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**London**  
CANADA

April 17, 2012

Mr. André Marin  
Ombudsman Ontario  
483 Bay Street, 10<sup>th</sup> Floor, South Tower  
Toronto ON M5G 2C9

Dear Mr. Marin;

This letter will serve to notify you, that the following item entitled "*How Bill 123 Satisfied Key Requirements of an Effective Open Meetings Law*", will be included on the Council agenda for your personal attendance (date to be determined).

As per your letter dated April 13, 2012 to all Members of City Council, I have the following questions and would appreciate a response in writing, to be placed on the Council agenda.

Although "Bill 123, Transparency in Public Matters Act, 2005" has been withdrawn pursuant to the Order of the House (included in facsimile), would you please comment on the following items.

1. Section 3 – What constitutes a Meeting
2. Roberts Rules of Order – Definition of a Meeting
3. Could you identify any Canadian/U.S. open meeting laws, that allow less than quorum to constitute a meeting?

I look forward to your response.

Sincerely,

Stephen Orser  
Councillor, Ward 4

Attach.

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## How Bill 123 Satisfies Key Requirements of an Effective Open Meetings Law

### Definition of a Meeting

Section 3 of Bill 123 provides that a meeting occurs if certain conditions are met. For example, a “meeting” within the definition of the bill occurs when a public body deliberates on or does any thing within its jurisdiction or terms of reference. The number of members in attendance must constitute a quorum, or a majority, in the absence of a quorum requirement. These elements are commonly found in U.S. open meetings laws.<sup>1</sup>

An example of the lack of clarity that currently exists can be seen in the *Municipal Act*, where a “meeting” is simply defined as any regular, special, committee or other meeting of a council or local board.<sup>2</sup> This definition provides little help in resolving ongoing debates about whether informal gatherings of municipal councilors or board members constitute meetings that should be held in public. The courts in Ontario have also stepped in on occasion to provide direction on what constitutes a “meeting”.<sup>3</sup>

We believe that Bill 123 provides a clear and practical definition of a meeting that can be applied at the municipal and provincial level. In our view, this definition will alleviate uncertainty stemming from the existing open meetings provisions in Ontario. Bill 123 provides additional clarity by expressly including electronic gatherings within the definition of a meeting.

### Notice Requirements

A meeting is not truly open to the public unless citizens are given advance notice that the meeting is going to take place.

Section 4 of Bill 123 clearly requires public bodies to give reasonable public notice of its meetings by posting the date, time and location of the meeting as well as a clear, comprehensive agenda of items to be discussed.

The *Municipal Act*, for example, does not set out specific notice requirements. Rather, it states that municipalities and local boards shall pass a procedure by-law for governing the calling of meetings<sup>4</sup>, which could result in varied practices. In addition, while some public bodies may

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<sup>1</sup> *I'm Sorry, this Meeting is Closed to the Public: Why We Need Comprehensive Open Meetings Legislation in Canada*, Information and Privacy Commissioner/Ontario, December 2004, pp. 9 and 10. Available at: [www.ipc.on.ca](http://www.ipc.on.ca)

<sup>2</sup> S.O. 2001, c.25, s.238(1)

<sup>3</sup> See, for example, *Southam Inc. v. Hamilton-Wentworth (Regional Municipality) Economic Development Committee* (1988) 66 O.R. (2d), p.213

<sup>4</sup> *Supra.*, note 2, s. 238(2)

# O Ombudsman

## Fax

**To:** Stephen Orser, Councillor, Ward 4

**From:** André Marin, Ombudsman

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**Fax:** 519-661-5933

**Phone:** 416-586-3347

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**Phone:** 519-661-2500, ext. 7012

**Date:** April 18, 2012

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**Re:** Open Meeting inquiry

**Pages:** 3 (incl. cover page)

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**Comments:**

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André Marin  
OMBUDSMAN

Sent via fax and mail

April 18, 2012

Councillor Stephen Orser  
City of London  
300 Dufferin Avenue  
P.O. Box 5035  
London, ON  
N6A 4L9

Dear Councillor Orser:

**Re: Open Meetings inquiry**

Thank you for your April 17, 2012 letter, in which you seek clarification of my Office's interpretation of the word "meeting" for the purpose of the open meeting requirements of the *Municipal Act, 2001*.

As you know, I am currently investigating complaints that members of Council for the City of London met improperly on February 21 at a local restaurant. My views on what constitutes a "meeting" for the purpose of the open meeting provisions will be addressed in the report resulting from this investigation.

You may also wish to review my report, "Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal", pertaining to a meeting held by Council for the City of Greater Sudbury. This report provides an overview of the case law my Office considered in developing a workable definition of "meeting" for the purpose of conducting open meeting investigations. This report is available on our website:

<http://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-br-Don't-Let-the-Sun-Go-D.aspx>

Further information can be found in my Office's Sunshine Law Handbook, also available on our website:

<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/sunshinelaw-en.pdf>

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André Marin  
OMBUDSMAN

Pages 16 and 17 of the Handbook address what constitutes a "meeting" under the open meeting provisions.

I will be attending a meeting with the Strategic Priorities and Policy Committee, which is currently being arranged through the Clerk, to answer any questions and clear up any concerns that council members may have relating to my Office's closed meeting investigations.

Yours truly,

A handwritten signature in black ink, appearing to read 'A. Marin', written over a horizontal line.

André Marin  
Ombudsman of Ontario



**“Don’t Let the Sun Go Down on Me:  
Opening the Door on the  
Elton John Ticket Scandal”**

**Investigation into  
City of Greater Sudbury Council  
Closed Meeting of February 20, 2008**

**André Marin  
Ombudsman of Ontario  
April 25, 2008**

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## Introduction

- 1 Ontario entered a brave new world on New Year's Day, 2008. As of that date, citizens have the right to request an investigation into whether a municipality has improperly closed its meeting room doors. Under section 239 of the *Municipal Act, 2001*, municipalities are required to open their council and committee meetings to the public unless they fall within prescribed exceptions. This has been the law for years, but this year marks the debut of the public complaints and investigation process.
- 2 New amendments to the Act designate my Office as the investigator of such complaints for all Ontario municipalities, unless they appoint their own investigator for this task. On November 14, 2007, the City of Greater Sudbury chose, through a council vote, to use my Office as its investigator for public complaints about closed meetings. At present, my Office is the investigator for some 200 municipalities across Ontario.
- 3 Open meeting legislation is intended to ensure that the exercise of political power is exposed to the light of day. In the U.S., where similar statutes are commonplace, they are called "sunshine laws." The term is particularly apt for this closed meeting complaint, since it arises from the ticket scandal surrounding Sudbury's Elton John concert on March 2, 2008. Elton John, after all, famously sang *Don't Let the Sun Go Down On Me*, and that is the very complaint here – that councillors closed the door and left the rest of us in the dark about what they had discussed.

## The Complaint and Background Facts

- 4 Sudbury is not a normal concert tour stop for megastars. Yet it snagged an Elton John concert, and this generated the kind of excitement one might expect. The Sudbury Community Arena would be packed to the rafters, and still there would be many fans who could not get in. On February 1, 2008, just over 6,000 concert tickets went on sale to the public. The public was advised to buy tickets online rather than line up at the box office in the dead of winter, but many still did just that – some 200 people, all but 50 of whom would walk away disappointed. Their hopes of securing tickets were dashed not only by the speed of electronic commerce, but also by the fact that a considerable number of tickets were held back by the promoter and the arena manager. More than 200 were designated for



use by arena staff and the 13 members of City Council, with elected officials having first dibs on 120 of them.

- 5 To be clear, this privilege was not initiated by the politicians. The concert promoter explained to our investigators that setting aside tickets for arena staff and local politicians was standard practice, just as it was standard practice to reserve some for media and entertainment industry representatives and others of the promoter's choice. In the case of elected officials, the promoter explained that such arrangements were made not with them directly, but with the arena manager, a municipal bureaucrat who ordinarily distributed them. In this case, a more senior bureaucrat – one of the city's general managers – co-ordinated distribution of the tickets to councillors. This unusual step was taken, we were told, because of the high volume of anticipated requests. Still, it was the Mayor who decided how many tickets each councillor would be entitled to purchase – a maximum of eight each. The Mayor had chosen this number because it was his understanding that each member of the public would also be entitled to purchase eight tickets, and another Ontario city on this same Elton John tour – Kitchener – had allowed its councillors that number (including one freebie). Ultimately, though, Sudbury council members stretched their limit somewhat – 120 tickets for 13 councillors actually works out to 9.23 tickets each, indicating that some clearly obtained more than their allotment of eight.
- 6 It should be stressed that these tickets were not gifts. Sudbury officials paid for them with their own money. However, that did not excuse them in the minds of the public. The tickets were made available to municipal politicians by virtue of their offices, while members of the public had to line up, either in Internet queues or outside an arena, and risk ending up empty-handed.
- 7 It is always worrisome when elected officials appear to be gaining personally from their positions, or when they appear to prefer their own self-interest to that of the people they serve. Municipal councillors hold positions of trust. They are elected to wield significant power and it is expected by the public that they will use their positions in the public interest, not to benefit themselves. This expectation applies not just to such blatant things as contract kickbacks or expensive gifts from suppliers – any perk derived from elected office may be viewed with suspicion. The dollar amount at stake may be small, but the concern is not. That is why, when the Mayor confirmed to the local newspaper – the *Sudbury Star* – that council members had indeed scooped up priority concert tickets, it was a “stop the presses” moment. It became a hot topic of media and water-cooler conversation. As the controversy grew, so did the public backlash against councillors. Several of them told us they faced a barrage of angry calls, letters and public catcalls in the wake of this revelation.

- 8 By February 13, 2008, the matter had become an issue for council. At that night's council meeting, the Mayor requested permission to address the public. He apologized for the ticket controversy and stated that the purchase of the tickets by council members was in keeping with "long-standing" practice, but he vowed to have this practice reviewed and a formal policy adopted by council.
- 9 This promise did not stop the story's momentum. On February 16, 2008, the *Sudbury Star* reported that the concert could be in jeopardy as a result of the ticket scandal. This notion was denied outright by the promoter in a subsequent article. Yet four days later, evidently concerned about the public outcry, the promoter contacted the arena manager and asked for 60-70 tickets to be returned so they could be made available to the public in a lottery. The arena manager pushed the matter up to the Mayor's office. As a result of discussing the situation with the promoter, the Mayor undertook to obtain the tickets and assigned the General Manager (the same one who had distributed them) the task of administering their return. The Mayor then spoke to several of the councillors individually, and then met with as many as six of them informally in his office. He told them he was returning his 11 tickets and they would have to return some of theirs as soon as possible.
- 10 This about-face no doubt proved embarrassing for those councillors who would have to try to take back tickets they had obtained for others. It also presented logistical concerns: How many tickets would each councillor have to give back? How would they be refunded? What if they had paid by credit card? And so on. Evidently there was work to be done in administering the Mayor's request.
- 11 On February 20, 2008, the councillors attended a scheduled meeting of the Priorities Committee – a so-called "committee of the whole" which comprises the full membership of council. As is customary, several of them shared a supper in the council lounge beforehand and at least a few discussed the issue of the concert tickets and how many could be retrieved from friends and family. After the Priorities Committee meeting ended, 10 councillors retired to the lounge in preparation for their departure, and a discussion surrounding the tickets began in earnest.
- 12 The councillors in attendance were: Jacques Barbeau, Claude Berthiaume, Frances Caldarelli, Joe Cimino, Doug Craig, Ron Dupuis, Evelyn Dutrisac, Janet Gasparini, Joscelyne Landry-Altmann, and Russ Thompson. Although there was some evidence that an 11<sup>th</sup> councillor, André Rivest, was in the lounge for a very brief period, he was adamant that he did not take part in the ticket discussion, and I accept his account. Mayor John Rodriguez did not attend, nor did Councillor Ted Callaghan, who was on vacation, nor Chief Administrative Officer Mark

Mieto. Municipal staff who had remained behind to clean up the lounge were asked to leave because, we were told, the councillors were concerned about recent leaks of information to the media. Catherine Matheson, General Manager of Community Development, was summoned to the lounge to answer councillors' questions. According to our interviews, the meeting lasted for about 10 minutes and the discussion focused on calculating how many tickets each councillor could return, as well as questions about how those who used various credit cards to pay for their tickets would be reimbursed. Ms. Matheson explained to them how this could be done.

- 13 City administrators later proceeded to obtain legal and communications advice from external contractors on how to deal with media Freedom of Information requests and public opinion. We were told this was done in part because some regular staff were away, and because of a need for specialized advice. In any event, this decision was an administrative one, well within the bailiwick of city staff.
- 14 In the end, council members returned 71 tickets. The promoter added these tickets to some that he had placed on hold and, on February 24, 2008, made them available to the public through a lottery.
- 15 That proved not to be the end of what the local paper called "Ticketgate," but rather the beginning. Rumours concerning the councillors' closed-door meeting then began to circulate in the community, culminating in the complaint to my Office on February 26, 2008. After conducting preliminary inquiries and making efforts to contact a few witnesses who were temporarily unavailable, I launched an official investigation on March 26, 2008.

## **Investigative Process**

- 16 A four-member investigative team interviewed 17 individuals, including all 13 members of the City of Greater Sudbury Council, as well as various municipal staff. Documents obtained from the municipality were reviewed, including agendas and minutes for 2008 City Council and Priorities Committee meetings, emails, memoranda and councillors' personal notes. The investigation also involved extensive legal research, covering case law on open meetings in Ontario and other jurisdictions.
- 17 Prior to January 2008, Ontarians who wanted to challenge a closed municipal meeting would have had no recourse but to go to court. Today, they can complain

to my Office or their municipality's designated investigator, under a brand-new system of enforcement through investigation. It is so new, in fact, that this is only the second such full investigation my Office has conducted, and understandably few municipal officials or members of the public have had a chance to become familiar with the process. Under the circumstances, I have chosen to include an Appendix to this report that analyses legal issues concerning open meetings in considerable detail. I trust that this will provide guidance to municipal officials in the future with regard to their open-meeting obligations.

## **"Meeting" the Legal Test**

- 18** When I investigate a complaint about a closed municipal meeting, I must consider whether the municipality has complied with the requirements of section 239 of the *Municipal Act, 2001*, as well as the procedure bylaw the municipality is required to pass under subsection 238(2) of the Act.
- 19** The Act provides a list of exceptions permitting municipalities to hold closed meetings if they are dealing with certain limited subjects, such as personnel matters or litigation. The subject of concert tickets for councillors clearly does not fall within these exceptions. Therefore, the critical issue in this case is whether the February 20, 2008 meeting in the Sudbury council lounge was a "meeting" as defined under the Act.
- 20** The *Municipal Act, 2001* defines a "meeting" as **"any regular, special or other meeting of a council, of a local board or of a committee of either of them."** This definition, which has also essentially been adopted by the City of Greater Sudbury in its procedure bylaw, is not particularly illuminating. In fact, it is infuriatingly circular: A meeting is a meeting is a meeting.
- 21** The question here is whether what happened in the council lounge on February 20, 2008 was a "meeting" subject to the open meeting requirements – or was it an informal discussion falling outside of the Act?
- 22** Certainly, those in attendance did not think it was a "meeting" subject to the Act. The General Manager told us:

Personally, I don't think it was a meeting at all. It was an informal discussion and a normal process that happens after Council and people leaving get their coats. So, was there a decision made? No. Was there an explanation to a few politicians about how to return their tickets? Yes.

**23** One councillor described it this way:

The decision [to return tickets] was not recorded, as it was not something that we voted on. In my mind, it was never a council decision. This was not city taxpayers' money. This wasn't a policy issue. This had nothing to do with the business of council, really. It had to do with us taking advantage of what had been a long-standing practice, which now needs a policy.

- 24** At the risk of sounding legalistic, not all meetings are “meetings” for the purposes of this law. While any gathering of individuals having a discussion might be considered a meeting in the colloquial sense of the word, in order to constitute a “meeting” subject to the Act, something more is needed.
- 25** The Supreme Court of Canada has recently noted that Ontario’s open meeting legislation was “intended to increase public confidence in the integrity of local government by ensuring the open and transparent exercise of municipal power.” It serves two important purposes: The pursuit of effective democracy, and the preservation of the appearance of integrity in the exercise of political power.
- 26** The political power held by councils and committees is, in the main, a policy-making power. Mayors and municipal councillors represent the public by holding delegated authority to pass bylaws and determine broad questions of policy, including the allocation of municipal programs and services. They also establish and oversee administrative policies, practices and programs that are required to implement the decisions of council.
- 27** By contrast, councillors are *not* given the power to do the hands-on administration of a municipality; it is the officers and employees of the municipality who implement or administer council’s policies and program choices and carry out the duties assigned by a municipality. Naturally, politicians interact with administrators on behalf of their constituents, or to ensure that existing policies are properly implemented, but when doing so they are not exercising power in a way that requires “sunshine laws.” They are managing existing policies or otherwise engaged in administration. It would not be feasible or desirable to require every such get-together to be held openly and with notice.
- 28** The Greater Sudbury Council’s procedure bylaw reflects this, and attempts to distinguish between the role of council and the administration, noting in its Schedule C that “one of the principal distinctions of a council as opposed to the administration is council’s mandate to establish the policies of the organization.”

- 29 Taking into consideration the court decisions on open meeting requirements (referred to in detail in the Appendix to this report), I have concluded that the legal definition of when a meeting is a “meeting” under the Act should be interpreted as follows: **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.**

## When is a Meeting Not a “Meeting”?

- 30 So, was the meeting in the Sudbury council lounge a “meeting” that should have been open to the public, according to the law?
- 31 Looking at the first part of the above definition, the answer is yes, council members clearly “came together,” even though it was after the formal meeting of the Priorities Committee had been adjourned. Ten members of a powerful political body convened – albeit without the usual formal trappings of a council meeting – to discuss and settle matters on a topic of common concern. They summoned the General Manager. They had quorum and therefore the legal authority to make decisions. This was a meeting of the council, period.
- 32 However – and this is where it gets tricky – that does not necessarily mean the open meeting obligations of the Act apply. It ultimately depends on what the council was doing and why. The “coming together” must be **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**. And here, based on my review of all the evidence, the answer is no, the 10 councillors were not meeting for this purpose.
- 33 They came together to determine who should give tickets back, how many, and to learn about the mechanics of doing so. They were engaged in the face-saving surrender of tickets. This was not a policy matter that invoked council’s political power. It related to the administration of the ticket returns. Those present did not deliberate on any matter that would involve the use of council’s political authority. They were not equipping themselves for a later political decision. They just wanted to sort out what to do with the tickets.

## Not a “Meeting,” But ...

- 34** Now here comes the “but.” There *was* a policy matter lurking beneath the surface. Indeed, it was precisely the kind of policy matter that the public would be interested in, and the type of thing that open meeting legislation is all about – namely, the question of whether councillors should have ticket priority over their constituents. Certainly, when perks come from the city budget, they are matters that are dealt with in open council meetings, with good reason. The Toronto news media recently buzzed over the decision by councillors in that city – made and debated in public – to maintain their free taxi rides and passes for city golf courses, the zoo and public transit. The public is entitled to know that these kinds of self-serving benefits are being claimed by elected officials, not only because it is public money, but because it says something relevant about the use of power.
- 35** Mercifully, Sudbury’s Elton John ticket scandal did not involve public funds, but it did involve benefits coming to elected officials by virtue of their office. While the preferential ticket acquisition practice had never in the past been treated as a matter for council, the fallout turned it into one. The Mayor used a council meeting to make a public statement about the scandal, and then, on April 2, 2008, at Priorities Committee, a new policy was proposed and discussed to cover the advance sale and distribution of tickets for events at the Sudbury Community Arena. Staff recommended that council members and the city’s arena staff be given the opportunity to purchase a maximum of two tickets each before they become publicly available. But council was split on whether to endorse any priority ticket plan. The vote at that meeting was tied 6-6, so no decision was reached until April 9, 2008, when the Mayor cast the deciding vote. Council ultimately decided 7-6 to adopt a policy eliminating the “long-standing practice” that had sparked so much trouble: City councillors and employees can no longer obtain tickets to events at the Sudbury Community Arena in advance of the general public.
- 36** It is worth noting that, had the conversations and discussions between councillors in that crucial 10 minutes behind closed doors on February 20, 2008 been only marginally different, section 239 would have kicked in. Had there been a discussion where councillors agreed, as a matter of policy, that they deserved ticket priority over their constituents, it could have been deemed an illegal meeting. If they had talked about making the issue the subject of a formal policy at council, or if the General Manager had been directed to look into the question of whether this should have happened, section 239 would have applied.
- 37** I am satisfied from their evidence, however, that councillors did not engage in these kinds of discussions, and therefore their lounge meeting was in compliance

with the law – *but only barely so*. This case perfectly illustrates the principle that open meetings engender public trust, while closed meetings breed suspicion. Municipal councillors, in the heat of a scandal in which they were believed to have used their positions as public officials to gain an advantage over the citizens they represent, waited for the public to clear out of a public meeting, asked staff to leave, and closed the door to talk about the very tickets that had sparked the controversy. No wonder there was so much backlash against them in the community – and enough distrust to inspire a complaint to my Office.

- 38** As one Ontario judge cautioned in an open-meeting case, the actions of public officials “must not only be above board, but should appear to be above board.” What took place on February 20, 2008 did not appear to be above board. All that saves council’s actions from censure in this case is that the meeting did not involve the exercise of municipal power.
- 39** If Sudbury council is getting off the legal hook here, it is not because it acted wisely or respected the important principle of the appearance of acting above board. It is because of the kind of reasons that tend to resonate with lawyers: Contrary to common sense, sometimes a meeting is not a “meeting.”



## Opinion

- 40** This is not a case where vindication should be claimed. It is a case where councillors should reflect on their actions from the vantage point of the ordinary constituent, and ask themselves whether, in the throes of a controversy such as this one, they should have closed the door.
- 41** It is not my place to comment on the fairness, reasonableness or even the wisdom of councillors receiving preference over their constituents by virtue of their office. The public outcry in this case has admirably filled that role. It is, however, my job to comment on the issue of municipal officials holding closed meetings, and in this I am in agreement with the Ontario judge who remarked a few years ago: “Given the legislative prohibition contained in the *Municipal Act*, [holding closed meetings] is a highly dangerous practice.” In other words, even in matters that do not formally fall within the requirements of section 239, local politicians should think long and hard before closing the doors and letting the sun go down.



André Marin  
Ombudsman of Ontario

## Appendix: Legal Analysis

### The Importance of Open Meetings

- 42 As stated in the attached report, Ontario has only had a public complaints mechanism for closed municipal meetings for a few months. However, the legislation requiring open meetings has been in place since the 1990s, and has been the subject of numerous court decisions, as well as various proposed amendments. In forging a path for enforcement of the law through investigation, a thorough review and analysis of relevant case law – both in Ontario and in other jurisdictions where so-called “sunshine laws” have been well tested – is in order. My hope is that this analysis will help guide municipal officials and their legal advisors in future as they deal with the issue of closed meetings.
- 43 In *London (City) v RSJ Holdings Inc.*<sup>1</sup>, the Supreme Court of Canada described how the impetus for the initial round of open meeting reforms in Ontario in the 1990s was “to foster ... democratic values and respond ... to the public’s demand for more accountable municipal government.”<sup>2</sup> In the Court’s words, open meetings are required if there is to be “robust democratic legitimacy.”<sup>3</sup> This is because effective democracy requires more than the people having a chance to vote in periodic elections. The people must also have knowledge of elected officials’ actions so they can cast their votes intelligently, and they must have the ability to have ongoing input while political decisions are underway.<sup>4</sup> Closing the door stifles this.
- 44 In that same case, the Supreme Court of Canada also said the province’s *Municipal Act, 2001* had an additional role in fostering public trust. It observed that section 239 “was intended to increase public confidence in the integrity of local government by ensuring the open and transparent exercise of municipal power.” In other words, open meetings can increase public trust, while closed meetings do the opposite. Or, as a Florida judge so colourfully put it back in 1969, “[t]erms such as ... secret meetings, closed records, executive sessions and study sessions have become synonymous with ‘hanky panky’ in the minds of public-spirited citizens.” States like Florida had passed “sunshine laws,” he said, “to maintain the faith of the public in governmental agencies.”<sup>5</sup>

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<sup>1</sup> [2007] S.C.J. No. 29 [*London (City) v. RSJ Holdings Inc.*].

<sup>2</sup> *Ibid.* at para. 18.

<sup>3</sup> *Ibid.* at para. 38.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).

## Open Meetings and the Ombudsman

- 45** In 2007, the *Municipal Act, 2001* was amended to provide for Ombudsman investigation into closed meeting complaints. This was a sage development. As many of the legal cases I discuss here disclose, in the past, closed meeting complaints tended to be brought in court by individuals or organizations as a means to argue that bylaws they opposed were “illegal” because they were passed in contravention of the open meeting obligation in section 239 of the statute. Ombudsmanry provides a complaint process that is readily available to concerned citizens who may not have a financial or personal stake in the matter but who understand the importance of the open meeting principle to democracy. It is an inexpensive, efficient way of vindicating the democratic principles advanced by open government.
- 46** Unfortunately, the mandate of the Ombudsman of Ontario to accept a complaint depends upon a municipality not appointing its own “investigator” under s.239.2(1) of the *Municipal Act, 2001*. In November 2006, while the amendments to the Act (in the form of Bill 130, which became the *Municipal Statute Law Amendment Act, 2006*) were still under review by the Standing Committee on General Government, I appeared before the committee and furnished a written position paper on why this was a bad idea. Those municipalities that take this route must pay the costs of an investigator out of their own budgets. More importantly from a public interest perspective, the statute does not adequately insure that these investigators will have the independence or the investigative powers that my Office holds. There is therefore every reason to believe that internally appointed investigators will be ill-suited to effectively protect the important principles at stake.
- 47** The kind of jurisdiction the Ombudsman exercises in this context is unique in the sense that my Office’s mandate does not extend, as it ordinarily does, to a broader evaluation of questions of basic fairness or reasonableness. My authority is only to investigate “whether a municipality or local board has complied with section 239 or a procedure bylaw under subsection 238(2) in respect of a meeting or part of a meeting that was closed to the public.” These are ultimately legal questions requiring a proper interpretation of the requirements of the *Municipal Act, 2001* and the procedure bylaw of the municipality in question.

## Forcing Doors Open: Our Commitment to Open Meetings

- 48** Prior to the enactment of specific legislation, it was left entirely up to the political process to force the doors open at local government meetings in Ontario: “[T]he

public had no right of access to deliberations of council or its committees which were free to hold meetings in camera.”<sup>6</sup> The effect of leaving it up to officials, many of whom would naturally prize their own political survival ahead of openness, transparency and accountability, was predictable. The 1984 *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information* found that “some municipal councils employ lengthy, in-camera, special and committee meetings to discuss matters under debate, and then ratify their decision in full council in a few minutes, with minimal discussion.”<sup>7</sup> The result of this and other corroborating studies<sup>8</sup> was the passage of the *Planning and Municipal Statute Law Amendment Act 1994*, S.O. 1994, c.23, which adopted the open meeting provisions now found in section 239 of the *Municipal Act, 2001*.

- 49 The importance that has now been given to the open meeting law is evident in the structure of section 239. Subject to designated exceptions, it declares “**all meetings shall be open to the public.**” As the Supreme Court of Canada observed, the imperative “shall” “demonstrates that, in the normal business of municipal government, meetings will be transparent and accessible to the public.”<sup>9</sup> By contrast, eight of the nine exceptions to that rule are permissive – in other words, even if the municipal council or committee can legally close the doors, the Government of Ontario leaves them the flexibility, in the interests of transparency and accountability, to refrain from doing so. The Act is a strong endorsement of the open meeting principle.
- 50 This strong legal commitment to open meetings has produced two important rules relating to how open meeting complaints are to be approached. First, “open meeting statutes are enacted for the public benefit and are to be construed most favourably to the public.”<sup>10</sup> The relevant terms of the statute should not be read or understood or applied in a way that narrows or weakens the open meeting obligation. They should be interpreted and used in a way that makes open meetings the norm rather than the exception, and so that exceptions to the open meeting rule are circumscribed. As the Ontario Court of Appeal has observed, “the clear legislative purpose informing section 239 is to maximize the

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<sup>6</sup> *Southam Inc. v. Hamilton-Wentworth (Regional Municipality) Economic Development Committee*, [1988] O.J. No. 1684 at para. 22 (Ont. C.A.), per Lacourciere J.A., dissenting [*Hamilton-Wentworth*].

<sup>7</sup> Ontario. *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee (July 1984) at 2.

<sup>8</sup> See, for example, Ontario. The Commission on Freedom of Information and Individual Privacy (“Williams Commission”) *Public Government for Private People*. Toronto: The Commission, (1980), and Ontario. Ministry of Municipal Affairs. *Open Local Government*. Toronto: Queen’s Printer, 1992 at 2, 3 and 31.

<sup>9</sup> *Supra* note 1 at para. 22.

<sup>10</sup> *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1 (Minn. 1983) [*St. Cloud Newspapers*].

transparency of municipal governance so far as that is possible in the circumstances.”<sup>11</sup>

- 51** Second, when an open meeting complaint is made, the onus is on the politicians to demonstrate that they have not breached their statutory obligation. In *Southam Inc., Eade and Aubry v. Council of the Corp. of the City of Ottawa et al.*, the Court held that the onus is on elected officials to make sufficient disclosure about what happened behind closed doors to demonstrate compliance.<sup>12</sup> The reason for this is obvious. With the doors shut, only those in attendance know whether what took place constituted a “meeting” within the meaning of the legislation, or fit within an exception. If they do not explain why the doors were closed, in a way that demonstrates compliance with the statute, a violation of the open meeting requirement is apt to be found.
- 52** Ultimately, my determination of whether the open meeting requirements have been respected depends not on my own sense of what I think is reasonable. The question is a legal one, taking into account the interpretation of the *Municipal Act, 2001* and the relevant procedure bylaw.

## Determining Contravention of the Act: Defining “Meeting”

### Which Meetings May Be Closed?

- 53** Municipalities may rely on s.239(2) to close meetings involving the security of municipal property (s.239(2)(a)), personal matters about an identifiable individual (s.239(2)(b)), proposed land acquisition or disposal (s.239(2)(c)), a labour or employee negotiation (s.239(2)(d)), litigation or potential litigation (s.239(2)(e)), advice subject to solicitor-client privilege (s.239(2)(f)), or a matter that can be closed under the authority of some other enactment (s.239(2)(g)). “Education or training” sessions may also be exempt under the new exception in s.239(3.1). However, municipalities may choose to hold meetings concerning these subjects in open session. The only circumstances in which a closed meeting is required is when the municipal body as the “head of an institution” is considering a request under the *Municipal Freedom of Information and Protection of Privacy Act*.

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<sup>11</sup> *Farber v. Kingston (City)*, [2007] O.J. No. 919 at para. 19 (Ont. C.A.).

<sup>12</sup> *Southam Inc., Eade and Aubry v. Council of the Corp. of the City of Ottawa et al.*, [1991] O.J. No. 3659 (Ont. Div. Ct.) [*Southam Inc. v. Ottawa Council*], and see *Hamilton-Wentworth*, *supra* note 6 at para. 11.

## What is a "Meeting"?

- 54 The current definition of "meeting" offered in s. 238(1) of the *Municipal Act, 2001* is virtually useless because it is entirely circular. As one judge commented, it does not "advance the matter" of determining when a gathering is subject to the legislation.<sup>13</sup> It says only that a "meeting" means any "**regular, special or other meeting of a council, of a local board or of a committee of either of them.**" As a definition, it offers no criteria for decision-making. Under the guise of defining "meeting" it really avoids telling us what a "meeting" is, resting content to define only whose meetings are caught.
- 55 When the Information and Privacy Commissioner issued her 2003 paper, *Making Municipal Government More Accountable: The Need for an Open Meetings Law in Ontario*, she commented on the need for a clear, precise and practical definition of "meeting." She described the then existing definition (which is almost identical<sup>14</sup>) as being insufficient and imprecise.<sup>15</sup> On October 13, 2004, Private Member's Bill 123, *Transparency in Public Matters Act, 2004*, offered a three-part definition that found the support of the Information and Privacy Commissioner. It read:

- (1) A meeting of a designated public body occurs for the purposes of this Act if the following conditions apply:
1. The meeting is one which the entire membership of the body is entitled to attend or which a specified number of members is entitled to attend, such as the meeting of a committee or other designated division of the body.
  2. The purpose of the meeting is to deliberate on or do anything within the jurisdiction or terms of reference of the body, committee or other division.

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<sup>13</sup> *Southam Inc. v. Ottawa Council, ibid.*

<sup>14</sup> The then existing definition described "meeting" as "any regular, special committee or other meeting of a council or local board."

<sup>15</sup> A. Cavoukian, "Making Municipal Government More Accountable: The Need for an Open Meetings Law in Ontario" (2003), online: Information and Privacy Commissioner of Ontario <<http://www.ipc.on.ca/images/Resources/open-mtg.pdf>> (date accessed: 14 April 2008).

3. The number of members in attendance constitutes a quorum or, in the absence of a quorum requirement in the rules or terms of reference to the body, committee or other division, a majority.

(2) A meeting includes an electronic or telephone meeting to which the conditions described in subsection (1) apply.<sup>16</sup>

- 56** Unfortunately, when Bill 130, the *Municipal Statute Law Amendment Act, 2006*, was passed, amending the *Municipal Act, 2001*, it did not incorporate these suggestions, instead maintaining the same circular “a meeting is a meeting” language.<sup>17</sup>
- 57** The failure to offer a precise definition does not mean that a legislative body has abdicated its legislative role by leaving matters for courts to settle. Most often terms are left without fixed definition when there is a desire not to unduly limit the operation of the enactment. This is how the Supreme Court of Canada saw things in the *London (City) v RSJ Holdings Inc.* case, when it said (of the pre-2007 definition) that “the words ‘committee’ and ‘meeting’ are broadly defined in s.238(1) of the *Municipal Act, 2001*.”<sup>18</sup> Since the current definition is substantially the same as the one the Court had before it, the *London (City) v RSJ Holdings Inc.* case offers a clear mandate to those who apply this provision to give the word “meeting” broad compass.
- 58** This does not mean, however, that the word “meeting” is to be given the broadest linguistic interpretation it can bear. The term must be interpreted using the approach required for all statutory provisions according to the Supreme Court of Canada’s *Bell ExpressVu* standard: “There is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”<sup>19</sup> The word “meeting” must therefore be understood in light not only of its ordinary sense, but according to the way it is used, and in light of the objectives of open meeting legislation. This is why a meeting is not always a “meeting” for the purposes of the statute.
- 59** This universal rule of interpretation has yet to yield a generic definition. While judges have offered various descriptions of when a “get-together” is a “meeting,”

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<sup>16</sup> Bill 123, *Transparency in Public Matters Act, 2004*, 1st Sess., 38<sup>th</sup> Leg., Ontario, 2004, s. 3 (1<sup>st</sup> reading 13 October 2004).

<sup>17</sup> Bill 130, *Municipal Statute Law Amendment Act, 2006*, 2d Sess., 38<sup>th</sup> Leg., Ontario, 2006 (assented to 20 December 2006), S.O. 2006, c. 32.

<sup>18</sup> *Supra* note 1 at para. 23.

<sup>19</sup> *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26.

the descriptions offered tend to relate to the facts before the court. Taking those decisions together in light of the purpose of the legislation, a fair definition that brings together the various strands of authority would be as follows:

**For a meeting to occur, 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.**

- 60** There are essentially two components to this definition: It must be a meeting of the council or committee, and it must be 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.

### What Constitutes a “Meeting”?

- 61** As indicated, applying ordinary principles of interpretation, the term “meeting” has to be understood in the context in which it is being used. On its face, the relevant provision, section 239(1), is apparently limitless. It provides:

(1) Except as provided in this section, all meetings shall be open to the public.

- 62** The term “meeting” is defined in the statute, however, in a way that imposes limits on whose meetings are caught; it is confined to those of “council,” or a “local board,” or a “committee of either of them.”
- 63** There are cases where it is obvious that a get-together is being undertaken by a council or a committee in its capacity as such. This will ordinarily be obvious because of the formal trappings surrounding the event, such as where the event in issue is a regularly scheduled meeting, or where actions consistent with the conduct of meetings by that body, such as singing *O Canada*, or taking minutes, or appointing a chair, have been complied with. In the *Southam Inc. v. Ottawa Council* case, in finding that a meeting of council had occurred, the Court observed that councillors had met “to discuss [matters] in a structured way.”<sup>20</sup> Similarly, in *City of Yellowknife Property Owners Assn. v. Yellowknife (City)*,<sup>21</sup> the decision that weekly “briefing sessions” conducted by council were actually subject to open meeting legislation was aided by the fact that there were agendas,

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<sup>20</sup> *Southam Inc. v. Ottawa Council*, *supra* note 12 at para.15.

<sup>21</sup> *City of Yellowknife Property Owners Assn. v. Yellowknife (City)*, [1998] N.W.T.J. No. 74 at para. 12 (N.W.T.S.C.) [*City of Yellowknife*].



there was someone to serve as meeting chair, minutes were taken, as were straw polls and show-of-hands votes. The meetings were structured in the way the body would ordinarily be expected to act as a body, making the finding that they were “meetings” subject to open meeting legislation easier.

- 64** In *Hamilton-Wentworth*, Justice Grange relied on the fact that members of council were summoned formally to find that it was a meeting of a municipal council. He observed that “when all members [of a committee] are summoned to a regularly scheduled meeting and there attempt to proceed in camera, they are defeating the intent and purpose of [secret meeting rules.]”<sup>22</sup> It was in this context that Justice Grange suggested that a meeting is “a gathering to which all [committee members] are invited.”<sup>23</sup>
- 65** But if the legislation is to be applied effectively, the formality of an invitation cannot be a necessary condition. To so hold would exempt impromptu gatherings by the relevant body, such as a spontaneous decision to deal with business not revealed on a formal agenda after the public leaves. The defect in Justice Grange’s insistence on the formality of invitation was recognized by the Divisional Court in *Southam Inc. v. Ottawa Council*.<sup>24</sup> There, the definition offered by the majority of the court provided that a meeting could be held in the absence of a request, where councillors or committee members do attend without summons.<sup>25</sup> As the Court made clear, “it is not a question of whether ... the ritual trappings of a formal meeting of council are observed.”<sup>26</sup>
- 66** Perhaps the main reason why a meeting must be “a meeting of the council or a committee” to qualify has to do with the purposes of the open meeting provisions, which I discuss in detail below. These provisions deal with the exercise of political power. For this reason, many U.S. jurisdictions do as was attempted in Ontario’s *Private Member’s Bill 123* and deal with this question by examining when the relevant body would be empowered to act in the capacity of a body, or *qua body*. For this reason they include a quorum requirement; since a body cannot act without a quorum, the relevant body is not legally authorized to have a “meeting” unless there is a quorum present.
- 67** In general, this approach commends itself to me. There must be one caveat applied, however. Even if a quorum of members is not present, those who attend

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<sup>22</sup> *Supra* note 6 at para. 12.

<sup>23</sup> *Supra* note 6 at para. 9.

<sup>24</sup> *Southam Inc. v. Ottawa Council*, *supra* note 12.

<sup>25</sup> *Southam Inc. v. Ottawa Council*, *supra* note 12 at para. 12.

<sup>26</sup> *Ibid.*

might still begin to do the groundwork necessary to exercise the body's power once enough members show up. In that case, a “meeting” will have taken place. So, too, arguably, will a “meeting” have taken place if a body engages in serial meetings, in small groups, where the body’s business is effectively conducted in secret.

- 68** In sum, a meeting will only be caught by section 239(1) when it is a meeting of a council or committee. If the assembly conducts itself in a structured fashion reminiscent of that used in its ordinary meetings, then the body is meeting. But even in the absence of the formal trappings of a meeting, where a quorum of council or committee members meet, the assembly will be a “meeting.” And even in the absence of a quorum, where members meet in the expectation that a quorum will attend or engage in serial meetings to enable council or committee business to be undertaken, the first requirement will likely be met – the result will be a “meeting.” Whether a meeting must be open under section 239(1), however, depends ultimately upon its purpose.

## What Was the Purpose of the Meeting?

- 69** As indicated, for a “meeting” to occur within the meaning of s.239(1), that meeting must be 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. Essentially, there are two purposes served by this open meeting legislation – the pursuit of effective democracy, and the preservation of the appearance of integrity in the exercise of political power.
- 70** In *London (City) v RSJ Holdings Inc.*,<sup>27</sup> the Supreme Court of Canada observed that “democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law.”<sup>28</sup>
- 71** To put things in perspective, open-meeting guarantees share the same function as access-to-information legislation, the “open court principle” (that enables the public to witness what happens in courts of justice) and the constitutionally protected value of freedom of the press. Together, these tools assure that the public, to whom the government belongs and in whose best interest decisions must be made and power used, has what 19<sup>th</sup>-century political philosopher James Mill described as “the means of removing the defects of vicious government.”

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<sup>27</sup> *Supra* note 1.

<sup>28</sup> *Supra* note 1 at para. 38.

The “means” Mill was speaking about was access to information – information to enable the public to express discontent and to challenge what he called “misgovernment.” He was responding to the widely understood fact that mismanagement, sloth and even dishonesty can thrive behind closed doors, but in a democracy, cannot survive the sanitizing light of day. A Minnesota judge echoed this when describing that state’s open meeting legislation: It exists, he said, “to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning board decisions or to detect improper influences.”<sup>29</sup> Or, as one American author put it, openness produces “better government programs, more efficiency in government and government more responsive to public interest and less susceptible to corruption.”<sup>30</sup>

- 72 There is another important function served by open meeting laws: Open meetings foster public trust. As noted above, in the *London (City) v. RSJ Holdings Inc.* case, the Supreme Court of Canada said that the open meeting provision in section 239 of the *Municipal Act, 2001* “was intended to increase public confidence in the integrity of local government by ensuring the open and transparent *exercise of municipal power*.”<sup>31</sup>

## Defining “Exercise of Political Power”

- 73 Since the purposes behind the open meeting provision relate to controlling the use of power by elected officials, any definition of “meeting” should be broad enough to encompass the exercise of power, but narrow enough to avoid including conduct unrelated to the exercise of power. The importance of a meeting’s purpose can be seen in two Canadian cases. In *Southam Inc. v. Ottawa Council*, the court précised a more formal definition for its purposes by saying, “[i]n other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?” And in *Niagara-on-the-Lake Conservancy Society v. Niagara-on-the-Lake (Town)*,<sup>32</sup> an Ontario judge supported his conclusion that there was no open-meeting violation by observing that there had not been any suggestion that “anyone who supported the decision had an improper

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<sup>29</sup> *Lindahl v. Independent School District No. 306*, 270 Minn. 164, 167, 133 N.W.2d 23, 26 (1965).

<sup>30</sup> Little & Tompkins, *Open Government Laws: An Insider’s View*, 53 N.C.L. Rev. 451, 475 (1974), quoted with approval in *St. Cloud Newspapers*, *supra* note 10.

<sup>31</sup> *Supra* note 1 at para. 19.

<sup>32</sup> *Niagara-on-the-Lake Conservancy Society v. Niagara-on-the-Lake (Town)*, [2000] O.J. No. 3480 (Ont. S.C.J.).

motive or a conflict of interest.”<sup>33</sup> In essence, there was, in the judge’s evaluation, no reason in the case to worry about the appearance of integrity in the exercise of political power.

- 74** A review of judicial opinion on determining whether a gathering is a “meeting” reveals three lines of inquiry. There are cases that ask (a) whether the body is making decisions; (b) whether the relevant body is acting within its jurisdiction; and (c) whether the body is exercising a policy-making function.

## Is the Body Making Decisions?

- 75** Councils and committees are decision-making bodies, and that is where their power comes from. For this reason, if those who have assembled have taken decisions as a body using that power, a “meeting” has obviously occurred. In *Southam Inc. v. Ottawa Council*, the Court held that the fact that the council made the “action-taking decision” of appointing a committee to investigate and report on pay for committee heads helped support the finding that a “meeting” had occurred in spite of the council’s claim that it had merely been a “retreat.”<sup>34</sup>
- 76** Unfortunately, there are some who link open meeting provisions in whole or in part to whether decisions have been reached. This approach finds its genesis in Ontario in the decision in *Vanderkloet et al. v Leeds & Grenville County Board of Education*.<sup>35</sup> In that case, the Ontario Court of Appeal was determining whether a school board had breached administrative law requirements of procedural fairness. The Court ultimately held that the school board did not breach administrative law standards when it held an informal in-camera meeting prior to an “open” council meeting (held without notice) where the vote was taken. Central to the decision was the fact that the school board had reopened the issue after objection was raised and it held a full, with-notice meeting where the initial decision was ultimately reaffirmed, with reasons. In other words, the fact that no ultimate decisions were made during the earlier sessions and the end result was a decision of integrity taken in a public meeting satisfied the demands of procedural fairness.
- 77** The transferability of the *Vanderkloet* approach to open meeting cases is questionable. The *Vanderkloet* Court did not have to contend with a statutory

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<sup>33</sup> *Ibid.* at para. 18.

<sup>34</sup> *Southam Inc. v. Ottawa Council*, *supra* note 12 at para. 15.

<sup>35</sup> *Vanderkloet v. Leeds & Grenville County Board of Education* (1985), 51 O.R. (2d) 577 (C.A.) [*Vanderkloet*].

provision giving obvious legal priority and heightened importance to the open meeting principle. Moreover, the ultimate issue was different. The Court was not focused on whether the open meeting principle had been respected; it was asking the broader question of whether the initial failure to conduct an open meeting so undermined the fairness of the process that a school board decision should be invalidated. In spite of this, the influence of the *Vanderkloet* thinking can be seen in open meeting authority. In *3714683 Canada Inc. v. Parry Sound (Town)*,<sup>36</sup> for example, a developer seeking a zoning change to facilitate a development met with the council behind closed doors. The Court held that this meeting did not violate the open meeting provisions because there was only an “exchange of information” and no decisions were made regarding the proposed zoning changes. As a result, no meetings were found to have occurred.<sup>37</sup>

**78** With respect, the *Parry Sound* case actually serves as a clear example of why arriving at a decision should not be a necessary hallmark of a “meeting.” Bear in mind that in the *Parry Sound* case, some members of the public were opposed to the developer’s request. Permitting the developer to have a “secret information session” with council prior to its public meeting left the public in the dark about what had been considered or what influence may have been exerted by the developer behind closed doors. The secret meeting only served to weaken the appearance of integrity in the exercise of political power that the open meeting provisions are intended to secure. To be clear, this was not a case of councillors as individuals meeting with the developer as one of their constituents. It was a democratic deliberative body, a municipal council, meeting with the developer who had an interest in the matter under consideration and who was offering information for use in a matter that the council would be called upon to decide. With respect, the decision that this was not a meeting is unpersuasive.

**79** In fairness to the Court that decided *Parry Sound*, it did distinguish another case, *Aitken v Lambton Kent District School Board*,<sup>38</sup> because the meetings at issue in that case had “materially advanced the [relevant] cause,” such that the “heart of the matter” had been decided in the in-camera proceeding.<sup>39</sup> This is similar to the standard endorsed in *Southam Inc. v. Ottawa Council*.<sup>40</sup> In that case, the Court held that a “meeting” can occur without decisions being arrived at – if matters requiring deliberation and decision “materially move along.” This is in keeping with many American jurisdictions, which define “meeting” as including the

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<sup>36</sup> *3714683 Canada Inc. v. Parry Sound (Town)*, [2004] O.J. No. 561 (Ont. S.C.J.) [*Parry Sound*].

<sup>37</sup> *Ibid.* at para. 67.

<sup>38</sup> *Aitken v. Lambton Kent District School Board*, [2002] O.J. No. 3026 (Ont. Div. Ct.).

<sup>39</sup> *Parry Sound*, *supra* note 36 at para. 66.

<sup>40</sup> *Southam Inc. v. Ottawa Council*, *supra* note 12.

deliberations of a public body leading up to a decision, even if no formal action occurs.<sup>41</sup>

- 80** In my opinion, even this approach – which requires proof that matters have “materially moved along,” or that there were deliberations leading up to a decision – does not fully catch the purpose behind the legislation. Guidance can be found, ironically, in the dissenting judgment of Justice Lacourciere in *Hamilton-Wentworth*, where he looked not at the result of the meeting, but at its purpose. He referred with approval to the definition from *Black’s Law Dictionary*, defining “meeting” as “a coming together of persons ... for the purpose of discussing and acting upon such matter or matters in which they have a common interest.”<sup>42</sup> I take from this statement the wisdom that a meeting does not cease to be a “meeting” because the parties cannot reach a consensus or make progress. What matters is that they met for a purpose that engages the democratic process, namely, by working towards the possible application of their political power.
- 81** I do not think, however, that a “meeting” occurs only where the purpose of getting together is to “discuss and act upon” a matter. Either can suffice. The approach implicit in the majority decision in *Hamilton-Wentworth* (and taken expressly in the Supreme Court of Minnesota case of *St. Cloud Newspapers*) seems to me to be correct in law. In that case, the Court endorsed the view that open meeting legislation was intended to catch every step of the decision-making process, including the collective inquiry and discussion stages, even where the “coming together” is not for the purpose of acting upon a matter – because that action is expected to come later.<sup>43</sup> Where material information is furnished, not for the kinds of general educational or informational purposes contemplated by the new exception in section 239(3.1) of the *Municipal Act, 2001*, but instead as specific fodder for pending or expected decision-making, the open meeting provision should apply.
- 82** At first blush, this approach may appear to be at odds with the body of law that permits councillors and committee members to receive information or engage in informal discussion without the ballyhoo of the open meeting legislation. The most frequently cited *dictum* used to support exempting mere discussions is, not surprisingly, Justice Dubin’s comment in the administrative law case of *Vanderkloet*: “I do not think that the requirement that meetings ... should be open

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<sup>41</sup> See, for example, Arizona, Texas, Oregon, West Virginia and Idaho.

<sup>42</sup> *Supra* note 6 at para. 31. Justice Lacourciere dissented because he felt that the impugned meeting was simply a “workshop” where information was exchanged, but effort was not made to work towards particular decisions.

<sup>43</sup> *St. Cloud Newspapers*, *supra* note 10.

to the public precludes informal discussions among ... members, either alone or with the assistance of their staff.”<sup>44</sup>

- 83** Justice Dubin was speaking in a distinguishable context, but there is obvious wisdom in what he is saying. It is a healthy thing in a democracy for elected officials to share information and to get the lay of the land through informal discussions with others before making policy decisions. As Justice Simonett of Minnesota observed, citing a proposed model law, “nothing ... should make illegal informal discussions, either personally or telephonically, between members of public bodies for the purpose of obtaining facts and opinions....”<sup>45</sup> He remarked that “[t]o say ... that a board member may never talk to another board member outside of a duly called [public] meeting ... is unrealistic and chills speech unnecessarily...”<sup>46</sup>
- 84** All of this is true. Still, if the purpose of the open meeting provisions is to be respected, care has to be taken not to allow this “informal discussion” concept to swallow up the open meeting principle. Justice Grange in *Hamilton-Wentworth* was obviously right when he cautioned that a committee that is bound to hold meetings in public cannot convert a meeting into an informal discussion and thereby defeat the purpose of “open meeting” legislation.<sup>47</sup> In my opinion, the way to prevent open-meeting rules from losing their sense in this way is to recognize that when elected politicians are not working together as a group, the democratic authority they are provided is not engaged. By contrast, it would be perilous to the purposes underlying the open meeting provisions to accept that a body can convene in secret as a body, and acquire information relating to a pending or expected decision that may influence the points of view of the participants. Where councillors or committee members come together in order to work towards the ultimate resolution of a matter that requires the exercise of their power, even if they do so only to secure the data needed to make decisions, the open meeting provisions should apply.
- 85** 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

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<sup>44</sup> *Vanderkloet*, *supra* note 35 at para. 33.

<sup>45</sup> *St. Cloud Newspapers*, *supra* note 10, per Simonett J., concurring in part and dissenting in part.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Hamilton-Wentworth*, *supra* note 6 at para. 12. See also *City of Yellowknife*, *supra* note 21.

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.**

## Is the Body Acting Within its Jurisdiction?

- 86** A common component offered when “meeting” is defined in the cases is the requirement that the gathering must be to deal with matters falling within the body’s authority. In *Hamilton-Wentworth*, Justice Grange said that “in the context of a statutory committee, ‘meeting’ should be interpreted as any gathering to which all members of the committee are invited to discuss matters within their jurisdiction.”<sup>48</sup> In *Southam Inc. v. Ottawa Council*,<sup>49</sup> the Court also asked whether the actors were engaged “**in a function at which matters which 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.”<sup>50</sup>
- 87** Certainly, an important clue to whether or not a body is “meeting” would be that the body is doing the kind of stuff that the body is established to do. Still, it is my opinion that this should not be an essential condition before a breach of the open meeting provisions occurs. That would exempt from the protection of the legislation those occasions when the body purports to use the powers it possesses as a body but is in fact performing *ultra vires* or illegally. At an intuitive level, it cannot be that a council or a committee can escape open-meeting scrutiny by exceeding its authority. In my opinion, so long as **the participants have come together for the purpose of exercising the power or authority of the council or committee**, the fact they are not acting within their jurisdiction should be irrelevant.

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<sup>48</sup> *Supra* note 6 at para. 9.

<sup>49</sup> *Southam Inc. v. Ottawa Council*, *supra* note 12 at para.12.

<sup>50</sup> *Ibid.*



## Is the Body Exercising a Policy-Making Function?

**88** In the case of *Board of County Commissioners v. Costilla County Conservancy District*, the Colorado Supreme Court said of that state's open meeting legislation:

(1) [W]e hold that a local public body such as the Board is required to give public notice of any meeting attended or expected to be attended by a quorum of the public body when the meeting is part of the policy-making process. A meeting is part of the policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance, or formal action. If the record supports the conclusion that the meeting is rationally connected to the policy-making responsibilities of the public body holding or attending the meeting, then the meeting is subject to [the legislation].<sup>51</sup>

**89** Although the decision is American, it forms the clearest articulation of an undercurrent also found in Canada, namely, whether the kind of issue being addressed at a meeting is a policy issue or otherwise.

**90** The question of whether the body is working on or towards an issue of policy is an attractive one because the open meeting provisions are concerned with the exercise of political power, and the political power held by councils and committees is mainly a policy-making power. Here in Ontario, elected municipal officials have the authority to pass bylaws and determine broader questions of policy, including the allocation of municipal programs and services. They also establish and oversee administrative policies, practices and programs that are required to implement the decisions of council. But they are not given the power to do the hands-on administration of a municipality; it is the officers and employees of the municipality who implement or administer council's policies and program choices and carry out the duties assigned by a municipality.<sup>52</sup> Municipal politicians do interact with administrators, of course, but when doing so they are not exercising power in a way that requires "sunshine laws." They are managing existing policies or otherwise engaged in administration.

**91** Asking whether a body is making or working towards policy decisions can operate as a useful check on whether s.239(1) should apply. Still, looking only at whether or not a decision is one of policy risks an under-inclusive approach. For example, the decision identified in the *Southam Inc. v. Ottawa Council* case – to commission a study – was less a policy decision than a prelude to a potential

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<sup>51</sup> *Board of County Commissioners v. Costilla County Conservancy District*, 88 P.3d 1188 (Colo. 2004).

<sup>52</sup> See *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 224-229.

policy choice. Moreover, where a committee has the task of rendering an administrative decision, it stretches the concept to describe that as a policy decision, but certainly those proceedings should be open. For this reason, identifying that there is a policy at stake is a strong indicator that a meeting is occurring, but finding there is not a general policy under consideration may not be a reason for finding that there is no open meeting obligation.

- 92** Hence, we arrive at the last piece of what I believe is a useful and workable set of criteria for a “meeting” to be deemed to have occurred within the meaning of s.239(1): 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.