Transparent Municipal Governance: When Must a Meeting be Open?

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Introduction

In most Canadian municipalities, municipal council meetings shall be open to the public ("Open Meeting Rule"). In Ontario, which is the province of focus for this paper, the Open Meeting Rule is found in subsection 239(1) of the *Municipal Act, 2001*.[2] Similar provisions exist in other provinces and at least one territory.[3]

In principle, the Open Meeting Rule requirement helps to ensure accountable and transparent local governance. The challenge for municipal clerks[4] and lawyers is advising councils on the implementation of that broad mandate in practice. While the *Municipal Act, 2001* clearly delineates the one extreme when councils may convene a closed session (also known as an "*in camera*" meeting),[5] it does little to clarify when a meeting is a *meeting* that attracts the Open Meeting Rule. This paper strives to go beyond strict rules of statutory interpretation.[6] It aims to provide guidance to those who wade into these unclear waters, particularly with closed meeting investigators[7] waiting just below the surface to strike should one run afoul of this important accountability and transparency provision.

Since the analysis of whether a meeting is a meeting that attracts the Open Meeting Rule is one of degree rather than absolute, this paper proposes a "Three Step Enquiry" that involves the use of the

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[2] S.O. 2001, c. 25 [*Municipal Act, 2001*].

[3] British Columbia: *Local Government Act,* R.S.B.C. 1996, c. 323, s. 165.1; Alberta: *Municipal Government Act,* R.S.A. 2000, c. M-26, s. 197; Manitoba: *Municipal Act*, C.C.S.M. c. M225, s. 152; Saskatchewan: *Municipalities Act*, S.S. 2005, c. M-36.1, s. 120; Nova Scotia: *Municipal Government Act*, S.N.S. 1998, c. 18, s. 22; New Brunswick: *Municipalities Act,* R.S.N.B. 1973, c. M-22, s. 10.2; Newfoundland: *Municipalities Act, 1999,* S.N.L. 1999, c. M-24, s. 213; Prince Edward Island: *Municipalities Act,* R.S.P.E.I. 1988, c. M-13, s. 21(4); Yukon: *Municipal Act*, R.S.Y. 2002, c. 154, s. 213.

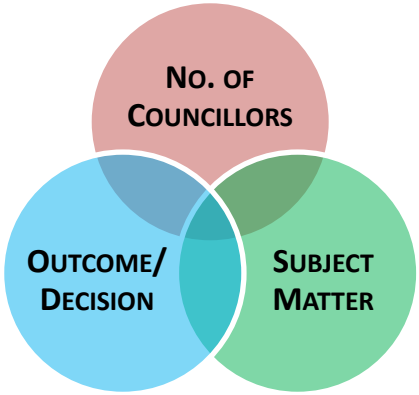
[4] Municipal clerk duties are set out at s. 228 of the *Municipal Act, 2001.*

[5] *Municipal Act, 2001,* ss. 239(2).

[6] See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26 ("the words of an Act are to be read in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament").

[7] A closed meeting investigator "has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a local board has complied with section 239 [the Open Meeting Rule] or a procedure by-law under subsection 238(2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation", pursuant to section 239.2 of the *Municipal Act, 2001* ("Closed Meeting Investigator"). That role will be discussed later in this paper.

following Venn diagram,[8] which is based on the applicable Ontario legislation, case law, commentary and the Ontario Ombudsman's[9] reports that are discussed throughout the paper:



The courts, learned authors and the Ontario Ombudsman have suggested factors to consider in determining whether a meeting is a meeting that attracts the Open Meeting Rule. This paper intends to add to the discourse by exploring the practical challenges associated with delineating meetings that meet the threshold, while taking into account recent positions of the Ontario Ombudsman with respect to these matters.

Given the limited space, this paper focuses almost exclusively on Ontario law. However as noted, several other provinces, as well as the United States and other common law jurisdictions, have or are beginning to develop jurisprudence and expertise in this area. Indirectly, the American perspective makes its way into Ontario law through the reports of the Ontario Ombudsman, who is openly a proponent of the so-called "sunshine laws."

Legislative Background

For many years, council meetings had to be open to the public,[10] but that transparency did not extend to committee meetings or members of council gathering for "committee of the whole."[11] The rationale to exclude the public was to allow discussion to take place in an environment that encouraged fulsome

[8] Conceived around 1880 by John Venn, these diagrams show all hypothetically possible logical relations between a finite collection of sets or aggregation of things ("Venn Diagram," Wikipedia: http://en.wikipedia.org/wiki/Venn_diagram).

[9] The Ontario Ombudsman is "an independent officer of the [Provincial] Legislature who investigates complaints from the public about Ontario government services" (online: http://www.ombudsman.on.ca/Home.aspx).

[10] *Municipal Act*, R.S.O. 1980, c. 302, ss. 55(1) [*Municipal Act* (1980)].

[11] "Committee of the Whole" is a procedural mechanism, often set out in the procedural by-law, that permits freer discussion and debate than is normally permitted in formal council meetings.

debate without the scrutiny of the public or the prying lens of the media, so long as the decisions themselves were made in an open session. The focus was on full disclosure surrounding the actions of council rather than the discussion leading up to those actions.

The committee exemption from public meetings changed on January 1, 1995 when amendments to the *Municipal Act*[12] took effect. The *Planning and Municipal Statute Law Amendment Act, 1994*[13] amended the *Municipal Act* (1990) (then section 55) to include committee meetings in the definition of "meeting," which were required to be open to the public. As noted in Hansard,[14] these amendments were "intended to increase public confidence in the integrity of local government by ensuring the open and transparent exercise of municipal power."[15] That goal appears just as relevant today, over fifteen years later.

The introduction of the *Municipal Act, 2001* brought clarification regarding the type of committee that would attract the Open Meeting Rule. In particular, committees with membership of 50% or more of council members would fall into the definition of a "meeting."[16] The application of the Open Meeting Rule to a committee of council or a local board was added by the extensive amendments introduced by the *Municipal Statute Amendment Law Act, 2006*.[17]

In addition to introducing that small but significant change to the definition of a committee, there was an entirely new part added to the *Municipal Act, 2001* by the *Municipal Statute Amendment Law Act, 2006*: Part V.1 – Accountability & Transparency.[18] Although a discussion of those provisions, including the important addition of an Integrity Commissioner,[19] is beyond the scope of this paper (but has been discussed in several informative papers[20]), the key addition from that Part for the purposes of this paper

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[12] R.S.O. 1990, c. M.45 [*Municipal Act* (1990)].
[13] S.O. 1994, c. 23.
[14] Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 162, November 28, 1994, at 7978 (Pat Hayes).
[15] *RSJ Holdings Inc. v. London (City)*, [2007] 2 S.C.R. 588, 2007 CarswellOnt 3919 at para. 19 [cited to WeC].
[16] *Municipal Act, 2001*, ss. 238(1).
[17] S.O. 2006, c. 32 ("Bill 130"), ss. 102(2).
[18] *Ibid.* at s. 98.
[19] *Municipal Act, 2001*, s. 223.3; see also George Rust-D'Eye, "Municipal Integrity Commissioners in Ontario", 120 *Municipal World* (January 2010), No. 1, at 21-22.
[20] Nancy L. Shea Nicol, "Municipal Accountability Reforms: A Shift in the Municipal Operational Landscape or Business as Usual?" (2008) 44, M.P.L.R. (4th) 44; Jennifer Smout, "Municipal Appointees: Investigators and Part V.I Officers – Beyond Accountability and Transparency in *Current Municipal & Planning Law Issues*, Ontario Bar Association, February 16, 2010.

is section 270 of the *Municipal Act, 2001*. That provision requires municipalities to "adopt and maintain policies with respect to the following matters," including:

> The manner in which the municipality will try to ensure that it is accountable to the public for its actions, and the manner in which the municipality will try to ensure that its actions are transparent to the public.[21]

The *Municipal Statute Amendment Law Act, 2006* also amended the *Municipal Act, 2001* provisions dealing with the mandatory procedural by-law, which councils must adopt to govern "the calling, place and proceedings of meetings".[22] The procedural by-law shall now also "provide for public notice of meetings."[23]

Current Key Provisions

There are several current key provisions that councillors and their advisors should review related to the Open Meeting Rule. Firstly, the Open Meeting Rule itself, as discussed above. It requires meetings to be open to the public, pursuant to subsection 239(1) of the *Municipal Act, 2001*:

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

Meeting Defined

In order to apply that rule, the definition of "meeting" becomes critical. It is set out in subsection 238(1) of the *Municipal Act, 2001*:

> "meeting" means any regular, special, committee or other meeting of a council, of a local board, or of a committee of either of them.

We therefore know *who* needs to participate for a meeting to attract the Open Meeting Rule (i.e. members of council, a local board,[24] a committee of council, or a committee of a local board). A committee is defined in subsection 238(1) of the *Municipal Act, 2001*:

> "committee" means any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards.

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[21] *Municipal Act, 2001*, ss. 270(1)(5).
[22] *Municipal Act, 2001,* ss. 238(2).
[23] *Municipal Act, 2001,* ss. 238(2.1); *Municipal Statute Amendment Act, 2006,* ss. 41(1)
[24] Note that the *Municipal Act, 2001* carves out police service boards and public library boards from the definition of "local board," pursuant to section 238(1).

We also know that, based on the definition of a meeting, the Open Meeting Rule will apply to all *types* of meetings of those persons listed above, as a result of the broad net cast by the legislation that captures "regular," "special" and—importantly and broadly—"other" meetings.[25]

In 2004, a private member's bill[26] sought to define meeting as follows and, although it is not law, it assists in focusing the inquiry of when a meeting is a meeting that attracts the Open Meeting Rule:

> 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 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.
>
> 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.[27]

It went on to note that an "electronic or telephone meeting" to which the conditions described above would also constitute a meeting that attracts the Open Meeting Rule.[28]

Closed Meetings

There are several exceptions to the Open Meeting Rule, but they all pertain to the *subject matter* of the meeting. The first six permissive exceptions are outlined in subsection 239(2) of the *Municipal Act, 2001*:

> (a) the security of the property of the municipality or local board;
>
> (b) personal matters about an identifiable individual, including municipal or local board employees;
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
>
> (d) labour relations or employee negotiations;

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[25] The Supreme Court of Canada also interprets the term "meeting" in the *Municipal Act, 2001* broadly, see *RSJ Holdings Inc. v. London (City)*, [2007] 2 S.C.R. 588, 2007 CarswellOnt 3919 at para. 23 [cited to WeC].

[26] Bill 123, *Transparency in Public Matters Act, 2004*, 1st Sess., 38th Leg., Ontario, 2004 (1st Reading, 13 October 2004).

[27] *Ibid.* at s. 3.

[28] *Ibid.*

> (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
>
> (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.

A council *may* choose not to close the meeting if any of those matters is considered. In contrast, a meeting *shall* be closed to the public if the subject matter relates to a request under the *Municipal Freedom of Information and Protection of Privacy Act*,[29] pursuant to subsection 239(3) of the *Municipal Act, 2001*:

> A meeting shall be closed to the public if the subject matter relates to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act* if the council, board or commission or other body is the head of an institution for the purposes of that Act.

An example of the interaction between clause 239(2)(g) of the *Municipal Act, 2001* (listed above) and the *MFIPPA* prohibition is be found in the *Emergency Management and Civil Protection Act*.[30] In that Act, a meeting may be closed to the public if council is considering the release of a document that contains information related to the identification and assessment of "various hazards and risks to public safety that could give rise to emergencies", among other things.[31]

A meeting may also be closed to the public if council members are participating in an educational or training session *and* the business or decision-making of the council is not materially advanced, pursuant to subsection 239(3.1), which provides:

> A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:
>
> 1. The meeting is held for the purpose of educating or training its members.
>
> 2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

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[29] R.S.O. 1990, c. M.56.
[30] R.S.O. 1990, c. E.9, as amended.
[31] *Ibid.*, s. 2.1.

Quorum & Voting

There are two other provisions of importance to this issue: quorum and voting. Quorum is the minimum number of council, local board or committee members who must be present for that body to legally transact business.[32] Under the *Municipal Act, 2001*, quorum is set at a majority of members.[33] Interestingly, the *Municipal Act, 2001* does not specifically state that the presence of a quorum is a necessary pre-condition for a "meeting," although that is the obvious intention given the use of the term itself.

Voting must also take place in public, pursuant to section 244 of the *Municipal Act, 2001*, which provides:

> Except as provided in sections 233 [appointment of the head of an upper-tier council] and 238 [presiding officer], no vote shall be taken by ballot or by any other method of secret voting, and every vote so taken is of no effect.

Note that a vote does not need to occur for the gathering to constitute a "meeting" under the legislation.

In summary, the *Municipal Act, 2001* provides that all types of meetings (i.e. regular, special and other) of council, local boards and their respective committees (where 50% of the committee membership is made up of council or local board members, respectively), must be open to the public, except when the subject matter deals with one of the issues specifically set down in the legislation. The legislation does not make clear whether meetings attracting public scrutiny must have a quorum present, although it is implied. A vote does not need to occur for the Open Meeting Rule to apply. Therefore, there will be little ambiguity for most official meetings of a council, local board or committee as to whether it must be open to the public. But what about the other end of the spectrum where the formal traditions of a meeting (e.g. council chambers or an agenda) are not present?

Common sense suggests that a social gathering of a quorum of council poses no practical concern for transparent municipal governance. Yet, the drafters of the legislation chose to carve out the exceptional subject matters that the public would not need to necessarily observe—not specify those specific topics that it would. The drafters could have, for example, implemented a definition of "meeting," clarifying its

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[32] Adapted from the *Black's Law Dictionary*, 8th ed., *s.v.* "quorum".
[33] *Municipal Act, 2001*, s. 237.

application to only those meetings that materially advance the business of a council, local board or committee of either of them. But they did not.

As such, if a quorum of council gathers at the local coffee shop after a formal council meeting to discuss how it went,[34] is that a meeting that does attract the scrutiny of the Open Meeting Rule? The next section explores the applicable case law for further assistance in understanding when a meeting is a meeting that attracts the Open Meeting Rule.

Jurisprudence

The purpose of this section is to review several leading Ontario cases that assist our understanding of the development of the current state of the law related to open municipal meetings, notwithstanding that a number of the decisions were rendered prior to the most recent amendments imposing greater accountability and transparency in the *Municipal Act* that were discussed earlier in this paper.

Southam Inc. v. Regional Municipality of Hamilton-Wentworth Economic Development Committee

The first case of interest pertaining to open meetings of municipalities is the Ontario Court of Appeal's decision in *Southam Inc. V. Regional Municipality of Hamilton-Wentworth Economic Development Committee*.[35] It dealt with a closed session of an Economic Development Committee and the procedural by-law of the region that put into practice the Open Meeting Rule [then subsection 55(1) of the *Municipal Act* (1990)].

After noting that the procedural by-law did not define "meeting," and reviewing part of the *Black's Law Dictionary* (5th ed.) definition of "meeting," the majority of the Ontario Court of Appeal held that "meeting" should be interpreted as "any gathering to which ***all*** members of the committee are ***invited*** to discuss ***matters within their jurisdiction***" [emphasis added].[36]

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[34] See Ombudsman of Ontario, *Investigation into whether the Town of South Bruce Peninsula Council improperly held closed meetings* by André Marin (July 7, 2010) at para. 86, online: <http://www.ombudsman.on.ca/media/150473/omletsouthbrucefinaljuly5.pdf>.

[35] (1988), 66 O.R. (2d) 213, 1988 CarswellOnt 574 (C.A.), leave to appeal to S.C.C. dismissed (1989), 57 D.L.R. (4th) viii [*Southam v. HWEDC* cited to WeC].

[36] *Ibid.* at para. 9.

The Court distinguished the case from its earlier decision in *Vanderkloet v. Leeds & Grenville County Bd. of* Education,[37] where an *in camera* meeting was held but the resolutions from that meeting were later confirmed at a public meeting of the Board of Education.[38] The majority in *Southam v. HWEDC* made it clear that the proposition from that case was not the ability for boards to "convert a scheduled meeting into an informal discussion and thus avoid the necessity of public disclosure."[39] As a result, the gathering was considered to be a meeting attracting the Open Meeting Rule and the region was found to have violated its own procedural by-law.[40]

Interestingly, the Court left the door open for private, informal discussions *of the committee* even where the subject matter is germane to the committee's business. Justice Grange, speaking for the majority, held:

> There is no doubt that ***members of a committee, meeting informally, can discuss questions within its jurisdiction privately***, but when all members are summoned to a regularly scheduled meeting and there attempt to proceed in camera, they are defeating the intent and purpose of council's by-law which governs their procedure. [Emphasis added.][41]

Justice Lacourciere, in dissent, focused on the issue of whether *action* was taken by the committee while meeting privately. Lacourciere J.A. cites the full definition of "meeting" in *Black's Law Dictionary,* 5th ed., (St. Paul: West, 1979) at p. 886, focusing on

> [...] an assembling of a number of persons for the purpose of discussing ***and acting upon*** such matter or matters in which they have a common interest [...]. [Emphasis added.][42]

Similarly, *Jowitt's Dictionary of English Law*, 2nd ed. (London: Sweet & Maxwell, 1977), vol. 2, p. 1169, provides that a meeting is

> [...] an assembly of persons whose consent is required for anything ***to decide***, by a proper majority of votes, ***whether or not that thing shall be done***. [Emphasis added.][43]

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[37] (1985), 51 O.R. (2d) 577, 1985 CarswellOnt 682 (C.A.), leave to appeal to S.C.C. dismissed (1986), 54 O.R. (2d) 352 (note).

[38] Section 183(1) of the *Education Act*, R.S.O. 1980, c. 129, as amended, required that meetings of the board be open to the public.

[39] *Southam v. HWEDC, supra* note 32 at para. 12.

[40] *Ibid.* at para. 14.

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

[42] *Ibid.* at para. 18.

The dissenting Justice noted the fact that the gathering was supposed to be "a free-wheeling discussion"; "bull session"; "kicking around ideas or bouncing ideas off each other"; and, a "brainstorming session".[44] It was also noted that the meeting occurred in a lounge rather than a regular meeting room; there was no agenda; no clerk or secretary present; no report to council occurred.[45] Additionally, Lacourciere J.A. also noted that "the public has no write of access to deliberations of council or committees" at common law.[46]

As a result, Lacourciere J.A. agreed with the Divisional Court below and would have found that the gathering was a workshop and not a meeting, therefore not attracting the open meeting requirements under the region's procedural by-law.[47]

It is not unreasonable to assume that there are currently a number of councillors around the province who would still think that the factors considered by the dissent in *Southam v. HWEDC* are accurate indicators of whether a particular gathering or workshop may be closed to the public. Indeed, politicians in general would likely agree that meeting without public scrutiny permits

> an opportunity to express, exchange and test ideas, to deliberate freely, off the record, and without the restraint of outside influence. Freedom of discussion and the exchange of ideas is essential to an understanding of a problem. It cannot be satisfactorily accomplished under a spotlight or before a microphone.[48]

Nevertheless, the Legislature, in its wisdom, has made its intention to hold at least municipal governance up to a very high threshold of public scrutiny. Ironically, the Legislature has not held its own provincial decision-making up to the same standard.

Southam Inc. v. Ottawa (City)

The second leading decision in this area is the 1991 decision of the Divisional Court in *Southam Inc. v. Ottawa (City).*[49] In that case, the municipal council held an *in camera* retreat at the Calabogie Resort with only council and staff in attendance. Similar events had been held a number of times since 1978. As an aside, these types of events happen all over the province, particularly during the first year of a

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[43] *Ibid.*
[44] *Ibid.* at para. 19.
[45] *Ibid.*
[46] *Ibid.* at para. 22.
[47] *Ibid.* at para. 31.
[48] *Dayton Newspapers Inc. v. Dayton (City)*, 274 N.E. 2d 766 (1971) at 768, cited in *Southam v. HWEDC* at para. 26.
[49] (1991), 5 O.R. (3d) 726, 1991 CarswellOnt 482 (Div. Ct.).

new council's term, although a number of prudent municipal clerks try to schedule these events before the newly elected officials take office and commence their term.

As in the *Southam v. HWEDC* case, the Court held that the retreat was a meeting and therefore violated the Open Meeting Rule. This time the Court pushed the threshold to include discussions that would materially advance the business of the council. The Court held:

> Clearly, it is ***not*** a question of whether all or any of the ***ritual trappings of a formal meeting*** of council are observed [...]. The key would appear to be whether the councillors are ***requested to*** (or do in fact attend without summons) ***attend*** a function at which ***matters which would ordinarily form the basis of council's business*** are dealt with in such a way as to ***move them materially along*** the way in the overall spectrum of council decisions. In other words, is the ***public being deprived of the opportunity to observe a material part of the decision-making process***. [Emphasis added.][50]

Therefore, the three-part test for determining whether a meeting is a meeting that attracts the Open Meeting Rule, based on this particular case, is as follows:

- whether councillors are invited to attend;
- whether the matters discussed are matters which would ordinarily form the basis of council's business; and
- whether those matters are dealt with in such a way as to move them materially along the way in the overall spectrum of an ultimate decision.[51]

As discussed later in the paper, the second two factors remain relevant today. The first factor, at its root, is really a question of whether a quorum of members participates in the discussion rather than whether councillors actually participate by invitation or summons. In today's open meeting environment nearly twenty years after the *Southam Inc. v. Ottawa (City)*, the formality of an invitation or summons to a meeting appears more like a "ritual trapping of a formal meeting."[52] The Ombudsman of Ontario, discussed further in this paper, also argues that an invitation "cannot be a necessary condition" for the Open Meeting Rule to apply.[53]

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

[51] John Mascarin & Christopher J. Williams, *Ontario Municipal Act & Commentary*, 2011 ed. (Markham: LexisNexis Canada Inc., 2010) at 56.

[52] *Southam Inc. v. Ottawa (City)*, *supra* note 46 at para. 12.

[53] 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* by André Marin at

Interestingly, the Court again left "informal discussions" on the proverbial table of permitted actions.[54] Similar sentiments were expressed by courts throughout the country in the 1990s. For example, in *Yellowknife Property Owners Association v. Yellowknife (City)*,[55] the Court held that it had "no power to compel councillors not to meet and discuss municipal issues outside of the legislative requirements of the *Cities, Towns and Villages Act"*, which contained a similar provision to the Open Meeting Rule in the *Municipal Act*.[56]

Niagara-on-the-Lake Conservancy Society v. Niagara-On-The-Lake (Town)

Ten years later, a similar issue came before the Ontario Superior Court of Justice in *Niagara-on-the-Lake Conservancy Society v. Niagara-On-The-Lake (Town)*.[57] This time it was not a retreat but a "think-tank" session that was designed "to discuss numerous broad based topics of general concern to council and staff that were expected to be dealt with that year."[58]

In that case, the applicant sought to invalidate a resolution pertaining to the relocation of the town's library because "it was conceived in 'secret meetings' and was passed in bad faith."[59] Ultimately, the court found that the decision was made at an official meeting of council after deputations had been received and a public meeting was held to solicit the public's comments.[60] The court held that the alleged illegality of the initial "think-tank" meeting could not invalidate every decision flowing from that matter. Such a "drastic result" would send the affairs of the town into "chaos" and, in any event, that is not mandated by the legislation, according to Taliano J.[61]

The approach of Taliano J. in this case, while certainly practical, illustrates the challenge that courts face when an issue is first discussed behind closed doors, but then subsequently debated and proper resolutions are passed in public sessions. If the Open Meeting Rule does not come with sufficiently

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para. 65 (April 25, 2008) online: <http://www.ombudsman.on.ca/media/32463/sudburyreporteng2.pdf> [City of Sudbury Report].

[54] *Ibid.* at para. 16.

[55] (1996), 40 M.P.L.R. (2d) 96, 1996 CarswellNWT 72 (N.W.T.S.C.) [cited to WeC].

[56] *Ibid.* at para. 12; but see *Yellowknife Property Owners Association v. Yellowknife (City)* (1998), 49 M.P.L.R. (2d) 65, 1998 CarswellNWT 123 at para. 24 (N.W.T.S.C.) ("it is clear that briefing sessions held in Yellowknife were meetings within the jurisdiction of council [...] and they dealt with matters which form the basis of the council's business and were dealt with in such a way as to move them materially along in the overall spectrum of the council's decision".).

[57] (2001), 14 M.P.L.R. (3d) 94, 2000 CarswellOnt 3366 (Ont. S.C.J.).

[58] *Ibid.* at para. 5.

[59] *Ibid.* at para. 2.

[60] *Ibid.* at para. 14.

[61] *Ibid.* at para. 13.

significant sanctions to influence the behaviour of municipal councils, local boards and committees, the Legislature may be required to intervene to clarify its intention. Note, however, that this concern is tempered by the more recent decision of the Supreme Court of Canada in *RSJ Holdings Inc. v. London (City),*[62] which is discussed later in this paper. There, the Court quashed a decision that had been made *in camera* but was later confirmed by by-law in open session. The Court held, among other things, that the eight minutes of "public air time" was in sufficient.

Read by itself, the Niagara-on-the-Lake decision would seem to pull the pendulum back slightly from the expanding interpretation of a meeting that would attract the Open Meeting Rule as set out in the two Southam Inc. decisions. However, the cost order in *Niagara-on-the-Lake Conservancy Society v. Niagara-On-The-Lake (Town)*[63] admonished the town for its actions. It provided only "nominal costs" of $1200 versus the over $43,000 requested.[64] The Court described the "hollow" victory as follows:[65]

> Even though this Court was not prepared to grant the applicant's claim and strike the By-law authorizing the moving of the library, nevertheless this court had and continues to have, serious misgivings about the propriety of the Town's practice of meeting behind closed doors to discuss issues of importance to the citizens of the community.
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> [...]
>
> The court cannot be seen to be supportive of activities that are or appear to be in contravention of the Municipal Act. The Town's actions must not only be above board, but should appear to be above board. When the Town fails to meet that standard, it can not expect to be rewarded or vindicated when concerned citizens complain about it, even in a losing cause.[66]

"Heart of the Matter" Cases

The challenge discussed above related to "curing" invalid closed session discussions by bringing them into the public sphere was also discussed by a three member panel of the Divisional Court in *Huron East (Municipality) v. Avon Maitland District School Board*.[67] Several residents sought judicial review to quash the school board's decision to close a high school, in part, because the decision to do so was made *in camera*, contrary to the *Education Act*'s equivalent to the Open Meeting Rule. Although the

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[62] [2007] 2 S.C.R. 588, 2007 CarswellOnt 3919 [cited to WeC].
[63] (2001), 20 M.P.L.R. (3d) 84, 2001 CarswellOnt 1332 (Ont. S.C.J.).
[64] *Ibid.* at paras. 1 and 15.
[65] *Ibid.* at para. 12.
[66] *Ibid.* at paras. 12 and 13.
[67] (2002), 2002 CarswellOnt 2185 (Ont. Div. Ct.).

Court found that an *in camera* meeting had been held to discuss the closing of the high school, the Court focused its analysis on whether information was withheld from the public that would have influenced the residents' ability to present their case for keeping the school open. In effect, the Court sanctioned the "curing" of the invalid meeting. It held:

> While we note that there may have been an infraction of s. 207 of the Education Act concerning which matters are to be dealt with in closed sessions [...], we do not see that ***the applicants have made out a case that such meeting deprived them of information reasonably necessary for the presentation of their case to keep the Seaforth High School open***. [Emphasis added.][68]

There does not appear to be sufficient language in the applicable provision of the *Education Act*, which mirrors subsection 239(1) of the *Municipal Act, 2001,* to read in an additional onus of establishing that the information discussed in the closed session, if kept secret, would have materially affected someone's rights. In any event, for our purposes, the Court concluded that "[t]his is not a case where the heart of the decision-making was conducted out of public view",[69] highlighting the shift of the inquiry to the subject-matter rather than the form of the meeting.[70]

Two other decisions released between *Southam Inc. v. Ottawa (City)* and *RSJ Holdings Inc. v. London (City)* had a similar focus. First, in *Aitken v. Lambton Kent District School Board*,[71] the school board admitted that it held a "secret meeting" in violation of the Open Meeting Rule equivalent in the *Education Act.*[72] Interestingly, the three-member panel of the Divisional Court felt compelled to categorize the concern as one of procedural fairness rather than statutory obligation. The Court found that the applicants had been deprived

> of a level playing field to such a degree that the applicants have been deprived of procedural fairness and the appearance of procedural fairness has been irretrievably comprised [*sic*].[73]

As a result, the Court held that it was a case "where the heart of the decision making was conducted out of public view."[74]

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[68] *Ibid.* at para. 7.
[69] *Ibid.*
[70] See also *RSJ Holdings Inc. v. London (City)*, *supra* note 59 at para. 18.
[71] [2002] O.J. No. 3026, 2002 CarswellOnt 2577 (Div. Ct.).
[72] *Ibid.* at para. 38.
[73] *Ibid.* at para. 43.
[74] *Ibid.* at para. 38.

Second, in *3714683 Canada Inc. v. Parry Sound (Town),*[75] the applicant applied to quash a development by-law that was adopted as a result of *in camera* meetings. Del Frate J. distinguished the case from *Southam v. HWEDC, Southam Inc. v. Ottawa (City)* and *Aitken v. Lambton Kent District School Board* by finding that the "heart of the matter" in this case was not decided at the *in camera* meeting. "There was a subsequent ratification at an open Council meeting where interested persons, if they so wished, could have been heard."[76] The Court limited the threshold of what would constitute a meeting attracting the Open Meeting Rule even further by holding that

> [w]here there is merely an exchange of information and where the matter is discussed in generalities, such a practice [of meeting *in camera*] is helpful, not only to the developer, but also to Council.[77]

RSJ Holdings Inc. v. London (City)

In its 2007 decision of *RSJ Holdings Inc. v. London (City)*,[78] the Supreme Court of Canada had an opportunity to address the issue of open municipal meetings. In that case, a developer sought to quash an interim control by-law, which had the effect of freezing all land development in a specific area for one year. One of the issues was whether the discussion occurring *in camera* and then the by-law passing in council in less than eight minutes constituted a violation of the Open Meeting Rule.

In reviewing the open meeting imperative in subsection 239(1) of the *Municipal Act, 2001*, the Court held that "***in the normal business of municipal government***, meetings will be transparent and accessible to the public [emphasis added]." Importing a "normal business" standard into the interpretation of whether a meeting is a meeting that attracts the Open Meeting Rule ensures that it remains temporally relevant as time progresses, but does little to assist us in its practical application.

The Court did clarify that there is a "clear distinction between a citizen's right to notice and participation, and his or her right to observe municipal government in process."[79] It is this right to observe that is at the core of the Open Meeting Rule. Note that this is in stark contrast to the jurisprudential direction in Ontario prior to this decision. For example, as noted above, the courts had begun to place the emphasis on (a) the "heart of the matter" being decided at the in camera meetings and (b) whether it was "cured" subsequently at an open meeting.

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[75] (2004), 4 M.P.L.R. (4th) 197, 2004 CarswellOnt 5213 (Ont. S.C.J.).
[76] *Ibid.* at para. 66.
[77] *Ibid.* at para. 67.
[78] *Supra* note 59.
[79] *Ibid.* at para. 32.

Ultimately, the respondent city conceded that the gathering was a meeting that was closed to the public. It was not closed to discuss one of the approved subject matters set out in the *Municipal Act, 2001;* rather, it was closed to deal with a matter which did not require public notice under the *Planning Act*.[80] Unfortunately, the Court did not provide more guidance on the open meeting issue in finding that the city had breached the provisions of the *Municipal Act, 2001* because there was no foundation for closing the meeting in the *Planning Act* as alleged by the city.

Importantly, even though the decision was *intra vires* the municipal council, it was quashed as a result of a failure to observe the open meeting requirements. The extraordinary by-law at issue "'accentuate[d] the need for the courts to jealously require' that these discussions be held in a public forum."[81]

The Supreme Court of Canada found that open meetings ensure "robust democratic legitimacy";[82] indeed, as the Court observed:

> The 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.[83]

The strong sanction of quashing a by-law that was decided upon in a closed session does address the earlier concern raised in this paper regarding a lack of "teeth" that the Open Meeting Rule has to influence the behaviour of councils, local boards and committees. However, the position—pushed to the extreme--presents the concern of the tyranny of one.[84] Notwithstanding the public discussion, consultation and notification that may have taken place, or the near unanimous support that may exist for a particular course of action, one individual could see to it that a municipal decision is quashed by the courts if it was not made transparently.

The courts, thankfully, are unlikely to provide such a drastic remedy where a municipality simply fails to pass a resolution to proceed *in camera*. In *Farber v. Kingston (City)*,[85] the Court of Appeal held that the

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[80] R.S.O. 1990, c. P.13.

[81] *RSJ Holdings Inc. v. London (City)*, *supra* note 59 at para. 42; John Mascarin & Sidonia Loiacono, "Municipal Decision-Making and the Open Meeting Requirement" (2007), 3 D.M.P.L. (2d) (September 2007), No. 9, at 5.

[82] *RSJ Holdings Inc. v. London (City)*, *supra* note 59 at para. 38.

[83] *Ibid*.

[84] James P. Barber, "Legal Transparency in Local Government – Better Democracy Through Litigation" (Paper presented to the International Municipal Lawyers Association 2006 Annual Conference, September 17-20, 2006) at 8-9.

[85] (2007), 31 M.P.L.R. (4th) 31, 2007 CarswellOnt 1473 (Ont. C.A.) [cited to WeC].

"failure to pass the necessary resolutions [...] are at most procedural irregularities unconnected to the real decision to pass the by-law. They therefore do not taint its legality."[86]

The defence costs of litigating these types of cases are also significant for municipalities, particularly smaller ones. But litigation is not the only way to address this matter. The next section examines the ability under the *Municipal Act, 2001* to request a closed meeting investigation and the contributions that have been made to the Open Meeting Rule interpretations by those investigators.

Closed Meeting Investigations

Where a meeting of a council, local board or committee (that has 50% or more membership made up of council members) of either of them, is closed to the public, any person may request that an investigation occur to determine if the Open Meeting Rule was violated. Section 239.1 of the *Municipal Act, 2001* provides:

> A person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,
>
> (a) by an investigator referred to in subsection 239.2 (1); or
> (b) by the Ombudsman appointed under the *Ombudsman Act*, if the municipality has not appointed an investigator referred to in subsection 239.2 (1).

Municipally Appointed Investigators

Many municipalities have appointed their own closed meeting investigator. In doing so, those municipal councils were required to have regard to the following matters, pursuant to subsection 239.2(5) of the *Municipal Act, 2001*:

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

If the investigator is of the opinion that there was a violation of the Open Meeting Rule, he or she will prepare a report to council and "may make such recommendations as he or she thinks fit."[87] Although

[86] *Ibid.* at para. 28.
[87] *Municipal Act, 2001*, s. 239.2(10).

the investigator does not have the ability to bind council, the fact that his or her report must be made public[88] ensures that there is sufficient opportunity for the council, local board or committee to take corrective action or for a member of the public to commence civil action if warranted.

Ontario Ombudsman

If a municipality does not appoint its own closed meeting investigator, the default investigator is the Ombudsman of Ontario, currently André Marin, who operates under the *Ombudsman Act*.[89] As an officer of the Legislature, the Ombudsman's broad purpose is

> to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his, her or its personal capacity.[90]

In the municipal context, this means investigating allegations of an improperly closed meeting, pursuant to subsections 14(2.1) to (2.6) of the *Ombudsman Act*. The same public disclosure required of a municipally appointed closed meeting investigator's report applies to the Ombudsman's report and recommendations.[91]

A review of the nine investigative reports released by the Ombudsman to date on this matter,[92] suggests that he and his staff take their role very seriously. With no authority to sanction, the effectiveness of the office relies, in large part, on the publicity of the investigative reports and public outrage. Perhaps it is not surprising then to find language like the following passage taken from a closed meeting investigation published by the Ombudsman entitled, "Pirating Our Property: Investigation into the City of Oshawa's Apparent Failure to Co-operate":[93]

> Two things make this sad story particularly offensive. The first is that my Office depends entirely upon moral suasion and co-operation to function. The citizens of this province receive tremendous value from the work that we do. We are efficient, inexpensive, and effective at solving real problems. It is disheartening to encounter such rank disrespect for this Office. Had I chosen to ignore it, it could have become

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[88] *Ibid.,* ss. 239.2(11).
[89] *Ombudsman Act,* R.S.O. 1990, c. O-6.
[90] *Ibid.*, ss. 14(1).
[91] *Ibid*., ss. 14(2.6).
[92] The nine reports are available online: Ombudsman of Ontario <http://www.ombudsman.on.ca/en/what-we-do/municipal-matters/investigative-reports.aspx>.
[93] Ombudsman of Ontario, *Pirating our Property: Investigation into the City of Oshawa's Apparent Failure to Co-operate* by André Marin (April 2009), online: <http://www.ombudsman.on.ca/en/publications--resources/municipal-reports.aspx> [Pirating our Property Report].

> contagious. I have therefore chosen to expose it to the sanitizing light of day in the hope and expectation that this Office will not again experience such intransigence.

The Ombudsman appears to approve of the colourful language often borrowed from American writings and jurisprudence on the issue of transparent governance. See, for example, the following quote from his report regarding the City of Sudbury,[94] wherein the Ombudsman quotes approvingly from a Florida judge's decision from 1969:

> Terms such as [...] secret meetings, closed records, executive sessions and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens.[95]

Undoubtedly, municipal clerks and solicitors collectively shuddered after reading the Oshawa report noted above in April 2009. But the investigative power and process of the Ombudsman is not the focus of this paper; rather, for our purposes, the Ombudsman's comments in his reports on when a meeting is a meeting that attracts the Open Meeting rule is of particular interest. The above-noted passage does provide some insight into the approach taken by the Ombudsman in conducting closed meeting investigations.

When the Ombudsman began investigating municipal meetings in 2008, he discussed three overarching lines of inquiry regarding whether the Open Meeting Rule should apply. The Ombudsman asked (a) whether the public body was making decisions; (b) whether it was acting within its jurisdiction; and, (c) whether it was exercising a policy-making function.[96] The first factor is highly indicative of a meeting, as seen throughout the case law and commentary on this matter and as discussed in this paper. The second factor is also highly suggestive of a meeting, but is more difficult to assess given the recent expansion of municipal power from specifically enumerated authorities to broad spheres of jurisdiction under sections 9, 10 and 11 of the *Municipal Act, 2001*. Strangely, the Ombudsman concludes his discussion on the second factor in the City of Sudbury Report by stating that it should be irrelevant because an illegal or *ultra vires* meeting should not be permitted to escape public scrutiny:

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[94] City of Sudbury Report, *supra* note 50 at para. 44.
[95] *Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).
[96] City of Sudbury Report, *supra* note 50 at para. 74.

> 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.[97]

The third factor is whether the body was exercising a policy-making function. If it was not, then the exercise of political power in a transparent and accountable manner is not in jeopardy. But the Ombudsman believes that this third factor is a helpful but not a necessary condition because a meeting may be a prelude to a potential policy choice.[98] As such, the Ombudsman suggests that "identifying that there is a policy at stake is a strong indicator that a meeting is occurring".[99]

In the end, the Ombudsman employs the following expanded definition of a "meeting," which he has derived:

> 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.[100]

Both Southam Inc. decisions[101] discussed earlier in this paper are cited in the small reference guide published by the Ombudsman entitled, *The Sunshine Law Handbook: Open Municipal Meetings in Ontario,*[102] regarding the definition of a meeting for the purposes of the Open Meeting Rule. The guide is distributed to municipalities across the province—regardless of whether they have appointed their own closed meeting investigator. The guide notes that the *Municipal Act, 2001* "does not provide guidance on how to determine which gatherings are 'meetings'", and therefore it sets out the working definition developed by the Ombudsman noted above.[103]

In the Town of South Bruce Peninsula Report, the Ombudsman also indicated that the presence of quorum, in his opinion, is an important but not a necessary condition for the Open Meeting Rule to apply:

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[97] *Ibid.* at para. 87.
[98] *Ibid*. at para. 91.
[99] *Ibid.*
[100] City of Sudbury Report, *supra* note 50 at para. 59; Ombudsman of Ontario, *Investigation into whether the Town of South Bruce Peninsula Council improperly held closed meetings* by André Marin (July 7, 2010) at para. 86, online: <http://www.ombudsman.on.ca/media/150473/omletsouthbrucefinaljuly5.pdf> [Town of South Bruce Peninsula Report].
[101] *Southam v. HWEDC, supra* note 32; *Southam Inc. v. Ottawa (City), supra* note 46.
[102] Ombudsman of Ontario, *The Sunshine Law Handbook: Open Municipal Meetings in Ontario* (Toronto: Office of the Ombudsman of Ontario, 2008) at 17 [*Sunshine Law Handbook*].
[103] *Ibid.* at 16.

> The presence of quorum, the minimum number of members of a body required to be present at a meeting in order for council to exercise its power or authority, is an important indicator of when a meeting is a "meeting" under the law—since a body can take official action when it has quorum—***but this is not definitive***. [Emphasis added.][104]

Interestingly, in an earlier closed meeting investigation into the conduct of the Council of the City of Greater Sudbury,[105] the Ombudsman found that an informal gathering of a quorum after a formal meeting in a lounge was a "meeting of the council, period." But he went on:

> 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.[106]

In that case, the Ombudsman found that the purpose of the meeting was administrative, did not involve council's "political authority", and it did not involve councillors "equipping themselves for a later political decision."[107] The Ombudsman went on in that report for another six paragraphs in an attempt to articulate how very close to the line the Sudbury Council came to engaging the Open Meeting Rule during its informal discussions. He notes that if the conversations had "been only marginally different, section 239 would have kicked in."[108]

There is no appeal from a closed meeting investigator's report, including the Ombudsman's reports, under the *Municipal Act, 2001* or the *Ombudsman Act*.[109] Nevertheless, one might expect the first municipality that is found to have contravened the Open Meeting Rule as a result of an informal meeting occurring without quorum present to vigorously defend itself in at least the court of public opinion. On the other hand, if a council, local board or committee purposefully attempted to thwart public scrutiny by making a decision through a series of "quorum-less" gatherings,[110] one might see the courts and closed meeting investigators come to a similar conclusion as the Ombudsman.[111]

Similarly, e-mail discussions amongst council, local board or committee members, which may or may not involve others (e.g. constituents, staff, and stakeholders), may result in courts and closed meetings

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[104] Town of South Bruce Peninsula Report, *supra* note 97 at para. 87.
[105] City of Sudbury Report, *supra* note 50.
[106] *Ibid.* at para. 32.
[107] *Ibid.* at para. 33
[108] *Ibid.* at para. 36.
[109] *Sunshine Law Handbook, supra* note 99 at 12.
[110] Barbar, *supra* note 81 at 9.
[111] See also City of Sudbury Report, *supra* note 50 at para. 67.

investigators seeking to have those discussions captured by the Open Meeting Rule as well.[112] As more and more information is exchanged through electronic means via e-mail, websites, blogs and social networking sites (e.g. Facebook, Twitter, LinkedIn), and the use of mobile electronic communications devices (e.g. iPhone, Blackberry) becomes more prevalent, the issue of public scrutiny of virtual decision-making will inevitably be tested by the courts, through a closed meeting investigation, or made public through requests for e-mail records under *MFIPPA*.

The Ombudsman also took the opportunity in the Town of South Bruce Peninsula Report to discuss what many municipal clerks and solicitors have always assumed, i.e. the Open Meeting Rule does not apply to social gatherings:

> Informal gatherings for social purposes are not generally considered to be "meetings." However, where the ***purpose of the gathering is to discuss the business of council and/or make decisions***, a gathering is more likely to be deemed a "meeting" that is subject to the open meeting requirements. [Emphasis added.][113]

One of the concerns identified by the Ombudsman about the practices of the South Bruce Peninsula Council was the tradition of informally gathering at Tim Hortons after council meetings. The Ombudsman cautioned against this type of practice:

> In this case, there is no evidence that the gatherings at Tim Horton's were anything other than social get-togethers. However, these circumstances illustrate the ***dangers inherent in council members meeting informally***, particularly in close proximity to official council meetings. Such gatherings naturally attract speculation about the nature of the discussions taking place, and council members should be extremely careful to ensure that a casual social conversation does not drift into improper areas. [Emphasis added.][114]

In the earlier City of Sudbury Report, the Ombudsman acknowledged that there may still be room for informal discussions germane to council, local board or committee business:

> 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. [...] Still, if the purpose of the open meeting provisions is to be respected,

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[112] *Ibid.*

[113] Town of South Bruce Peninsula Report, *supra* note 97 at para. 88.

[114] *Ibid.* at para. 89; see also Ombudsman of Ontario, *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meeting* by André Marin (December 2010) at para. 61, online: <http://www.ombudsman.on.ca/media/163669/mattawafinal.pdf>.

> care has to be taken not to allow this "informal discussion" concept to swallow up the open meeting principle.[115]

Although quantitative research into the practice of municipal politics across the province is beyond the scope of this paper, as noted earlier, it seems likely that a great deal of municipal business is conducted informally by politicians or local board and committee members in gatherings that would fall into the Ombudsman's wide interpretation of a meeting that attracts the Open Meeting Rule. Indeed, as James P. Barber notes in his paper entitled "Legal Transparency in Local Government – Better Democracy Through Litigation":

> A more pluralistic and inclusive view of politics is that it includes the debates and compromises in meetings and hallways, discussions in coffee shops, radio and television shows, the internet, newsletters and newspapers, church meetings, mass marches and organizing work in fields, factories and homes which may occur out of the public eye.[116]

Three Step Enquiry

Considering the legislation, developments in the case law, commentary and the Ombudsman's reports, this paper offers the following Three Step Enquiry for determining whether or not a meeting is likely to attract the open meeting requirement prescribed in subsection 239(1) of the *Municipal Act, 2001*.

Step One

First, determine who is likely to participate in the gathering. If they are members of a municipal council or local board, proceed to the next step of the enquiry; or, if they are members of a committee (that is comprised of at least 50% council members), then proceed. If they are not members of one of those three public bodies, stop the enquiry–the meeting is not a "meeting" for the open meeting purposes. That means, for example, that committees of council that have 50% or less membership made up of council members are not subject to the Open Meeting Rule, notwithstanding that the same general principle of transparent municipal governance may philosophically apply in those cases. At this point in time, however, the Legislature has not included them in the Open Meeting Rule.

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[115] City of Sudbury Report, *supra* note 50 at paras. 83 and 84.
[116] Barber, *supra* note 81 at 10.

Step Two

Second, determine if any of the "ritual trappings of a formal meeting" listed below are likely to exist:[117]

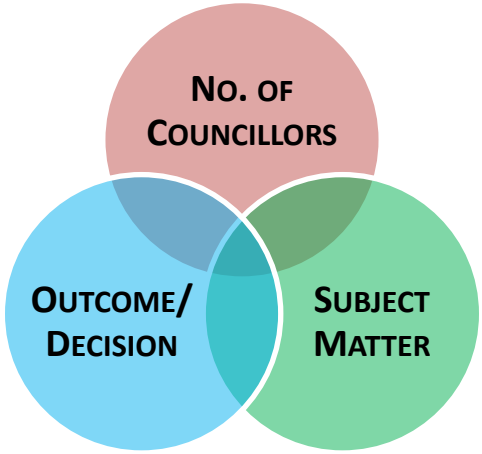
- Will a record be created (e.g. invitations, notices, agendas, resolutions, staff reports, minutes)?
- Will there be meeting formalities, such as singing of O Canada or a chairperson conducting the meeting?
- Is it occurring at a regularly scheduled time, date and/or place?

If several of the aforementioned factors are expected to be a part of the gathering, then one can stop the enquiry since it is likely a meeting attracting the Open Meeting Rule.

On the other hand, a gathering without those items listed above may still be a meeting. As such, proceed to the next step of the enquiry where no "ritual trappings of a formal meeting" are likely to exist.

Step Three

The third and final step of the enquiry is slightly more complex. It requires assessing an additional three factors and plotting them on a Venn diagram. In general, the centre of the diagram where all three circles or factors overlap ("Centre Point") is when there is the highest likelihood that the gathering attracts the Open Meeting Rule. Where only two circles overlap, it is still likely that the meeting attracts the Open Meeting Rule and further investigation is warranted. If, after all three factors are plotted, the three plots are not on a spot where at least two of the circles overlap, it is unlikely that the meeting is a meeting that would attract the Open Meeting Rule. Here is Open Meeting Rule ("OPR") Venn diagram:



[117] *Southam Inc. v. Ottawa (City), supra* note 46 at para. 12.

The primary factor is the number of members: the more members participating, the greater the likelihood it is a gathering that attracts the Open Meeting Rule. To plot the location of this primary factor on the OPR Venn diagram, envision the Centre Point (i.e. where all three circles intersect) as the number for quorum. As one moves away from the Centre Point, the number of members decreases until, near the edge of the circle, there are less than two members.

The secondary factor is the outcome or decision made: the closer the outcome resembles a vote or a definite decision, the greater the likelihood it is a gathering that attracts the Open Meeting Rule. To plot the location, envision the Centre Point as a finite decision or vote occurring. As one moves away from the Centre Point, the less the outcome resembles a decision and the more it involves just the sharing of information.

The tertiary factor is the subject matter: the closer the subject matter reflects the core of the business of council (i.e. policy-making), the local board or committee, the greater the likelihood it is a gathering that attracts the Open Meeting Rule. To plot the location, envision the Centre Point as the most fundamental exercise of political power and public authority in the case of a council gathering, or that of the specific mandate provided for the local board or committee. As one moves away from the Centre Point, the less the 'heart of the matter' being discussed relates to the business core of that public body.

To practice, try plotting three of nine members of council who have gathered to vote on where their annual council holiday dinner will be held. In that situation, only the secondary factor would be on the Centre Point because the purpose was to gather to take a vote and make a decision. The primary factor would be plotted away from the Centre Point because there is less than quorum, i.e. less than five of nine members participating which would be required for a quorum. And finally, the tertiary factor would be plotted far away from the Centre Point because the subject matter is not related to the core policy-making business of the municipality.

Imagine, however, that there was a quorum participating in the annual council holiday dinner meeting. This would move the primary factor plot to the Centre Point, resulting in two of three factors engaged. At first glance, one might think that the system is flawed since common sense would suggest that this gathering could not possibly attract the Open Meeting Rule—it seems inconsequential. But recall that the result of an OPR Venn diagram analysis where two plots are on the Centre Point is that further investigation is warranted. In this case, that could be reasonable if the members decided to use a part

of their council discretionary budget for the dinner. Some of the public may be concerned about that type of spending thereby engaging the foundational principles of transparent municipal governance.

Conclusion

While the Three Step Enquiry involving the OPR Venn diagram is derived from the legislation, case law, commentary and Ombudsman's reports, it obviously does not guarantee that a closed meeting investigation or lawsuit will not result in a finding that the Open Meeting Rule was violated. Rather, it is designed to assist municipal clerks and solicitors in weighing the various considerations and factors when asked whether a meeting is a meeting that attracts the Open Meeting Rule. This is particularly important in the absence of a clear legislated definition or criteria for such a meeting.

Since *RSJ Holdings Inc. v. London (City)*, the majority of the advancement to this discourse has come from the reports of the Ontario Ombudsman. There may be less of those reports in the future, however, if more municipalities decide to appoint their own closed meeting investigators (or "toothless watchdog[s]", in the Ombudsman's words),[118] given the approach of the current Ombudsman. Nevertheless, as a result of the Supreme Court of Canada's clear signal that there are serious consequences for violating the Open Meeting Rule (e.g. quashing a by-law that is passed in a public session where the decision regarding the matter was made *in camera*), there will likely be further jurisprudential development in this area.

Until there is greater clarity from the courts or intervention by the Legislature, municipal councils, local boards and committees will need to be cautious about meeting without the opportunity for the public to observe. When in doubt, the laudable action—in keeping with the principles of transparent municipal governance—is to open the meeting to public scrutiny.

[118] Pirating our Property Report, *supra* note 90 at 11.