

AMCTO BACKGROUNDER

RECENT CHANGES TO ONTARIO'S OPEN MEETING RULES

SEPTEMBER 2017

I. BACKGROUND

Despite negative media portrayals, a reasonable case can be made that local governments are the most trusted and transparent order of government in Canada. Municipalities consistently score high on measures of public trust—often higher than other levels of government. For instance, an Ipsos Reid poll conducted in 2012 found that 57% of Canadians trust their local municipal government more than the federal government or their respective provincial government, while 55% said that they saw their tax dollars being put to better use by their municipal government than the federal government (Global, 2012). Similar research conducted by Nanos in 2014 and 2016 also found that Ontarians viewed their municipality as the most responsive level of government in Canada (Nanos Research, 2016).

The foundation of municipal trust and transparency in many ways rests on the province's open meeting rules for municipalities. While most decisions made by the provincial and federal governments happen in cabinet or caucus meetings that are closed to the public, municipalities are allowed to deliberate and make decisions in closed-session in only a limited number of circumstances (Sancton, 2015, 428).

Section 239 of the *Municipal Act* requires that meetings of municipal councils, and local boards or committees must be open to the public unless they fall within a narrow set of proscribed exemptions. These exemptions are listed in section 239 and mostly involve a set of discretionary topics, such as legal advice, disposition of land, labour relations and situations that involve a clearly identifiable individual. The *Municipal Act* also sets out the requirements for procedures that municipalities must follow to ensure the public can participate in open meetings, including giving public notice and passing resolutions in open session before closing a meeting to the public.

Closed meeting investigations are the primary mechanism for ensuring compliance with the open meeting requirements. The *Municipal Act* allows any person to request that an investigation be undertaken to determine whether or not a municipality, local board or

committee has failed to comply with the *Act's* open meeting rules. Every municipality has an investigator who is responsible for probing potential open meeting violations. The Ontario Ombudsman serves as the default meeting investigator for municipalities that choose not to appoint their own.¹

Over the past several months there have been a number of changes to Ontario's open meeting rules as a result of Bill 68, as well as a recent decision from the Ontario Superior Court of Justice. This backgrounder provides a brief overview of some of the changes to Ontario's closed meeting rules.

II. MOMLA

In November of 2016 Minister of Municipal Affairs Bill Mauro tabled Bill 68, the *Modernizing Ontario's Municipal Legislation Act (MOMLA)*, which introduced a series of reforms to the *Municipal Act*, *Municipal Conflict of Interest Act*, and *City of Toronto Act*. Bill 68 includes a number of implications for municipal meetings, including a new definition of what constitutes a meeting, four new closed meeting exceptions, a new requirement for municipalities to report back on closed meeting investigations, and new rules allowing councillors to participate electronically in meetings.²

Definition of a Meeting

Prior to the introduction of Bill 68, there was a high-level of ambiguity about what constituted a meeting. Different closed meeting investigators conducted their investigations using different conceptions and definitions of what constituted a meeting. The Ontario Ombudsman's office, in particular, took an expansive view of what constituted a "meeting."

Bill 68 proposes a new definition of a meeting, based on two criteria: quorum and materially advancing the business of council (see Box 1). While this definition of a meeting is not perfect, we should will clarify some of the ambiguity that existed prior to Bill 68.

BOX 1: Bill 68 Definition of a Meeting (s.238, Municipal Act, 2001)

The definition of "meeting" in subsection 238 (1) of the Act is repealed and the following substituted: "meeting" means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where (a) a quorum of members is present, and (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

¹ Currently the Ontario Ombudsman is the closed meeting investigator for 218 of the province's municipalities.

² You can find more information about proclamation dates for Bill 68 in Appendix 1.

Closed Meeting Exceptions

In addition to proposing a new definition of a meeting, Bill 68 also adds new exemptions for municipalities to meet in closed session. During the government's review of the *Municipal Act* in 2005, the issue of closed meetings and closed meeting investigations was one of the primary concerns identified by the municipal sector. There was a general feeling amongst municipal stakeholders that the existing reasons for municipalities to go into closed session, listed in the *Municipal Act*, were not sufficient. Specifically, a number of municipal stakeholders—including AMCTO—argued that new closed meeting exemptions were needed for the following reasons:

- Municipalities needed greater flexibility
- The legislation had not kept pace with the needs of the sector
- There were certain circumstances where municipalities had a justifiable reason for closing a meeting to the public, but where the existing exemptions in the *Act* were not sufficient
- The level of complexity of municipal business had grown considerably since the initial closed-meeting exceptions were conceived and outpaced their usefulness
- The high-profile nature of closed-meeting investigations necessitated a clear legal basis for going into closed session

To mitigate these concerns, Bill 68 adds four new exceptions to the seven that are currently contained in the *Municipal Act*. The four new exceptions are:

(h) information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of any of them;

i) a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(j) a trade secret or scientific, technical, commercial or financial information that belongs to the municipality or local board and has monetary value or potential monetary value; or

(k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

While these new closed meet exemptions are likely to provide some added flexibility, they also carry a number of risks. Over the past ten years municipalities have adapted to the open meeting regime in Ontario, and now conduct the vast majority of their business in public. As these new closed meeting exemptions are added to those currently contained in the *Act*, it will

be incumbent upon Clerks to ensure that they are used with great discretion. The default for municipalities should still be to hold meetings in open session.

Reporting Back on Closed-Meeting Investigations

Bill 68 also introduced a new requirement for municipalities to address closed meeting investigations. Under the new requirements, following a closed meeting investigation by a municipality's meetings investigator, council will be required to pass a resolution that explains how they intend to address the findings of a report. For instance, if a report from a meetings investigator concludes that a municipality's processes or procedures for deciding when to go into closed session are deficient, that municipality may want to pass a resolution that describes how they will improve those deficient systems.

Electronic Participation in Meetings

Along with the changes to the rules around closed meetings, Bill 68 will allow councillors and members of local boards to participate in meetings electronically. While this option will be available to all municipalities it does come with a number of caveats, including that:

- Councillors who participate in a meeting electronically cannot be counted towards quorum. In order for a councillor or participate electronically, there must be an in-person quorum of councillors for the meeting to proceed.
- Councillors or members of local boards are only permitted to participate electronically in meetings that are open to the public. Participating in closed session meetings will remain limited to those councillors or members of a local board who are participating in-person.

III. CITY OF HAMILTON V. OMBUDSMAN OF ONTARIO

Finally, in addition to the changes brought by Bill 68, a recent decision from Ontario's Superior Court of Justice also carries implications for municipal meetings. On August 28, 2017, the Ontario Superior Court of Justice ruled that Election Compliance Audit Committees (CACs) and Property Standards Committees are not local boards under the *Municipal Act*. The ruling means that Election Compliance Audit Committees and Property Standards Committees will no

longer be subject to closed meeting investigations by the Ontario Ombudsman, or any other meetings investigator.

The ruling was the result of an application for judicial review, filed by the City of Hamilton following an Ombudsman investigation completed in July of 2016. The investigation found that an Election Compliance Audit Committee meeting on July 15, 2015 was conducted illegally according to the *Municipal Act's* open meeting requirements. Specifically, the Ombudsman argued that the meeting happened behind closed doors and did not provide notice, follow procedure, receive legal advice, or fulfill any of the other statutory exemptions the *Municipal Act* makes for moving an open meeting into closed session. According to the Ombudsman's report on the investigation:

"I have considered the submissions of the city and the committee and while I understand the committee's expressed need to be able to deliberate in private, I cannot find that the open meetings provision of the Municipal Act do not apply in this case. When the criteria considered by the courts in the context of analogous cases are applied, it is clear that compliance audit committees are local boards." (Page 14)

Despite the Ombudsman's ruling, however, the City maintained that CACs are statutory adjudicative tribunals performing quasi-judicial functions, and thus not "local boards." The City's argument was based on the following:

1. That compliance audit committees are not listed in the definition and general language in the Act, and further the fact that municipalities cannot dissolve compliance audit committees and assume their functions means that they are not local boards
2. That under the *ejusdem generis* principle, CACs are not the same as local boards specifically listed in the Act's definition because they do not act on behalf of the City's interests and are not providing municipal services
3. That the quasi-judicial decision-making function of CACs distinguishes them from local boards.

In response, the Ombudsman argued that CACs

1. Carry on the affairs of the municipality
2. That there is a direct link with the municipality either by way of legislation or through authority from the municipality
3. That CACs are either connected or controlled by the municipality
4. That there is an element of autonomy possessed by CACs

Ultimately the court sided with the City:

"I conclude that, interpreting the definition of 'local board' in its full statutory context and in harmony with the Municipal Elections Act, the Election Compliance Audit Committee is not a local board. It is an independent and impartial decision-making body with a mandate that is part of the Legislature's oversight of municipal elections. Its purpose, as set out in the Municipal Elections Act, is to make certain decisions that form part of the enforcement of election finance provisions in the Act, for which it is distance from the municipality in a manner that is inconsistent with a municipality's power to dissolve a local board. (Para. 66)

Given my conclusion that the Election Compliance Audit Committee and the Property Standards Committee are not local boards, the Ombudsman does not have jurisdiction to investigate either of them under s. 14.1 of the Ombudsman Act or s. 239.1 of the Municipal Act... (Para. 76)

I therefore grant an order declaring that the Ombudsman has no jurisdiction to investigate the Election Compliance Audit Committee or the Property Standards Committee under either s. 14.1 of the Ombudsman Act or s. 239.1 of the Municipal Act... (Para. 83)

As a result of this decision, Election Compliance Audit Committees and Property Standards Committees will no longer be subject to closed meeting investigations by the Ontario Ombudsman, or any other meetings investigator. However, it is important to note that there are public meeting requirements in the *Municipal Elections Act* (MEA) that still apply to Compliance Audit Committees.

APPENDIX A: PROPOSED BILL 68 PROCLAMATION DATES

The Ministry of Municipal Affairs has released scheduled proclamation dates for Bill 68, the Modernizing Ontario's Municipal Legislation Act. As seen below, the provisions of Bill 68 will be implemented in two phases, with the dates for some remaining provisions still to be announced. We will continue to update this post as more information becomes available.

Phase 1: January 1, 2018

Changes to council composition (including temporary replacement of a member of upper tier council)

New definition of a meeting

New closed meeting exceptions

Electronic participation in council meetings

Small business programs

Phase 2: March 1, 2019

Codes of Conduct

Integrity Commissioner provisions

Policy on Staff-Council relations

Policy for pregnancy/ parental leave

Policy for protection of a tree canopy

TBD

Amendments related to property taxes, tax collection and tax sales

Prudent Investor Status

(As of September 2017)

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About AMCTO:

AMCTO represents excellence in local government management and leadership by providing education, accreditation, leadership, and management expertise for Ontario's municipal professionals for over 75 years. With almost 2,200 members working in municipalities across Ontario, AMCTO is Ontario's largest voluntary association of local government staff, and the leading professional development organization for municipal professionals.

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