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LAWYERS

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November 12, 2013

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

Dear Sir:

**RE: Our Client: The Corporation of the Township of Leeds and the Thousand Islands**
**Re: Ombudsman's Preliminary Report dated October 2013**

We represent The Corporation of the Township of Leeds and the Thousand Islands.

Thank you for providing us with a copy of your Preliminary Report following your investigation into whether members of Council held an improper closed meeting on November 16, 2012, and whether the municipality's Personnel Committee failed to give proper notice of a closed meeting on February 19, 2013.

We have now had the opportunity to review it with the municipality and wish to make the following submissions on those aspects of your Preliminary Report with which the municipality disagrees.

The nature of those areas of disagreement can be summarized as follows:

(a) The municipality respectfully submits that you exceeded your jurisdiction by undertaking an investigation and making recommendations in respect of the Closed Meeting on November 26, 2012, for which no request for an investigation was filed by any person.

(b) The municipality respectfully submits that you have improperly adopted your own "working" definition of what constitutes a meeting for purposes of the *Municipal Act, 2001*, that incorrectly interprets the established common law of Ontario as determined

by the Ontario Court of Appeal, the Ontario Divisional Court and the Ontario Superior Court of Justice.

(c) The municipality respectfully submits that you have made an incorrect finding that the gathering of members of Council on November 16, 2012 constituted a "meeting" for purposes of the *Municipal Act*.

(d) The municipality respectfully submits that you have made an incorrect finding that the failure to give public notice of the Personnel Committee Meeting on February 19, 2013, violated the *Municipal Act*.

**EXCEEDING YOUR JURISDICTION**

Section 239.1 of the *Municipal Act, 2001*, (the "Act") permits a person to request that an investigation be undertaken to determine whether a municipality has complied with section 239 of the Act or its own procedural by-law before holding a meeting closed to the public. In the absence of an independent investigator appointed by the municipality, the Ontario Ombudsman is the default investigator.

Your Preliminary Report states that two complaints received allege a failure by the municipality to comply with section 239 of the Act and/or its own procedural by-law before holding meetings closed to the public. The first complaint relates to the informal gathering of members of Council on November 16, 2012; the second relates to a closed meeting of the Personnel Committee on February 19, 2013.

The municipality acknowledges that you have the lawful authority to investigate those complaints and make findings and recommendations in respect of those two meetings in accordance with the requirements of the *Municipal Act* and *Ombudsman's Act*.

Your Report indicates, however, that you also undertook an investigation of and made findings in respect of the closed meeting of Council held on November 26, 2012, for which you acknowledge you never received a complaint. Specifically, your Report opines that Council offended sections 228 and 239(7) and (8) of the Act when it asked staff to leave the closed meeting at which senior staff compensation issues were being discussed and failed to keep what you consider to be an accurate and complete record of the meeting.

In our view, sections 239.1 and .2 of the *Municipal Act, 2001*, are clear that your mandate to investigate is limited to only those matters for which a request for an investigation has been filed. It is not, in our respectful submission, an invitation for you to broaden your investigation into an examination of other meetings of Council for which there has been no complaint. In our view, to do so represents an exercise of your authority that exceeds your lawful jurisdiction under the Act and is improper. Instead, your investigation must be limited to only those meetings that were the subject of the original complaints.

For these reasons therefore, we respectfully request that your Preliminary Report be revised to remove all references and findings in respect of the closed meeting of Council held on November 26, 2012.

**IMPROPER DEFINITION OF MEETING**

Your Preliminary Report properly states that section 238 (1) of the Act defines a "meeting" to mean "any regular, special or other meeting of the Council, of a local board or of a committee of either of them." To better understand when a meeting has been convened, your report indicates that as part of your investigation of the Council of the City of Greater Sudbury in 2008, your office adopted the following "working" definition of what constitutes a meeting.

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

While your efforts to help bring greater clarity to what constitutes a meeting are commendable, we respectfully submit that you have articulated criteria and thereby developed legal tests that are not consistent with decisions of the courts of Ontario.

Indeed, an examination of your Report dated April 25, 2008, in respect of the City of Greater Sudbury suggests that, rather than embrace the findings of the various Ontario courts on what level of activity and discussion must occur before it can be said that there has been a meeting, you chose instead to make your own findings, even seeking to distinguish some of the courts' findings where they did not fit with your own views on the issue.

In our view, this approach is improper. More importantly, it has resulted in the application of tests and use of criteria for evaluating whether the gathering of Council members on November 16, 2012, constituted a meeting that are much less onerous than those articulated by the courts. Specifically, by applying your own concept of "doing the groundwork", you have concluded that a "meeting" occurred on that date when an objective examination of the facts and application of the law as defined by the courts would clearly rebut that conclusion.

Rather than your "working" definition, we respectfully submit that the proper definition of a meeting is the one articulated in the unanimous decision of the Ontario Divisional Court in *Southam Inc. et al. vs. Ottawa (City) Council*[1] wherein the Court states:

> "... a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?" [Our emphasis]

At the core of the Court's definition is the notion that members of Council must not just be assembled in the same place, but must engage in a degree of discussion and activity that "materially" advances the decision-making process. In our view, it is this concept of materiality when assessing what Council is doing or discussing at a particular moment that is critical to the issue of whether a "meeting" has occurred.

Implicit in this definition is that there may indeed be some discussion or activity among the assembled members of Council related to a municipal issue, but that in itself does not mean that there has been a "meeting". The discussion must go beyond just identifying and acknowledging a particular issue that Council must ultimately decide. Instead, Council must actually delve into the substantive (i.e. material) elements of the issue.

This is consistent with the definition of "material" found in the *Concise Oxford Dictionary* to mean "significant; important: Law (of evidence or a fact) significant or relevant, especially to the extent of determining a cause or affecting a judgment".

By comparison, your "groundwork" test is much less onerous. Again, according to the *Concise Oxford Dictionary*, "groundwork" is defined to mean any "preliminary or basic work". In the context of the municipal decision-making process, it could mean the most trivial or insignificant activity or discussion, which the Ontario Courts have clearly stated does not constitute a meeting.

We therefore request that, before issuing your final report, you revisit the evidence gathered during your investigation and evaluate it in the context of the applicable law in Ontario.

**INCORRECT FINDING OF A "MEETING" ON NOVEMBER 16, 2012**

Your Preliminary Report reviews the evidence gathered during your investigation and arrives at the conclusion that the informal gathering of Council members on November 16, 2012, constituted a closed meeting. You arrive at this conclusion despite the repeated and consistent evidence of all of the participants that there was no material discussion of the staff compensation issue.

You have also chosen to ignore the numerous statements of the participants that the Mayor repeatedly cautioned them that it was not a properly constituted meeting and that they understood they could neither ask questions nor engage in any discussion of the issue.

Instead, you have focused on irrelevant items and discrepancies in the different individuals' recollection of various immaterial aspects of an event that took place some 6 to 8 months prior to your investigation to make findings of credibility and draw adverse inferences in order to arrive at your conclusion. Those include,

(a) Repeatedly characterizing the room in which the members of Council gathered on November 16, 2012 as the "in camera" meeting room implying that since they gathered there then it must have been an "in camera" meeting. The room is a boardroom and, while closed meetings are held there, it is used for many other purposes. The fact that members of Council gathered in it on this particular date is completely irrelevant to the issue of whether it was a meeting, whether closed or open.

(b) Concluding that "clearly the intent was for the participants to meet privately" while acknowledging that the boardroom door was left open. Leaving the door open is hardly consistent with an intention to meet privately.

(c) Focusing on the Deputy Mayor's e-mail asking members of Council whether they would be "amenable to meeting" and Councillor Dickson's response confirming that "meeting" was a great idea. Irrespective of whether individuals use the word "meeting" in its generic or legal sense when talking about getting together, the issue of whether the gathering constitutes a "meeting" for purposes of section 239 of the Act depends on both its purpose and substance.

(d) Assuming that since the Deputy Mayor and Councillor Dickson recalled the meeting lasting for as long as one-half hour, this was consistent with holding a substantive discussion, but ignoring Councillor Merkley's recollection that it lasted only a few minutes and the Mayor and Councillor Emmons having no clear recollection of how long it had lasted. Irrespective of how long the members of Council were together in the boardroom, the issue is whether the nature of the discussion among them materially advanced their consideration of the substantive issues concerning staff compensation. In the face of the other and more consistent evidence concerning the nature of the discussions, it is, in our view, improper for you to draw any inference whatsoever from the various individual's recollection of the amount of time they were together for the purpose of making your finding on the core issue of whether there was a "meeting".

(e) Implying that the Mayor, having advised the Clerk that Council members would be getting together to "discuss a couple of things" and asking her to make copies of some documents beforehand, was compelling evidence of a meeting for purposes of the Act. Instead, your focus should be on what the Mayor and other members of Council have consistently stated in their evidence was actually discussed. As we point out below, an examination of that evidence demonstrates clearly that there was nothing about those discussions that materially advanced the decision-making process.

In our view, the answer to the question of whether there was a meeting within the meaning of the Act is answered by the consistent and repeated evidence of all of the participants on the critical issue of what was actually discussed. Those include,

(a) The Mayor's evidence that,

a. he had information that would be considered by Council at its next meeting that he wished to "distribute";
b. his assurance to the Township Clerk that "he was just distributing paperwork";
c. his handwritten covering memorandum that only listed the enclosed documents, identified (without comment) the issues that needed to be decided and encouraged members of Council to study the matter carefully;
d. his advice to "everyone present there would be no discussion" and his repeated caution that they were meeting for "just distribution purposes" and "we will not discuss it";

(b) The Deputy Mayor's evidence that

a. "the Mayor handed out the envelopes, and read out the contents, reviewed the historical background of the staff salary issue and noted inconsistencies surrounding the information";
b. "no one commented on the salary information";
c. "the Mayor reminded one council member who asked a question about the contents of the envelope that they were not holding a meeting on the issue"; and
d. "no Council business was advanced during the gathering";

(c) Councillor Dickson's evidence that the Mayor "instructed those present not to open [the envelopes], but to take them home, as they were for discussion at a future meeting";

(d) Councillor Emmons' evidence that "there was no discussion about [the envelope with the staff salary information]";

(e) Councillor Merkley's evidence that

a. "the Mayor responded to a question from one of the councillors and said there would be no discussion about the staff salary issue"; and
b. "the group did not discuss the staff salary issue".

Taken together, all of this uncontroverted evidence is, in our respectful submission, entirely consistent with a finding that a "meeting" as defined by the Superior Court of Justice did not take place. Given that everyone present was very aware that they could not discuss the issue and has been consistent in his or her evidence that the staff salary issue was not discussed, there is simply insufficient evidence on which you can properly conclude that the staff salary issue was "materially" advanced at that time.

Instead, all that can be said of this gathering was that the Mayor in his role as the Chief Executive Officer responsible for providing leadership to Council gathered the members of Council together for the sole purpose of distributing important documents, reminding them of the issues that needed to be considered and encouraging all of them to give the matter serious study and consideration ahead of the next Council meeting at which the matter would be discussed. In our view, those actions alone do not constitute a material advancing of the decision-making process sufficient to support a finding that there was a "meeting" within the meaning of the Act as defined by the courts.

In the words of the Superior Court of Justice, nothing that occurred on that day moved Council materially along the way in the overall spectrum of making a decision on the issue of staff compensation or deprived the public from knowing that a material part of the decision-making process had taken place. Instead, it was nothing more than a process of distributing important information together with encouragement from the Mayor that members of Council should study it carefully ahead of the meeting at which it would be discussed.

It is only when your "groundwork" test is adopted that you are able to conclude that a meeting occurred. As the Oxford dictionary definition above so clearly demonstrates, even the most modest amount of activity or discussion in respect of a particular issue could be interpreted as groundwork. Indeed, saying anything about any issue that may come before Council could, by your definition, qualify as "groundwork".

For example, an informal gathering of members of Council in the hall of the Township offices during which the Clerk approaches them, distributes their agenda packages for the next meeting and informs them that she has completed her report on a specific matter that they had requested and included it in the agenda package could, according to your "groundwork" test, qualify as a "meeting" for purposes of the Act.

In our respectful submission, your use of your own "groundwork" test rather than the "materiality" test articulated by the Ontario Superior Court of Justice has resulted in you arriving at an incorrect conclusion that the informal gathering of members of Council on November 16, 2012, constituted a meeting for purposes of the *Municipal Act, 2001*. With the greatest respect, your definition has never been adopted by the courts of Ontario and until it is, we respectfully submit that it is improper for you to apply it.

For this reason therefore, we request that you revise your Preliminary Report by applying the proper legal definition of what constitutes a "meeting" to the facts in the Leeds and the Thousand Islands Township situation. If you do, we respectfully submit that you will conclude that the gathering of members of Council on November 16, 2012, was not a meeting within the meaning of the Act.

**INCORRECT FINDINGS ON THE PERSONNEL COMMITTEE MEETING ON FEBRUARY 19, 2013.**

The complaint in respect of the closed Personnel Committee meeting on February 19, 2013 is that it was not publicized in advance and therefore did not comply with the municipality's procedural by-law required under subsection 238 (2) the *Municipal Act*. It is this issue of conformity with the procedural by-law that you are authorized to investigate under section 239.1 of the Act.

Section 238 (2) requires every municipality to pass a procedure by-law for "governing the calling, placing proceedings of meetings." Under subsection (2.1) "[T]he procedure by-law shall provide for public notice of meetings."

Your Preliminary Report concludes that the Personnel Committee meeting on February 19, 2013, "violated the *Municipal Act* requirements of the Act, as no public notice was given." We respectfully submit that this finding is improper because the *Municipal Act* contains no explicit requirement for the giving of public notice in respect of committee meetings. Instead, it merely requires that Council pass a procedure by-law providing for the giving of public notice of meetings.

In the case of the Township of Leeds and the Thousand Islands, its procedure by-law in effect at the time of this particular meeting was By-law No. 11-056. That by-law contained no provisions expressly requiring the giving of public notice of committee meetings. While the Procedure By-law may have been deficient in terms of what was required by section 238 (2.1) of the Act, it cannot be said that the failure to give notice of the Personnel Committee meeting violated the Procedure By-law or the *Municipal Act*.

Accordingly, the most that your investigation can conclude is that Procedure By-law 11-056 failed to comply with the *Municipal Act*; however, even that finding would now be moot because Council enacted a new Procedural By-law 13-022 on May 13, 2013 that contains explicit requirements for the giving of notice of meetings of committees as required by the Act.

We therefore request that you amend your conclusion to accord with the findings that you may make in accordance with the *Municipal Act*.

Finally, you note that the Mayor "disturbingly ... expressed some misconceptions about the application of the open meeting requirements to committees" based on his understanding of what constitutes a Committee. This is not denied, however, your finding that these misconceptions are disturbing is excessive and unnecessary.

The definition of what constitutes a committee based on the number of councillors who are members of it is a matter of legal interpretation and, while the Mayor may have been mistaken, it is hardly a mistake worthy of being characterized as disturbing. It is especially

unwarranted given that the Mayor had only held office for a few months after the incumbent had suddenly resigned mid-term.

We therefore request that you delete the word "disturbingly" in your report. It adds nothing.

As requested, we are enclosing the original copy of the Preliminary Report delivered to us in accordance with our Undertaking.

Sincerely,

**Cunningham, Swan, Carty, Little & Bonham LLP**

Timothy J. Wilkin
Professional Corporation

TJW:kj
Enclosure
cc: Mayor Frank Kinsella and Members of Council, Leeds and the Thousand Islands Township
Ms. Milena Avramovic, CAO, Leeds and the Thousand Islands Township

[i] 5 O.R. (3d) 726