



Ombudsman Report

**Investigation into whether
Council for the City of Niagara Falls
held an illegal closed meeting
on April 28, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
November 2015**

Complaints

- 1 On April 30, 2015, our Office received a complaint that council for the City of Niagara Falls met illegally in closed session on April 28, 2015, to consider whether to continue opening public council meetings with prayers.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has properly closed 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.
- 4 The Ombudsman is the closed meeting investigator for the City of Niagara Falls.
- 5 In 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

- 6 Members of the Ombudsman's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the city's procedure by-law and the Act, as well as relevant documentation relating to the complaints. They also spoke with the Clerk and conducted interviews with the Mayor, all councillors and the Chief Administrative Officer (CAO).
- 7 My Office received full co-operation in this matter.

Council procedure

- 8 The City of Niagara Falls' procedure by-law (89-155, as amended) states that regular council meetings are held at 6:00 p.m. on the dates set out in a schedule to the by-law, unless otherwise provided by special resolution of council. Notice of special meetings is to be provided to each member of council at least 48 hours in advance of the meeting, with a list of all items to be dealt with at the special

meeting. The by-law does not refer to opening regular council meetings with prayers.

- 9 According to the city's website,¹ council meetings are held on Tuesday nights and start at 5:00 p.m. The website states that

Council may have a Closed Meeting preceding the Council meeting, between 4 and 5:00 p.m., in compliance with s. 239(2) of the *Municipal Act*. More information on closed meetings can be found on our Closed Meetings of Council page. Resolutions to go into a Closed Meeting are viewable through the Agenda's [sic] & Minutes link.

- 10 A calendar of meetings for the year is provided on the site, with a notice that the schedule is subject to change. The website states that council agendas are made available on the city's website by the Thursday prior to the meeting.
- 11 The city's procedure by-law does not appear to have been updated to incorporate the recommendations made in this Office's February 2015 reports. These recommendations included that the procedure by-law be amended to explicitly provide for notice to the public and posting of agendas of regular and special meetings, and to reflect council's practice of meeting at 5:00 p.m. as opposed to 6:00 p.m.² The Ombudsman's recommendation to council to record its open and closed meetings was adopted by council resolution in May 2015.

Background: The Supreme Court decision

- 12 In an April 15, 2015 decision, the Supreme Court of Canada affirmed a decision of the Quebec Human Rights Tribunal under Quebec's *Charter of Human Rights and Freedoms*.³ The Tribunal had found that the City of Saguenay had breached its duty of neutrality and infringed on an individual's freedom of conscience through its practice of opening meetings with a prayer, as provided for in a by-law.

¹ <http://www.niagarafalls.ca/city-hall/council/schedule.aspx>

² Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an illegal meeting on October 8, 2013* (February 2015), online:

<<https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-%282%29.aspx>>; Ombudsman of Ontario, *Park Protest: Investigation into whether Council for the City of Niagara Falls held illegal closed meetings between July 2011 and August 2013 with respect to Marineland* (February 2015), online: <<https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls----Park-Protest-.aspx>>.

³ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.

- 13** On April 16, 2015, the Association of Municipalities of Ontario issued a background document about this decision to its members.⁴ It noted the following:

The court in this case recognized that there are many Canadian traditions that are rooted in religion, particularly Christianity. However, they cannot be used in a way that discriminates against others, including atheists and non-theists. While the court made its decision on the basis of the specific facts in Saguenay, the implication is that reciting a prayer in a municipal council chamber will generally breach the duty of neutrality.

Municipal governments in Ontario may wish to review their own council meeting practices in light of this decision. Some municipalities have initiated a review of whether their prayer reflects the principles of this decision and the test of neutrality (for both theists and non-theists). Some councils have a moment of silence and self-reflection

- 14** The City of Niagara Falls complaint arose in the context of the actions taken by the city in response to the Supreme Court of Canada decision.

The April 28, 2015 meeting

The agenda

- 15** The agenda of the April 28, 2015 meeting indicated there would be an in camera session at 4:30 p.m. under the “advice that is subject to solicitor-client privilege” and “potential litigation” exceptions to the open meeting requirements. This was to be followed by a regular meeting of council at 5:00 p.m.
- 16** The agenda of the 5:00 p.m. regular meeting of council had as its first item “Memo from Clerk”. This memo, appended to the agenda, and posted publicly on the Thursday preceding the meeting, directly addressed the prayer matter:

As Council is undoubtedly aware there was a recent Supreme Court decision (synopsis attached) regarding prayer at municipal council meetings.

⁴ Association of Municipalities of Ontario, “Supreme Court of Canada Decision on Prayer before Council Meetings” (16 April 2015), online: <<https://www.amo.on.ca/AMO-Content/Policy-Updates/2015/Prayer-before-Council-Meetings.aspx>>.

Staff will continue to review the matter and approaches in other municipalities but would recommend that Council cease with the recitation of the Lord's Prayer at this time.

- 17** OMLET staff were informed that, prior to the Supreme Court's decision, as a matter of custom, council for the City of Niagara Falls opened its meetings with one of the council members reciting a prayer or reading. This responsibility rotated amongst the council members. Most councillors opened the meeting with the Lord's Prayer; however, some members of council chose to recite other readings or prayers.
- 18** When asked about the Clerk's memo, the CAO stated that it was more of a "heads up" and that there was no opinion or staff report about it at the time.

Closed meeting

- 19** The resolution to go into closed session on April 28, 2015 cited the "advice that is subject to solicitor-client privilege" and "potential litigation" exceptions to the open meeting requirements in order to discuss matters related to Ontario Municipal Board hearings. There was no item related to prayer in the closed session resolution.
- 20** The minutes of the closed session note that it began at 4:30 p.m. and that all members of council were present. The minutes show that matters relating to Ontario Municipal Board hearings were discussed, and that one item was sent for ratification in open session and another referred to staff. The closed session adjourned at 4:50 p.m. There is no record of a discussion having taken place during the closed session with respect to prayer.
- 21** When asked whether or not council members had discussed the prayer in closed session, the Clerk explained that the closed session was only for the litigation matters.

Between the closed and open meetings

- 22** Interviews with the Mayor and councillors confirm that there was a brief discussion about the council prayer between the closed session and the regular meeting of council on April 28, 2015. Accounts of the discussion were consistent, although one councillor, Mike Strange, had no recollection of the conversation.
- 23** According to the eight council members who recalled what happened on April 28, as they were leaving the closed session and preparing to attend the regular meeting of council, Mayor Jim Diodati asked, "What are we doing about the prayer?"

- 24** According to the Mayor, he typically posed this question before each open session of council, as council members gathered in the antechamber between the closed meeting room and the council chamber, in order to identify who would be reciting the prayer or reading. Once a councillor was selected, council members would enter the chamber and the meeting would begin with the prayer or reading.
- 25** That evening, the Mayor's question prompted Councillors Joyce Morocco and Carolynn Ioannoni to state their opinions about prayer in council and the recent Supreme Court of Canada decision. The Mayor then asked if Councillor Victor Pietrangelo would do the reading he always led with, as it was "innocuous." Councillor Pietrangelo agreed to do so.
- 26** Councillors Wayne Thomson, Wayne Campbell, Kim Craitor and Vince Kerrio did not participate in this discussion.
- 27** Those who recalled the conversation characterized it as casual banter as they walked out into the council chamber.

Open meeting

- 28** Once council had entered chambers for the regular meeting, Councillor Pietrangelo opened the meeting with his reading.
- 29** The minutes make no mention of the memo from the Clerk or of any discussion of council prayer.
- 30** When asked why the memo was not discussed at the council meeting, the Mayor explained that council had started the same way for many years and he wanted to wait for more information, so he asked Councillor Pietrangelo to go ahead with his regular reading.

Media coverage

- 31** Although not specifically discussed at council during its April 28, 2015 meeting, there was media coverage in Niagara Falls with respect to the council prayer. The two excerpts below relate directly to the issue in the complaint:

April 24, 2015 (*Niagara Falls Review*): "Niagara Falls Mayor Jim Diodati said he believes council will support staff's recommendation Tuesday, so that Iorfida [the Clerk] and the city's lawyer can continue to review the matter."

April 29, 2015 (*Niagara Falls Review*): “Prior to Tuesday’s meeting, Mayor Jim Diodati said council would open its session with a deputation for peace and gave the floor to Pietrangelo to deliver the text.” [...] “Coun. Joyce Morocco, who yelled out ‘Amen’ after Pietrangelo’s deputation, said before the meeting, councillors debated how to open the meeting. ‘This is a point. What are they going to do? Throw us out of our elected seats? Are you kidding me?’ said Morocco.

- 32** Councillor Morocco indicated to OMLET staff that this “debate” was a discussion about the interpretation of the Supreme Court decision, as described above. When asked about Councillor Morocco’s reported comment, Councillor Pietrangelo stated that he did not read anything into it. He recalled only that the Mayor had asked him to do his reading.

Subsequent action by council

- 33** OMLET staff were informed that, at the subsequent meeting of council on May 12, there was a closed session during which advice was provided by the city solicitor with respect to the city’s response to the Supreme Court of Canada decision. In the open session that same day, council discussed the prayer and decided to open council sessions with “O Canada” and a moment of silence.

Analysis

- 34** The evidence confirms that the topic of the prayer was not considered during the formal closed session held before the regular open council meeting on April 28, 2015. The question remains whether the informal discussion amongst the council members, as they went from the closed session to the open council meeting, constituted an illegally held closed meeting.
- 35** Not all discussions amongst councillors will constitute meetings subject to the open meeting rules. In a 2008 Ombudsman report,⁵ following review of the relevant case law and keeping in mind the underlying objectives of open meeting legislation, a working definition of “meeting” was developed to assist in applying the law:

⁵ Ombudsman of Ontario, *Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 2008), online: <http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf>.

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

- 36** This definition is consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.⁶
- 37** With respect to informal discussions or gatherings of council members, closed meeting investigators, including my Office, have noted that the *Municipal Act* does not prevent council members from ever discussing city business outside of a formal meeting.⁷ It is expected that some casual conversations about municipal business will take place amongst individual members of such bodies.
- 38** In the City of Niagara Falls case, members of council discussed the council prayer on April 28, 2015, between the end of the closed meeting and the start of the regular meeting. Four of nine members of council participated in the discussion, while other council members were present.
- 39** The discussion leading to Councillor Pietrangelo doing his regular reading at the commencement of the open council session was consistent with council's normal practice. While the choice of Councillor Pietrangelo to do the reading might have been influenced by the general views expressed by Councillors Morocco and Ioannoni on the subject of prayer and the recent Supreme Court of Canada decision, the circumstances do not raise this exchange to the level of a meeting subject to the *Municipal Act* provisions.
- 40** In this instance, the members of council did not come together for the purpose of exercising the power or authority of council or for laying the groundwork necessary for the subsequent discussion and decision-making on May 12.

⁶ *London (City) v RSJ Holdings Inc*, [2007] 2 SCR 588, 2007 SCC 29 at para 32; *Southam Inc v Ottawa (City)* (1991), 5 OR (3d) 726 (Ont Div Ct) at paras 12-18; *Southam Inc v HamiltonWentworth Economic Development Committee* (1988), 66 OR (2d) 213 (Ont CA) at paras 9-12.

⁷ Ombudsman of Ontario, *Investigation into whether Council for the Village of Casselman held an illegal closed meeting on January 8, 2015* (April 2015) at para 38, online: <<http://www.ombudsman.on.ca/Files/sitemedia/files/Casselma-Restaurant-Apr2015-EN.pdf>>; Local Authority Services, *Report to the Corporation of the Township of Carling* (March 2015) at 7, online: <www.agavel.com/wp-content/uploads/2013/09/Carling-Investigation-Report-Final-March-2015.docx>.

Opinion

- 41** Council for the City of Niagara Falls did not violate the open meeting provisions of the *Municipal Act, 2001* when it informally discussed the council prayer on April 28, 2015.
- 42** I am making the following recommendation, however, to assist the city to improve its practices with respect to open meetings.

Recommendation

The City of Niagara Falls should amend its procedure by-law in accordance with the recommendations made in the Ombudsman's February 2015 reports.

Report

- 43** OMLET staff spoke with the Mayor, the Clerk and the CAO on November 2, 2015 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 44** This report should be made available to the public as soon as possible, and no later than the next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario