



## **Ombudsman Report**

**Investigation into complaints about meetings  
held by council for the Town of Grimsby on  
November 11 and December 5, 2016**

**Paul Dubé  
Ontario Ombudsman  
May 2017**

## Complaints

- 1 My Office received two complaints that council for the Town of Grimsby held meetings in its capacity as a shareholder of Niagara Power Inc. without providing notice to the public, contrary to the open meeting rules in the *Municipal Act, 2001* (the “Act”).
- 2 Under the Act, all meetings of council, local boards, and committees of each of them must be open to the public, unless they fall within prescribed exceptions. If a meeting is closed, prescribed procedures must be followed, including providing notice to the public, passing a resolution to close the meeting, and recording minutes.
- 3 The complaints alleged that, on November 11 and December 5, 2016, council failed to provide public notice of meetings and did not make meeting minutes available to the public.

## Ombudsman jurisdiction

- 4 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for the Town of Grimsby.
- 6 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

## Investigative process

- 7 We notified the town that we would be investigating these complaints on February 3, 2017.
- 8 My Office obtained and reviewed the agenda and minutes for the November 11, 2016, shareholders’ meeting, the agenda and minutes for the December 5, 2016 town council meeting, and documents related to the status of the corporation. We spoke with the Mayor, one member of

council, the Clerk, the Town Manager, and two senior staff at a subsidiary of the corporation.

- 9 My Office received full co-operation in this matter.

## **Council procedures**

- 10 The town's by-law 07-81, as amended, governs the proceedings of council, local boards, and committee meetings.
- 11 The by-law sets out the requirement for council to state by resolution the fact of a closed meeting and the general nature of the subject matter to be discussed prior to holding a closed meeting. It mirrors the exceptions to the open meeting rules set out in section 239 of the Act.
- 12 The by-law requires minutes to be recorded of all meetings.
- 13 The by-law permits council to call a special meeting, but requires that written notice be provided by the Clerk to the media in advance. The by-law does not address how notice of special meetings will be provided to the public.
- 14 The Town of Grimsby should amend its procedure by-law to provide for public notice of all meetings, including special meetings.

## **Niagara Power Inc.**

- 15 The Town of Grimsby is the majority shareholder of a municipally-controlled corporation, Niagara Power Inc.<sup>1</sup>
- 16 Niagara Power has no staff, as it functions as a holding company. It is operated by a board of directors.
- 17 Town staff told us that decisions about Niagara Power Inc. are usually made by the company's board and not discussed at council meetings. When council discusses the company, it is normally in its capacity as a shareholder at a shareholders' meeting, and staff are not present.

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<sup>1</sup> A private corporation owns a small portion of the company's shares.

- 18** Members of council told us they believe council is entitled to meet in its capacity as a shareholder of the corporation under Ontario's *Business Corporations Act*, and that these meetings are not subject to the open meeting rules.
- 19** Under s. 94 of the *Business Corporations Act*, the directors of a corporation are required to call an annual meeting for its shareholders. The corporation's directors can also call a special meeting of the shareholders at any time. They are required to follow certain procedures, including sending notice to all shareholders entitled to vote at the meeting, every director, and the auditor of the corporation. Minutes must be recorded and kept at the corporation's offices.
- 20** The Town of Grimsby is the majority shareholder of Niagara Power Inc. Individual members of council are not shareholders. When the company holds a shareholders' meeting, council is invited to attend in its capacity as representative of the town.
- 21** Senior staff at one of the subsidiaries of Niagara Power told us that, when the company holds an annual general meeting, notice is not provided to the public. Only the board members and shareholders are provided with notice, pursuant to the requirements set out in the *Business Corporations Act*.
- 22** A staff member from the corporation takes minutes, which are kept at the subsidiary's offices. The minutes are not publicly accessible, and the corporation will only disclose a copy of those minutes if directed to do so by the town.

## Meeting on November 11, 2016

- 23** The annual general meeting for Niagara Power Inc. was held at 4:00 p.m. on Friday, November 11, 2016 in the boardroom at 231 Roberts Road, Grimsby.
- 24** No notice of the meeting was provided to the public.
- 25** No town staff attended the meeting. An employee of Grimsby Power, a subsidiary owned by Niagara Power, took meeting minutes.
- 26** According to the minutes, eight of the nine members of council for the Town of Grimsby attended the meeting. Four members of Niagara

Power's board of directors who are not members of council also attended the meeting, as well as an auditor from an external firm, the CEO of Grimsby Power, the Director of Finance for Grimsby Power, and the recording secretary.

**27** The minutes record the discussion at the meeting and resolutions passed. In its capacity as shareholder, council voted on substantive issues during the meeting, including approving the audited financial statements, re-appointing the company's auditors, and approving an appointment to the board of directors.

**28** The meeting adjourned at 4:55 p.m.

## Analysis

### ***Did a meeting of council occur?***

**29** The *Municipal Act* 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."<sup>2</sup> In a 2008 report,<sup>3</sup> our Office set out a working definition of "meeting" to assist in the interpretation of the definition contained in the Act:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.<sup>4</sup>

**30** On November 11, 2016, a quorum of council for the Town of Grimsby attended the annual general meeting for Niagara Power Inc. The meeting was arranged by the board of directors for the corporation and hosted at the head office of a subsidiary of the corporation. Council was invited to attend the meeting in its capacity as the decision-making body for the town.

**31** In an August 2012 letter regarding the City of Elliot Lake, our Office

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<sup>2</sup> *Municipal Act, 2001*, S.O. 2001, Ch. 25, s. 238(1).

<sup>3</sup> Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: <[\*Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal\*](#)>.

<sup>4</sup> *Ibid* at paras 54-60.

determined that council's attendance at a presentation of the Nuclear Waste Management Organization constituted a "meeting" for the purposes of the *Municipal Act*.<sup>5</sup> In that case, a quorum of council for Elliot Lake came together to receive information that would inform the future decision-making of council. In the same letter, we also concluded that council's attendance at a meeting organized by the Elliot Lake Residential Development Commission constituted a meeting for the purposes of the open meeting rules because council had discussed council business. We noted that council attended the meeting as representatives of the town, and the fact that the meeting was arranged and hosted by a third party did not relieve council of its obligations under the *Municipal Act*.

- 32** Similarly, in a 2017 report regarding the Municipality of Brockton, our Office explained that a meeting hosted by an engineer retained by the municipality under the *Drainage Act* was a meeting of council and was subject to the open meeting rules.<sup>6</sup> In that case, a quorum of council attended a *Drainage Act* information session and received information about a municipal drain petition, a matter that would eventually come before council.
- 33** The majority shareholder of Niagara Power Inc. is the corporation of the Town of Grimsby. When Grimsby council is acting on behalf of the town as the majority shareholder for Niagara Power, it is acting in its role as decision-maker for the town. Before it can vote in its capacity as shareholder, council has to make a decision with respect to how to vote. That decision is a decision of council.
- 34** The individuals who attended the meeting did so in their capacity as members of council. Any business transacted by council as the shareholder of Niagara Power Inc. is the business of the Town of Grimsby. As such, Niagara Power shareholders' meetings attended by a quorum of Grimsby council are meetings of council that are subject to the open meeting requirements.
- 35** When a quorum of council for the Town of Grimsby attended the annual general meeting hosted by the directors of Niagara Power on November

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<sup>5</sup> Letter from Ombudsman Ontario to City of Elliot Lake (August 10, 2012), online: <<https://www.ombudsman.on.ca/Resources/Reports/Town-of-Elliot-Lake.aspx>>.

<sup>6</sup> Ontario Ombudsman, *Investigation into alleged closed meetings held by the Walkerton Business Improvement Area and the Municipality of Brockton on June 13, June 20, and September 27, 2016* (February 2017), online: <[https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brockton-\(1\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brockton-(1).aspx)>.

11, they discussed council business and made decisions as council with respect to the corporation. This was a meeting of council for the Town of Grimsby for purposes of the *Municipal Act* open meeting requirements.

***Was the meeting closed to the public contrary to the Municipal Act?***

- 36** The Act requires that a municipality provide for public notice of meetings in its procedure by-law. In order to comply with the open meeting rules, a municipality must provide notice and the public must be able to attend to observe local government decision-making in progress.
- 37** As the Town of Grimsby did not believe that the meeting on November 11 was subject to the open meeting rules, no public notice was provided.
- 38** The town and members of senior staff of the subsidiary corporation confirmed that the meeting was intentionally closed to the public, such that even if a member of the public had learned of its date, time, and location, they would not have been permitted to attend and observe the meeting.
- 39** During the meeting, council participated in the discussion of various matters relating to governance of the corporation, including a report on the performance of the corporation's subsidiaries, an update on various projects of the subsidiaries, a review of the audited financial statements, appointment of the corporation's auditor, and a change to the membership of the board of directors.
- 40** This meeting of council for the Town of Grimsby was closed to the public contrary to the open meeting rules in the *Municipal Act*.

**Meeting on December 5, 2016**

- 41** A regular meeting of Grimsby council took place in the council chambers at Town Hall at 7:10 p.m. on Monday, December 5, 2016. According to the meeting minutes, eight of the nine members of council were present.
- 42** The council meeting adjourned at 8:08 p.m.
- 43** Following the adjournment of the open meeting, council remained in chambers and held a discussion related to Niagara Power Inc. We were told that a member of council had asked the other council members to

remain after the regular meeting to discuss confidential information related to the corporation. No town staff or members of the public were present during this discussion.

- 44 No notice was provided to the public ahead of this discussion. No minutes were recorded during the discussion. Council did not pass a resolution to go into closed session.
- 45 During the discussion, one member of council who is also involved in the governance of Niagara Power Inc. provided information about the alleged conduct of an individual connected to the corporation. This member of council explained the allegations and next steps they planned to take in their capacity as a board member. Council did not reach consensus or take a vote on any matter.
- 46 The discussion ended after approximately 10 minutes.

## Analysis

### ***Was the December 5 discussion considered a 'meeting' of the shareholders of Niagara Power Inc.?***

- 47 On December 5, 2016, a quorum of council for the Town of Grimsby met in council chambers after a regular council meeting to discuss a matter related to the town's municipally-controlled corporation, Niagara Power Inc.
- 48 Members of council told us they believed this discussion was a shareholders' meeting under the *Business Corporations Act*, and was therefore not subject to the open meeting rules.
- 49 Under the *Business Corporations Act*, only the directors of a corporation may call a special shareholders' meeting. They are required to follow certain procedures, including sending notice to all shareholders entitled to vote at the meeting, every director, and the auditor of the corporation. Minutes also must be recorded and kept at the corporation's offices.
- 50 The corporation's directors did not call the meeting on December 5. Notice was not provided to any other parties or shareholders, and minutes were not recorded. The December 5 meeting did not satisfy the requirements of a shareholders' meeting of Niagara Power Inc. under the *Business Corporations Act*.

***Was the December 5 discussion a meeting of Grimsby council, subject to the open meeting requirements of the Municipal Act?***

- 51** As set out above, in order to be considered a meeting for the purposes of the open meeting rules, members of council must come together 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.
- 52** On December 5, a quorum of council was provided with information about a matter being handled by the board of directors for Niagara Power Inc. and/or its subsidiaries. There was no requirement for this matter to have been brought to council, and the individual council member who brought it forward did so only to keep other council members informed. Council did not make any decisions, or lay the groundwork for a future decision of council.
- 53** This discussion did not constitute a meeting under the *Municipal Act*. However, as with any informal gathering of a quorum of council, this discussion could easily have crossed the line into a discussion about council business, including with respect to council's role as shareholder.
- 54** Going forward, council should be vigilant to uphold its obligations under the open meeting rules and avoid informal gatherings of council on matters that could relate to council business.

***Application of the exceptions in section 239(2) of the Municipal Act to shareholders' meetings***

- 55** During our investigation, it was suggested that meetings of council as shareholders of Niagara Power Inc. could be closed to the public under section 239(2)(g) of the *Municipal Act*, which permits municipal meetings to be held in camera if the matter discussed is "a matter in respect of which a council, board, committee, or other body may hold a closed meeting under another Act".
- 56** In *London (City) v. RSJ Holdings*, the Supreme Court of Canada considered whether a provision of the Ontario *Planning Act* permitted a meeting to be closed "under another Act" to discuss an interim control by-law. The Court explained that, in order for this exception to apply, the legislation should explicitly permit the municipality to hold a closed meeting. It provided the example of subsection 2.1(7) of the *Emergency*

*Management and Civil Protection Act*, which states:

2.1 (7) The council of a municipality **shall close to the public a meeting or part of a meeting** if the subject matter being considered is the council's approval for the purpose of subsection (5) [Emphasis added].

- 57** The Court noted that, while the *Emergency Management and Civil Protection Act* explicitly allows municipalities to hold meetings closed to the public, there is nothing in the *Planning Act* that indicates a meeting can be closed to discuss an interim control by-law.
- 58** The Ontario *Business Corporations Act* sets out requirements for shareholders' meetings, including with respect to notice and minute-taking. However, nothing in the Act explicitly permits these meetings to be closed to the public. Therefore, the exception under section 239(2)(g) of the *Municipal Act* does not apply.
- 59** It was also suggested that some of the topics discussed during the November 11 meeting might have fallen within some of the other exceptions to the open meeting provisions in the Act. For the purposes of this report, it is not necessary to analyze which sections could have applied. By failing to provide public notice and to follow the procedural requirements in the Act, council for the Town of Grimsby held an illegal meeting contrary to the open meeting rules.

### **Best practice examples in other municipalities**

- 60** Ownership of a municipally-controlled corporation is not unique to the Town of Grimsby. Other municipalities in Ontario also act as shareholders with respect to municipally-controlled corporations.
- 61** For example, the City of Greater Sudbury is the sole shareholder of Greater Sudbury Utilities Inc. The city works to ensure that corporate board meetings that involve council comply with the open meeting rules. For its hydro, airport, and housing corporations, Sudbury holds annual general meetings during a special open council meeting.<sup>7</sup>

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<sup>7</sup> See e.g.

<http://agendasonline.greatersudbury.ca/?pg=agenda&action=navigator&lang=en&id=1094>

- 62** When council for the City of Ottawa meets in its capacity as the shareholder of a municipally-controlled corporation such as Hydro Ottawa, it does so in an open council meeting.<sup>8</sup> Notice is provided in advance and the meeting materials are provided to the public.
- 63** The City of Guelph is the sole shareholder of Guelph Municipal Holdings Inc. When council meets as the shareholder, it posts a public agenda and holds an open meeting.<sup>9</sup> The accompanying staff reports and agenda documents are made public, as are the meeting minutes.<sup>10</sup> Where available, the city also posts audio and/or video recordings of these meetings. If council decides to discuss a matter in camera during a shareholders' meeting, it follows the open meeting rules with respect to passing a resolution and limiting discussion to matters that fall within one of the exceptions in the Act.

## Opinion

- 64** Council for the Town of Grimsby contravened the *Municipal Act, 2001* and the municipality's procedure by-law when it discussed council business in camera on November 11, 2016, without providing notice to the public. The town also violated the Act by failing to pass a resolution to close the meeting.
- 65** Council for the Town of Grimsby did not contravene the Act when it met informally on December 5, 2016, as this was not a "meeting" for the purposes of the Act.

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<sup>8</sup> See e.g. <http://app05.ottawa.ca/sirepub/cache/2/guorxchnj1le0hggq1a0qae4c/38690602222017032915986.PDF>

<sup>9</sup> See e.g. [http://guelph.ca/wp-content/uploads/council\\_agenda\\_021517.pdf](http://guelph.ca/wp-content/uploads/council_agenda_021517.pdf).

<sup>10</sup> See e.g. [http://guelph.ca/wp-content/uploads/council\\_minutes\\_021517.pdf](http://guelph.ca/wp-content/uploads/council_minutes_021517.pdf)

## Recommendations

**66** I am making the following recommendations to assist the Town of Grimsby in adhering to the open meeting requirements of the Act and to improve its procedures and practices related to meetings of council.

### **Recommendation 1**

All members of council for the Town of Grimsby should be vigilant in adhering to their individual and collective obligation to ensure that the municipality complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

### **Recommendation 2**

The Town of Grimsby should ensure that it complies with the open meeting rules during all meetings of council, including when council is meeting in its capacity as the shareholder of a municipally-controlled corporation.

### **Recommendation 3**

The Town of Grimsby should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

### **Recommendation 4**

The Town of Grimsby should ensure that it provides public notice in advance of meetings, passes a resolution before going in camera, and records meeting minutes during all meetings of council, including when council is meeting in its capacity as a corporate shareholder.

### **Recommendation 5**

The Town of Grimsby should amend its procedure by-law to provide for notice to the public of special meetings.

## Report

- 67** The municipality was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.
- 68** The town has agreed to update its procedure by-law to provide explicitly for public notice of all meetings.
- 69** The town noted that it does not want to incur the expense of obtaining an external legal opinion, or spend staff time researching how other municipalities meet their obligations under both the *Municipal Act* and the *Business Corporations Act*. The town informed us that it is considering a change to its procedure by-law to limit attendance at shareholders' meetings to those members of council who are appointed to the corporation's board.
- 70** My Office cannot provide the town with legal advice. However, in the report above, we explain that the obligations under the *Municipal Act* are not incompatible with the obligations of a shareholder under the *Business Corporations Act*. We also provide three specific examples of other municipalities that have processes in place to meet their obligations under both statutes.
- 71** My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



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**Paul Dubé**  
**Ombudsman of Ontario**