

⁸ Ibid Footnote 5 at para’s 29 & 30

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 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.⁹

The June 24, 2014 Dinner Gathering

Prelude

- 26** On June 19, 2014, Joe Fontana formally resigned as Mayor of the City of London after being convicted by the Ontario Superior Court of breach of trust by a public officer, fraud under \$5,000 and uttering forged documents.
- 27** During a special council meeting on June 23, 2014, London council accepted Mr. Fontana's resignation, approved a motion that the appointment to fill the mayoral vacancy be made from the membership of the current council, and approved a process suggested by the city Clerk to determine an appointment to fill the vacancy in the office of mayor.
- 28** On June 24, 2014, council held a regular meeting at 4 p.m. at which then Ward 5 councillor Joni Baechler was appointed as mayor until the end of the council's term, which is due to end after the municipal elections on October 27, 2014. Since this appointment left her Ward 5 seat vacant, council determined it would appoint a person to fill the seat. A special council meeting was scheduled for 8 p.m. that evening to address the process for filling the Ward 5 seat.

The Dinner

- 29** The minutes of the 4 p.m. meeting indicate that council adjourned at 6:40 p.m. The 12 members who were identified in the complaints to my Office told us that they took the opportunity to grab a bite to eat in the cafeteria on the 12th floor of City Hall prior to returning to council chambers for the 8 p.m. special meeting.

⁹Ombudsman 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-forweb_1.pdf at para. 24.

- 30** Cafeteria staff told us that council members typically come to the cafeteria for dinner on evenings when meetings are scheduled, and that on these occasions the cafeteria is open only to council members and city staff. Cafeteria staff confirmed that 26 meals were served the evening of June 24.
- 31** Some witnesses had difficulty recalling when they arrived and left the cafeteria and how long they were present. The majority of witnesses confirmed that council members were in the cafeteria from 6:40 p.m. to shortly before 8 p.m. Council members did not arrive together and stayed for varying lengths of time. Some told us they were only in the cafeteria briefly, while others said they were there for up to an hour.
- 32** Some city staff members were in the cafeteria during the same period, including the city Clerk, the Deputy Clerk, two members of the city’s legal staff, the Director of Intergovernmental Affairs, one information technology staffer and three cafeteria workers. Two television camera technicians from a local cable station who voluntarily record council meetings were also present. We interviewed all but the city’s legal staff.

The Purpose

- 33** The June 24 gathering in the cafeteria was not an official meeting of council. All witnesses confirmed their purpose for being in the cafeteria that evening was to eat dinner. There is no evidence to suggest that this event was planned in advance for any other purpose.

The Table Setting

- 34** The cafeteria has tables that can seat up to four people along the exterior windows. It also has larger tables in the centre of the room that can seat six.
- 35** According to witness accounts, most of the council members were sitting at two of the larger tables on one side of the cafeteria near the entrance. The tables were close to one another. One or two council members sat with city staff at a smaller table directly opposite the larger tables.
- 36** Some council members could not recall whom they sat with, and there is some inconsistency in witness accounts of the seating arrangement.

What Was Discussed?

- 37** There was considerable variation in the evidence of the council members concerning what was discussed during the June 24 dinner gathering. Some witnesses had only vague recollection of the conversations or none at all.

- 38 Mayor Baechler** told us she was late arriving to the cafeteria for dinner, as she had been delayed by well-wishers and media interviews after being appointed Mayor. She said she was joined by Councillor Bud Polhill on the elevator to the 12th floor, and that in the elevator, Coun. Polhill asked whom she would recommend to fill her now-vacant council seat. She told us her reply was that her choice was Mr. Russell Monteith, a well-respected local lawyer and former member of council, and she said she also noted that as the councillor for Ward 1, Coun. Polhill would make the motion the following day to fill the vacancy. According to the Mayor, Coun. Polhill responded, “fair enough.”
- 39** The Mayor’s only other recollection was that after she picked up her food, she sat at the same table as councillors Polhill, Denise Brown, and Usher. She said she was in the cafeteria for about 15 minutes. She recalled exchanging pleasantries with Coun. Denise Brown, but said she did not talk with anyone during the dinner break about the vacant Ward 5 seat, the process to be used for filling it, or about Mr. Monteith or any other potential candidate. Nor could she recall any other surrounding discussions on these issues. She denied allegations that she discussed the issue of Mr. Monteith’s appointment with any other member of council in the cafeteria on the evening of June 24.
- 40** Councillor **Bill Armstrong** said he was only in the cafeteria briefly, because he had business to attend to across town before the 8 p.m. meeting. Coun. Armstrong told us he sat at the second of the larger tables, but could not recall who sat with him other than the Mayor, who sat directly across from him. Councillor Armstrong recalled the Mayor mentioning that Russ Monteith’s name might be coming forward, but did not remember any other details of that discussion or any other dinner conversation. He added that he knows Mr. Monteith very well after serving with him for many years on council, and would not need to be told to vote for him.
- 41** Councillor **Denise Brown** recalled being in the cafeteria for dinner for approximately 30 minutes, and sitting with councillors Polhill, Swan and Henderson. She said the Mayor joined her just for the last 10 minutes of the gathering. She did not remember any details of what was discussed at dinner. However, she recalled discussing the issue of filling the Ward 5 vacancy in brief individual exchanges with four other members of council, outside of the cafeteria. She explained that she had no one in mind to fill the vacancy and asked some of her colleagues if they had any suggestions. A few days before June 24, Ms. Baechler (then still a councillor) told her she was recommending Mr. Monteith. During an earlier meeting break on June 24, she also spoke to Coun. Orser, who mentioned another candidate (she could not recall the person’s name). As she and Coun. Polhill prepared to leave City Hall that night, she said he mentioned Mr. Monteith to her. And as she and Coun. Henderson walked out of the building, he told her he would be talking to someone about the position and would get back to her.

- 42** Councillor **Matt Brown** told us he went for a run after council adjourned at 6:40 p.m. He recalled going to the cafeteria close to 8 p.m. to see if it was still possible to get a bite to eat before the special meeting. He said no other members of council were there at that time, and none spoke to him prior to the vote on the Ward 5 vacancy.
- 43** Councillor **Nancy Branscombe** told our investigators that she was ill on the evening of June 24 and left council before the dinner break. She did not go to the cafeteria or the 8 p.m. meeting.
- 44** Councillor **Judy Bryant** recalled sitting at one of the larger tables, but could not remember whom she sat beside. She said that the Mayor sat behind her. She recalled Coun. Polhill leaning over to her and asking, “What do you think of Monteith?” – to which she replied, “That’s a good name.” She said there was no further elaboration or conversation on the issue, and she could not remember the details of any other dinner conversations. She told us she did have a conversation with then-councillor Baechler “way before June 24” about whom she would recommend for her ward if she was appointed interim mayor, and the response was Mr. Monteith.
- 45** Councillor **Dale Henderson** remembered going up to the cafeteria for dinner after 6 p.m. and staying for about 50 minutes. He recalled sitting in the middle seat of the first of the larger tables with councillors Polhill, Orser, and Van Meerbergen. He said Mayor Baechler and Coun. Bryant sat at the table behind them. He recalled “chitchat” at the table about how council was going to fill the vacant seat. He told us the Mayor came up to his table and said, “We’ve got Russ Monteith, he’s a good guy, and that’s who we’re going to be supporting.” He recalled the discussion lasting less than two minutes. He added that Coun. Sandy White might also have mentioned a potential candidate, but his recollection was vague. He said he expressed his concern about the process of appointment to Coun. Van Meerbergen and others in his vicinity.
- 46** Councillor Henderson also recalled councillors Hubert, Polhill, Swan, Van Meerbergen, and Denise Brown voicing their support for Mr. Monteith. According to him, the consensus was that Mr. Monteith was a “good guy.” However, he remembered Coun. Orser being unhappy because he viewed the discussion as collectively moving forward the agenda. As Coun. Henderson put it: “Whatever was said, happened. Monteith got all the votes except for two. The attitude I got from the conversation was, this is fait accompli.”
- 47** Councillor **Paul Hubert’s** recollection of the evening was vague. He recalled entering the cafeteria between 6:30 p.m. and 6:45 p.m. and staying approximately 40-45 minutes. He remembered sitting at one of the larger tables with three other council members, but did not recall which ones. He said he did hear the name “Monteith” mentioned, but did not recall the circumstances. He said there was no discussion at his table about who would fill the Ward 5 seat.

- 48** Councillor Hubert did recall speaking to then-councillor Baechler the previous week. He said she told him she had already spoken to Mr. Monteith about potentially filling a ward vacancy.
- 49** Councillor **Stephen Orser** told us that he arrived in the cafeteria at 6:45 p.m. and was there for about 45-60 minutes. He recalled 11 other members of council also being present at some point. He said he sat at the first large table with five other councillors: Denise Brown, Paul Hubert, Joe Swan, Bud Polhill and Paul Van Meerbergen. He recalled Mayor Baechler and councillors Judy Bryant, Bill Armstrong, and Harold Usher sitting at the table behind him, and councillors Dale Henderson and Sandy White sitting with two city staff at a smaller table nearby.
- 50** Councillor Orser recalled arguing with Coun. Hubert about who should fill the vacancy in Ward 5. He told us Coun. Hubert wanted Mr. Monteith to fill the vacant position and Coun. Swan referred to Mr. Monteith as “a good guy.” He said Mayor Baechler came up to their table, carrying her plate, and said that she wanted Mr. Monteith for the vacant ward seat and that she had already called him. As well, he recalled Coun. Van Meerbergen making some comment about Mr. Monteith. He described council members nodding their heads in response to the comments about the appointment of Mr. Monteith, with Coun. Henderson being the only one who didn’t seem to approve. Coun. Orser also recalled the Mayor briefly speaking with him after the 8 p.m. council meeting and “pushing hard” for Monteith. He said when members of council left that night, they all knew whom they were picking the following day and it was “already a done deal.”
- 51** Councillor **Bud Polhill** recalled going up to the cafeteria shortly after the regular council meeting adjourned at 6:40 p.m. and staying for about 35-40 minutes. He sat at the first large table but did not recall who sat with him. He recalled the Mayor coming up to his table and asking, “What do you think of Russ Monteith?” He replied that he thought he was “a good guy” and asked her if Mr. Monteith would take on the position. He said the Mayor responded that she had already talked to Mr. Monteith about it – he noted that she spoke quietly and that the conversation was meant just for him. He did not recall taking part in or overhearing any other discussions during dinner. He said he was the first to nominate Mr. Monteith the following day, at the Mayor’s request, and that his reason for doing this was his discussion with the Mayor the night before.
- 52** Councillor **Joe Swan** told our investigators he went straight up to the cafeteria after the regular council meeting adjourned and stayed for about 30 minutes. He recalled sitting at a large table but did not recall whom he sat beside. He had no recollection of any discussion during dinner about the vacant Ward 5 seat or Mr. Monteith.

- 53** Councillor Swan recalled that on the day of the vote (June 25), Mayor Baechler asked if him if he was comfortable with Mr. Monteith being her replacement. He said he replied, “We’ll see how the vote goes.” He said she did not ask him to vote for Mr. Monteith, with whom he was familiar from previous terms on council. He said about a week after Mr. Monteith was appointed, he asked why he decided to come back; Mr. Monteith’s reply was that two members of council had approached him and encouraged him to serve.
- 54** Councillor **Harold Usher** could not recall many details about the dinner gathering. He told us he went to the cafeteria shortly after the regular council meeting adjourned and stayed about 40 minutes. He said he sat and talked to Mayor Baechler and Coun. Polhill.
- 55** On July 17, 2014, after the announcement of our investigation became public, CTV London interviewed Councillor Usher about the June 24 gathering. During the interview, he stated that there might have been discussion about filling the vacant Ward 5 seat:
- If this happened, it probably happened innocently. The name [Russ Monteith] was thrown around. We were trying to figure out so how we were going to backfill and people were throwing out names, but it does not become official until it goes to Council.¹⁰
- 56** During his interview with our investigators, Councillor Usher clarified that what he meant was that if the issue was discussed, it was likely that people at different tables – not his – might have been throwing Mr. Monteith’s name around. He said he could not recall specifics about the dinner discussion, but he was sure that the issue of the Ward 5 vacancy and Mr. Monteith’s name did not come up at his table while he was there.
- 57** Councillor **Paul Van Meerbergen** told us he went up to the cafeteria shortly after council adjourned at 6:40 p.m. and stayed for about 40 minutes. He remembered sitting at one of the larger tables with councillors Polhill, Orser, Hubert and possibly Denise Brown. He also recalled councillors Henderson and White sitting at the smaller table opposite his.
- 58** Councillor Van Meerbergen remembered someone at his table declaring, “They’re talking about Russ [Monteith] at the other table.” He did not recall who made the statement. He said he voiced his opinion that Mr. Monteith was a good choice but asked whether he would want to fill the vacancy. He did not recall if anyone responded.

¹⁰ CTV London

Published Thursday, July 17, 2014 6:00PM EDT Read more: <http://london.ctvnews.ca/ombudsman-to-investigate-another-council-meal-1.1919119#ixzz39drzhMDJ>

- 59** He described some of the others at his table stating that Mr. Monteith “is a good guy,” but wasn’t sure whom. He did not recall any further details.
- 60** Later that night, after the council meeting, he said he called Mr. Monteith to ask if he would be interested in the position; he did not reach him, but left a voicemail message. He said Mr. Monteith returned his call the following day to tell him he was interested and that Mayor Baechler had already contacted him.
- 61** Councillor **Sandy White** recalled getting to the cafeteria at about 7 p.m. and being there for about an hour. She recalled sitting with Coun. Henderson and two members of city staff at the first small table by the window. She said councillors Orser, Hubert, Swan, Van Meerbergen, Polhill, Armstrong, and Denise Brown sat at the first large table directly opposite, and that Mayor Baechler and councillors Usher and Bryant sat at the second large table behind them.
- 62** She remembered councillors Orser and Hubert having a very loud argument as to who would be appointed to the vacant Ward 5 seat; Coun. Hubert was suggesting Mr. Monteith. She also recalled returning from the food counter to the table she shared with Coun. Henderson and noticing the Mayor talking with him. By the time she returned to the table, the Mayor had moved on. Coun. White said she asked him about their discussion and he told her the Mayor was looking for support to appoint Mr. Monteith and he was angry because he wanted to nominate someone else. She told us she did not hear any of this conversation directly. She recalled the Mayor going to other tables, but could not hear what was said.
- 63** Councillor White did not recall any other discussions during the dinner break, but remembered speaking with councillors Polhill and Swan individually later that evening and both telling her that the Mayor wanted Mr. Monteith to fill the vacant Ward 5 seat.
- 64** Newly appointed Councillor **Russell Monteith** told us that he first ran for council in 1997 and served three terms. He was familiar with several of the present council members from his previous terms, including Mayor Baechler and Councillor Van Meerbergen.
- 65** He told us that in the week before June 24, then-councillor Baechler contacted him and asked if he would be interested in the Ward 5 position. He asked for some time to think about it and followed up with her on June 20, confirming he would be willing to have his name put forward.
- 66** He recalled Mayor Baechler contacting him sometime during the evening of June 24 to tell him that if he was still interested, he needed to go to the Clerk’s office the next morning. He said she might have said there would be a council meeting on June 25 to deal with the appointment. He said Coun. Van

Meerbergen also contacted him to ask if he would be interested in the position; he responded that he had already agreed to submit his name.

- 67** The Information Technology staff member recalled sitting at a small table with councillors Henderson and White as well as the Director of Intergovernmental Affairs. The Director of Intergovernmental Affairs remembered sitting with the IT staffer, Coun. White and another councillor (he could not recall which one). These staff members did not remember any discussion at their table about the vacant Ward 5 seat or Russell Monteith, or the Mayor visiting their table. They also did not overhear any discussion about these issues at the tables nearby where the other council members were sitting. The Clerk, Deputy Clerk and the legal counsel sat at a small table at a distance from the tables occupied by council members. Similarly, the two video technicians sat by themselves away from the other diners. None of them recalled hearing any discussion about the Ward 5 seat or Mr. Monteith, or witnessing an argument between councillors Orser and Hubert. Nor did they see the Mayor visiting different tables.

After Dinner

- 68** At 8 p.m. on June 24, council held a special open session in council chambers to declare Mayor Baechler's Ward 5 seat vacant. Council established a process for nominating individuals to fill the vacant seat. Nominees were to go to the city Clerk's office prior to 11 a.m. on June 25 to confirm their eligibility and be certified as eligible candidates.

The Next Day, June 25

- 69** On June 25, a special council open meeting was held at 1 p.m. to consider three nominees for the vacant ward seat. Eleven out of the 13 members present voted for Mr. Monteith. Ten of the 12 members who had gathered in the cafeteria the night before voted in favour of Mr. Monteith, including Councillor Orser. When asked whether he was influenced by the dinner discussion to vote for Mr. Monteith, Coun. Orser told us that what "sold him" on Mr. Monteith was that he was neutral and council needed someone who was neutral to fill the vacancy.
- 70** Councillor Henderson did not vote for Mr. Monteith, nor did Councillor White. Coun. Henderson told us another member of the public interested in the vacancy had sent him an email on June 25. We reviewed the email, dated 8:50 a.m. that day. It does not identify the email addresses of the recipients. The body of the email is addressed to "Key Stakeholders." The author thanks these individuals for their support and notes he is sending a summary of the information that he will be handing in to the Clerk regarding the open council seat. Coun. Henderson was the only one to vote for this nominee.

- 71** Coun. White told us that the dinner discussions on the issue of the Ward 5 appointment prior to the vote bothered her. The next day, she was the only one to vote for the lone female candidate, who, according to the councillor, had learned about the nomination process from Coun. White's Facebook page. Coun. White was of the view that council members should not have been aware in advance of the nominees for the seat.
- 72** None of the other council members we interviewed expressed that their vote was affected by their conversations at dinner on June 24. Mr. Monteith previously served on council and is a well-known and respected figure in London.

Analysis

- 73** It is not in dispute that 12 council members, comprising a quorum of the then 14-member council, went to the City Hall cafeteria for dinner on the evening of June 24, 2014. The cafeteria was closed to the public, and the gathering took place shortly before the Ward 5 vacancy was to be considered by council in a special session. The question is, did the discussions during the dinner lead to a violation of section 239 of the *Municipal Act, 2001*? In response, I must consider whether the group came together for the purpose of exercising the power or authority of council, or for the purpose of doing the groundwork necessary to exercise that power or authority. Specifically, did the group gather and enter into discussion for the purpose of deciding or laying the groundwork for voting on who would be the next Ward 5 councillor?
- 74** It is normal for council members to gather in the cafeteria for dinner on meeting days. There is no evidence to suggest that this particular dinner gathering was orchestrated in order to discuss council business. The 12 members arrived at different times, sat at three different tables, and stayed for varying lengths of time. Unlike the February 23, 2013 lunch at Billy T's, there was no planned and concerted effort to converge together at a common location and time. While it is possible for a meeting to arise spontaneously when a quorum of council socializes, indications of pre-planning are factors to consider in determining whether a meeting has occurred.
- 75** The evidence of the 12 council members was rife with inconsistencies, and most witnesses had only vague recollections of the dinner discussions. However, at least nine council members recalled some mention of Mr. Monteith during the dinner period. Some said his name was mentioned in passing, at different tables and by different individuals. Some said they had discussed the possibility of Mr. Monteith standing for the vacant seat with individual council members – but at other times.
- 76** Some degree of contradiction is to be expected when recalling events after the fact. By the same token, sometimes accounts display similarities after witnesses have had an opportunity to discuss events amongst themselves prior

to being interviewed by investigators. In this case, some of the witness statements cannot be reconciled with the balance of the evidence. The clearest statements impugning the nature of the discussion amongst the council members came from councillors Henderson and Orser, who suggested that the fate of the Ward 5 seat was decided in the cafeteria the night before council's vote. None of the other members agreed with this view, although Coun. White had concerns about the discussions she alleged took place in the cafeteria. Their accounts are also not corroborated by the independent evidence of city staff, including the two who told us they were sitting with some councillors and in close proximity to the others.

- 77** Councillor Henderson claimed the Mayor came up to the table where he was sitting with councillors Polhill, Orser, and Van Meerbergen and essentially declared that council would support Mr. Monteith for the vacancy. While the evidence concerning the seating arrangements at the dinner varies, the bulk of the witness testimony places Coun. Henderson at another smaller table with two staff members and Coun. White. I accept that that this smaller table is where Councillor Henderson was seated. Both councillors Orser and Van Meerbergen have no recollection of sitting with Coun. Henderson, and Coun. White remembered that he sat at her table. I am particularly persuaded by the independent evidence of the member of the city's IT department, who told us that both councillors Henderson and White were seated with him and another staff member. The only person to partially support Coun. Henderson's claim that the Mayor spoke to him at his table about Mr. Monteith is Coun. White. She told us that while she was away from the table where she had been seated with Coun. Henderson and two city staff, she saw the Mayor approach Coun. Henderson. She was unable to overhear their conversation, and relied on Coun. Henderson's version of that exchange.
- 78** Councillor Henderson also said that five councillors spoke up in support of Mr. Monteith during dinner. However, four of the five he mentioned denied doing so.
- 79** Councillor Orser also claimed that the Mayor came up to his table and said she wanted Mr. Monteith for the Ward 5 seat. The Mayor and other council members did not support this aspect of Coun. Orser's account. While Coun. Henderson testified that he was sitting with Coun. Orser and that the Mayor came up to him to discuss Mr. Monteith, the preponderance of the evidence suggests that they were sitting at different tables. In addition, Coun. Orser stated that he argued with Coun. Hubert over the Ward 5 vacancy, but Coun. Hubert contradicted this evidence. While Coun. White claims to have overheard the loud argument from a nearby table, no other witnesses in the vicinity, including the two city staff at her table, had a similar recollection.
- 80** Given the significant discrepancy between the evidence of councillors Orser, Henderson and White and other witness accounts, I cannot place much weight on their testimony. It is unclear how much can be read into the fact that these

three were the only diners to suggest that there was anything problematic about the discussions over dinner on June 24. These councillors are certainly familiar with my Office. They were all interviewed as part of my investigation last year, and I ultimately found that they were part of an improper lunch meeting at Billy T's restaurant. Councillors Orser and Henderson also took part in the lunch at the Harmony Grand Buffet, about which I expressed concern in 2012. While Coun. Orser voted for Mr. Monteith on June 25, councillors Henderson and White supported other nominees. In the case of these two witnesses, Mr. Monteith's successful bid for the seat might well have affected their perspective of the dinner discussions the evening before.

- 81** The circumstances surrounding the filing of complaints with my Office about the June 24 dinner gathering raise concerns about the possible motives of the councillors who lodged them. Accordingly, I would like to emphasize for future reference that the "sunshine law" was not intended as a tool to serve the oblique purposes of those involved in municipal politics. It should be respected as a mechanism for upholding the public interest in ensuring accountability, openness and transparency in local government.

Conclusion

- 82** Councillors are entitled to socialize. They may also engage in individual discussions relating to council business. In this case, the evidence does not support that the various conversations during dinner about the Ward 5 seat rose to the level of a serial meeting, such as occurred in the Nipissing case. Considering the totality of the available evidence, the gathering in the cafeteria did not involve a collective effort on the part of a quorum of council members to address the issue of the Ward 5 vacancy.
- 83** Under the circumstances, it is my opinion that the dinner gathering of the 12 council members in the cafeteria on June 24, 2014 did not violate the open meeting provisions of the *Municipal Act*.

Report

- 84** This 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