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Dear Parties:

M07325: Avon Region Citizens Coalition and the Town of Windsor - Application for a Preliminary Order to amalgamate the Municipality of the District of West Hants and the Town of Windsor (MB-16-02)

This will confirm the items canvassed by the Board at a Hearing for a Preliminary Order held on Tuesday, June 28, 2016 at 10:00 a.m. at the Hants County War Memorial Community Centre in Windsor, Nova Scotia. The Board panel members were Roland A. Deveau, Q.C., Vice-Chair, Murray E. Doehler, CPA, CA, P.Eng., and Roberta J. Clarke, Q.C. This letter also outlines the Board's findings on various issues raised during the hearing.

The application for amalgamation was filed by both the Avon Region Citizens Coalition ("Citizens Coalition") and the Town of Windsor ("Town"), who were represented at the Preliminary Hearing by their counsel Jack A. Innes, Q.C., and John T. Shanks, LL.B., respectively. The Citizens Coalition and the Town are referred to collectively herein as the "Applicants", unless the context requires otherwise. Peter M. Rogers, Q.C., appeared as counsel for the Municipality of the District of West Hants ("Municipality"), while the Minister of Municipal Affairs ("Province") was represented by its counsel Duane Eddy, LL.B. CUPE Local 1089 was represented at the Preliminary Hearing by Naomi Stewart, its National Representative.

Written submissions on the issue of the Board's jurisdiction to order the Province to pay the costs of studies were completed on August 23, 2016.

SPEAKERS/STANDING

1. Speakers

No members of the public registered to make presentations at the Preliminary Hearing.

2. Formal Standing

The following three parties appeared at the hearing and requested Formal Standing in this matter:

a. Municipality of the District of West Hants;
b. Minister of Municipal Affairs ("Minister"); and
c. Canadian Union of Public Employees, Local 1089 ("CUPE").

The Applicants did not oppose the requests for Standing. The Board indicated at the hearing that it was satisfied these parties should be granted Formal Intervenor Status to participate at the hearing.

3. Possible s. 362(2) Motion to Dismiss Application

Mr. Rogers, both in his pre-filed written submissions and in oral argument at the Preliminary Hearing, confirmed that the Municipality intends to raise a motion under s. 362(2) of the *Municipal Government Act.* Indeed, Mr. Rogers indicated that the Municipality intends to make multiple motions under s. 362(2), at various stages of the proceeding, should the matter continue into the future.

Section 362(2) of the *Act* provides:

> **362 (2)** Where the Board determines that there are no reasonable grounds for the application or there is no reasonable possibility that the application would be granted, the Board may dismiss the application.

In his written submissions, Mr. Rogers stated:

> It is anticipated that the Applicants will need to commit over $500,000 for appropriate professional studies and Board consultant expenses. Unless they are prepared to do that, the Municipality's position is that a s.362(2) motion should be allowed because the studies necessary for an amalgamation to have a "reasonable possibility" of occurring will not have been undertaken.
> …
>
> In addition to a s.362(2) motion in the event the Applicants are not prepared to commit to properly fund the studies, if the proceeding still remains alive another s.362(2) motion should be scheduled on the grounds that there is insufficient public support for amalgamation to proceed. The Municipality believes the Board should start from the presumption that the existing elected Councillors of each unit reasonably reflect the views of their respective electors, and accordingly that there is not sufficient support amongst residents of the Municipality for amalgamation to warrant the great public expense and inconvenience of a merits hearing. The Municipality submits that in order to avoid unnecessary expense the studies should not be ordered pending the hearing of such a motion. The Municipality is prepared to bring on such a motion this summer, but recognizes that the Board has the authority to defer the motion pending the municipal election if it so chooses in order to have a further barometer of the likelihood of public acceptance of an amalgamation. [Emphasis added]
>
> [Municipality Submissions, June 24, 2016, pp. 7-9]

In his oral argument, Mr. Rogers suggested that the Municipality may consider further s. 362(2) motions in the future, including one following the municipal elections to be held in October 2016.

On behalf of the Town, Mr. Shanks submitted that there should be a limit to the number of s. 362(2) motions which the Municipality can make. In his submission, the Board's process should not be held "hostage" to the Municipality's successive attempts to "derail" it.

This issue was raised by the Board at the Preliminary Hearing to ascertain the parties' intentions for planning purposes related to the hearing timeline. The Board will rule on such motion(s) when, and if, they are made.

STUDIES

4. Preparation of Studies

The Board canvassed the preparation of studies at the Preliminary Hearing. All of the parties to the proceeding provided their comments with respect to the issue of studies.

There was general agreement among the parties about the types of studies that should be prepared. In his written and oral submissions, Mr. Rogers canvassed the topics, including studies or reports on infrastructure, finances, human resources, protective services (i.e., policing and fire services), municipal administration and governance. The Board observes, as noted by some, that this non-exhaustive list is generally consistent with the types of studies ordered by the Board in other recent amalgamation applications.

With respect to the preparation of studies, the Town strongly advanced its view that, given general agreement on the type of studies, the Board should control the preparation of initial independent studies through agreed upon terms of reference. In Mr. Shanks' view, this approach would be appropriate in the present circumstances where the matter is contested.

Mr. Rogers, on behalf of the Municipality, did not discount the possibility of having Board sanctioned studies. However, he maintained that his client should not have to pay for them (as explored in detail below). He did express skepticism about the parties being able to agree on common terms of reference for such studies, given the "adversarial" nature of the proceeding. Further, he noted the parties would likely require the ability to file their own experts' reports in rebuttal.

Mr. Eddy, counsel for the Province, confirmed that the Minister would be funding studies related to equalization, roads and streets, deed transfer tax and policing.

Based on its review of the submissions, the Board is generally satisfied that the parties agree on the type of studies that are needed (although the Municipality's original position is that this application should not proceed at all).

Further, the Board sees the benefit in the present proceeding of having Board ordered independent studies prepared in the initial stages of the matter. In its view, this would be cost-effective, to the benefit of those who have to pay for the studies, and it would lead to a more efficient process, including the early identification of non-contentious matters.

Accordingly, the Board concludes that it will requisition the initial set of studies in this proceeding. While the issue of municipal reorganization can raise a variety of issues, the Board has presided

over several amalgamation or dissolution matters in recent years and has some insight into the types of studies that may be helpful in such proceedings. Those types of studies are very consistent with those identified by the parties in their submissions.

The Board will canvass the parties for their comments on what studies should be prepared, what the Terms of Reference should be, and who should prepare them. However, the final decisions on these issues will be made by the Board.

As noted below, the costs of these Board ordered studies will be shared equally by the Town and the Municipality.

The Board notes that in the event any party wishes to prepare their own study or report on any topic, they shall bear their own costs.

As noted below, the Board will convene a further preliminary hearing in this matter following the conclusion of the October 2016 municipal elections. The topic of studies, and who prepares them, will be finalized at that time.

5. Cost of Studies

The Board received extensive submissions respecting the costs of studies, and specifically about who should pay for them.

> **Preliminary Order**
> ...
>
> **362(3)** The costs of any studies required by the Board shall be borne by the parties as directed by the Board.

The following provision, which sets out who can apply for an amalgamation, was also raised during the submissions on costs:

> **Amalgamation or annexation**
> **358** Municipalities may be amalgamated or the whole or part of a municipality may be annexed to another upon application to the Board by
>
> (a) the Minister;
> (b) a municipality; or
> (c) the greater of ten percent or one hundred of the electors in the area proposed to be amalgamated or annexed.

Mr. Innes, on behalf of the Citizens Coalition, submits that the Province should pay for his client's share of the costs of studies.

In Mr. Innes' view, the intent of the *Municipal Government Act* is to establish a threshold in the statute whereby a sufficient number of electors in a municipal unit can apply to the Board to change the structure of their municipal government. In the present case, they desired an amalgamation of the Town and the Municipality.

He submitted that once a group of electors has gathered a sufficient number of signatories for the application, then the Province should be responsible for the electors' share of the costs of studies. He noted that members of the public should not be reasonably expected to have the financial

means to fund the studies, especially their share of the estimated $500,000 that had been suggested by counsel for the Municipality, an amount he did not dispute.

Mr. Innes submitted that to require the Citizens Coalition to pay the costs of studies would effectively "neuter" the intent of s. 358, which allows for electors to launch such applications.

He further argued that there is nothing in the *Municipal Government Act* that supports the Province's position that it should only pay such studies when the subject municipal units reach a consensual agreement to investigate municipal reorganization.

Mr. Shanks, on behalf of the Town, supported the position advanced by Mr. Innes. He stated that accepting the view of the Province and the Municipality that the electors pay for the studies would have the impact of imposing an undue financial burden on the citizens to advance the best interest of their municipal government.

In his written submissions, Mr. Rogers submitted that the Applicants should pay for any studies:

> As the Municipality believes the proposed amalgamation is at this time contrary to the interests of its residents and believes there is little prospect of adequate public acceptance of an amalgamation, the Municipality is not willing to contribute to the cost of the studies. The cost of the studies should be borne entirely by the Applicants if they wish to proceed to a hearing on the merits.
>
> The staff time which will be required of the Municipality to provide information to consultants and in answering IRs is also expected to be very burdensome. The Municipality submits that very lengthy time periods should be built into any process requiring information gathering by its staff, unless the Applicants agree to pay for the Municipality's staff time, as staff has limited capacity at present to accommodate the extra demands which would be presented by a thorough study process.
>
> It is anticipated that the Applicants will need to commit over $500,000 for appropriate professional studies and Board consultant expenses. Unless they are prepared to do that, the Municipality's position is that a s.362(2) motion should be allowed because the studies necessary for an amalgamation to have a "reasonable possibility" of occurring will not have been undertaken.
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> [Municipality Submissions, June 24, 2016, p. 7]

At the Preliminary Hearing, Mr. Eddy, on behalf of the Province, suggested that in the event the Board was considering ordering costs as against the Province, he be afforded the opportunity to file written submissions on the Board's jurisdiction to do so. In light of the oral submissions of Mr. Innes and Mr. Shanks, the Board indicated such submissions would be helpful. The filings were completed on August 23, 2016.

In his written submissions, Mr. Eddy advanced several points in support of his position that the Board should deny the Applicants' request that the Province provide funding for the costs of studies. Among his arguments, he noted the common law presumption of Crown immunity provides that no statute (i.e., in this case the *Municipal Government Act)* affects the rights or prerogatives of the Crown unless it is clear that the Legislature intended that it should; that this presumption is enshrined in the *Interpretation Act;* that the *Municipal Government Act* does not reveal a clear intention to bind the Crown in such applications; and that the Crown had not waived its immunity in this case.

In the Board's view, the submissions of counsel raise three issues:

1) Does the Board have the jurisdiction to order that the Province contribute towards the costs of studies? If so, should the Board exercise such jurisdiction in this instance?

2) Should the Board order that the Municipality contribute to the costs of studies?

3) What portion of the costs of studies should the Board order be paid by the Town and the Citizens Coalition?

Issue #1 Board's jurisdiction respecting the Province

As noted above, Mr. Eddy submitted that the presumption of Crown immunity applied in this proceeding such that the *Municipal Government Act* did not affect the rights or prerogatives of the Crown and, accordingly, the Board should not order that the Province pay the costs of studies.

Board Counsel filed written submissions on the issue of the Board's jurisdiction. Mr. Outhouse submitted, in part, as follows:

> 18. In the final analyses, Board Counsel would not discount the argument that the word "parties", in the context of the MGA provisions, could expressly refer to the Crown. However, the caselaw is clear that the intent to bind the Crown must be manifestly unambiguous in order to avail oneself of the "expressly stated" wording in Section 14 of the Interpretation Act.
> ...
>
> 29. The question is whether there is a sufficient nexus between the benefits enjoyed by the Province as a party to this proceeding and the burden of paying for or assisting in defraying the cost of required studies pursuant to subsection 362(3).
> ...
>
> 37. What benefit is the Province enjoying as a party to the proceeding? In Board counsel's submission, the question is not whether the Crown will benefit from the potential amalgamation, but whether it benefits from provisions in the MGA by acting as a party to the proceeding, the extent of this benefit, and its relationship to the cost of studies required to proceed with the application. The Province enjoys all benefits associated with party status. As a party to the proceeding, the Province can be heard as to the viability of the amalgamation and make submissions about whether the Application should be granted. The Province could make submissions concerning the financial impact of the amalgamation on the Province and any other relevant matters arising as the hearing process unfolds.
> ...
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> 40. With this contextual backdrop, if the Crown is a full participant in the application, having the benefit of all procedural and substantive aspects involved, in Board Counsel's submission, it is hardly "patently obvious" there is no nexus between the Crown's decision to become a party and the potential burden of responsibility for the costs of studies. The Crown submits it is essentially a neutral party on a watching brief. While this may well be the Crown's intent in this proceeding, the Crown is not limited to this role by the MGA.
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> 41. In the final analyses, as this is a matter of first instance, the Board will have to determine whether there is a sufficient nexus between the benefits associated with the Province becoming a party and the potential burden associated with the cost of studies. There is at least a reasonable argument that a sufficient nexus exists to trigger the benefit-burden exception. [Emphasis added]
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> [Board Counsel Submissions, August 15, 2016, pp. 4-9]

The Board considers that an arguable case could be made that the Board does have the jurisdiction to order the Province to pay the costs of studies under s. 362(3), as set out by Board Counsel in his submission. However, based on the Board's findings below respecting the payment of costs by the Town and the Municipality, the Board concludes that it need not make a finding on this point in this proceeding.

Issue #2 Whether the Municipality should pay the costs of studies?

In addition to the Municipality's submissions quoted above, Mr. Rogers added the following written submissions:

> The parties seeking a non-consensual amalgamation should pay for the studies, based on the reduced likelihood of non-consensual amalgamations being successful under a legal test that includes consideration of the best interests of the respondent municipality, and based on the unwise nature of a huge expenditure of scarce government resources for such a project. Ultimately, while democracy may be imperfect, the refusal of consent to amalgamate from a municipal council should be taken at face value, at least as a presumptive indicator of the scepticism of its electors, and it should be the proponents of proceeding without consent that should bear the risks of wasted public resources. In this particular instance, there is a rapidly approaching election, and there is every opportunity for ARCC to get a Council mandate for amalgamation if there is a genuine groundswell for it in West Hants. In the circumstances, ARCC and the Town, while within the four corners of their legal rights to bring an amalgamation application forward before the election has occurred, should not be rewarded for impatient or unwise conduct by having the burden of an unsuccessful UARB application foisted in whole or in part onto other, more realistic and pragmatic parties.
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> [Municipality Submissions, August 16, 2016, p. 1]

Mr. Rogers' argument was in response to the Town's submission one day earlier:

> WHAT IS A FAIR ORDER FOR PAYMENT OF COSTS OF THE STUDIES?
> 38. As indicated above in these submissions, the Town's primary position is that the costs of the studies should be borne equally by the Minister, the Town and the Municipality. The Town does not believe that the objectives of the MGA, and in particular s.358 thereof, are properly advanced by imposing significant cost consequences upon a citizen group which has originated to advance an amalgamation application such as undertaken by ARCC in this proceeding.
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> 39. It must also be remembered that any award of costs for payment of the studies against ARCC has the impact of double or triple burdening the citizens of the region who have supported this initiative. An award against the impacted municipal units, and to a lesser degree against the Province, already imposes the financial burden of the studies upon the residents as municipal funds flow from its citizens as taxes. To make a separate award against ARCC places a further burden upon those citizens already supporting the study costs through their contributions to municipal revenues. The burden of these expenses should rest with the impacted governments, both Municipal and Provincial.
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> [Town Submission, August 15, 2016, p. 11]

The issue to be determined at this point is whether the Municipality should be ordered to contribute towards the costs of studies. The Municipality refutes such a suggestion, arguing that the application will not succeed and it would thus be a waste of resources.

There are several factors which the Board considers to be relevant on this issue. First, the Board accepts the submissions of Mr. Innes and Mr. Shanks that imposing such costs upon the Citizens Coalition would result in a significant financial impact upon the individual members of that group, all of whom are effectively residents of either the Town or the Municipality. The practical result of this might well be that the Citizens Coalition does not pursue this matter. The Board has already heard at this early stage that amalgamation discussions have been ongoing for decades between these two municipal units, but have been frustrated for one reason or another.

The Board, while mindful of Mr. Rogers' submission that the councillors of each municipal unit represent their constituents, observes that there is no evidence that any canvassing, either formal or informal, was done by Municipal Council to ascertain the views of its constituents on this very important matter. Further, no evidence was led as to whether amalgamation was a live issue in the last municipal election. Hence, in light of its receipt of a petition with a significant number of signatures, and no evidence to the contrary, the Board is not convinced that, on this important matter alone, the municipal councillors "reasonably reflect the views" of their constituents (as argued by Mr. Rogers).

A significant number of electors from each of the Town and the Municipality signed the application. A preliminary review shows that almost 20% of the electors in each municipal unit signed the application. This is not insignificant. In the Board's view, there is a public interest in determining whether amalgamation is a structure that would be in the best interests of the inhabitants of the region (which is effectively the test the Board must apply under s. 363(1) of the *Act,* as noted by Counsel for the Town). Both the residents of the Town and the Municipality would benefit if that were the case. In the end, it may be that sourcing properly funded studies would provide greater certainty for all respecting the benefits or pitfalls of amalgamation.

Accordingly, taking all of the above into account, the Board finds that the Municipality should contribute to the costs of the studies on an equal basis with the Town, as discussed below.

Issue #3 The Applicants' payment of costs of studies

As noted by counsel for the Province, an applicant in a proceeding typically carries the burden of providing evidence to the Court or tribunal to support its application or claim:

> 5. The Province submits that the starting point in the analysis of who should pay for studies under s. 362(3) of the MGA begins with the fact that it is the Town and AVON's responsibility to ensure that a proper record is created. It is the Town and AVON's application so it is the applicant's burden of ensuring that they submit the necessary studies that will allow the Board to conduct a reasonable assessment of the merits of the Town's joint application to amalgamate the Town and the Municipality.
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> [Province Reply Submission, August 23, 2016, p. 2]

Notwithstanding the submissions made by the Municipality and the Province, the Board considers that the circumstances in the present matter are distinguishable from those that normally apply in litigation. This is not a private matter. Indeed, as noted above, there is a strong public interest in determining whether amalgamation is in the best interests of the inhabitants of the region. If it is, then all the inhabitants of both the Town and the Municipality will benefit.

Again, as noted above, the Board finds that imposing the burden of the costs of studies on the Citizens Coalition would result in a significant financial impact upon the individual members of that organization.

Moreover, the Board again notes the significant number of electors that signed the application (i.e., almost 20% in each municipal unit). This represents a number well in excess of the minimum threshold required under s. 358 of the *Municipal Government Act* to commence such a proceeding. The effect of their actions, in the end, will indeed result in an independent, transparent and effective process to canvass an issue on which there is stark opposition by two Councils that are firmly entrenched in their respective views.

Taking all of the above into account, the Board concludes that the Citizens Coalition should not be ordered to pay the costs of studies directed by the Board. However, if the Citizens Coalition, or any other party for that matter, chooses to prepare studies or evidence of its own for filing in this matter, then it shall be responsible for those costs.

Further, the Board finds that the Town should contribute to the costs of studies ordered by the Board, on an equal basis. As a result, the Board concludes that the costs of any studies undertaken by Order of the Board shall be paid jointly, in equal shares, by the Town and the Municipality.

The Board notes that the Province has agreed to fund studies respecting several important matters, including roads and streets, deed transfer tax, equalization and policing.

6. Base Date for Studies

The Board confirmed that all studies should be based on the audited financial statements and actual data as at March 31, 2016. Any departures from that methodology should be clearly explained by the authors of such studies, including the basis for any assumptions.

7. Board Consultants

The Board noted at the hearing that it will engage one or more consultants to assist it with a review of the issues. As noted earlier, the Board directs that the costs of any such studies will be borne equally by the Town and the Municipality.

TIMELINE

8. Proposed Timeline of Events

The Applicants and all other parties confirmed that the Board's proposed timeline leading to an Autumn 2017 hearing was reasonable, subject to the Municipality filing its motion under s. 362(2). It was also noted that the holding of municipal elections in October 2016 was an important milestone to consider in setting the timeline. Upon completion of the municipal election, the Board will convene a preliminary hearing with the parties to schedule a timeline for the filing of evidence leading to the Hearing on the Merits.

HEARING

9. Location of Hearing

Alternative locations for the Hearing on the Merits were canvassed. Counsel for the Municipality recommended the Community Centre in Brooklyn, Nova Scotia. The Board will address the issue again with counsel before future hearings are scheduled.

10. Evening Sessions

In order to accommodate the receipt of comments from members of the public, the Board will conduct evening sessions during the Hearing on the Merits at various locations in the Town and Municipality. The Board confirms that it will implement a speakers' list to register members of the public wishing to speak at the evening sessions.

11. Notice of Hearing

The parties confirmed the Hants Journal, the Valley Harvester and the Chronicle Herald as appropriate to advertise Notices for the future Hearing on the Merits. The Town and Municipality will bear the advertisement costs. The Town, as well as the Municipality, are directed to post, in their municipal or town offices, any Notices of Hearing issued by the Board.

FILING OF EVIDENCE

12. Filing of Documents and Experts' Reports/Studies

For any filings from this point forward, the Board requires **nine** copies to be filed. Unless the parties agree on the qualifications of all experts testifying at the hearing, the Board will hold a separate hearing in advance for this purpose.

MISCELLANEOUS

13. Plebiscite

The Board canvassed the issue of a plebiscite at the Preliminary Hearing.

The Applicants do not support the holding of a plebiscite. Mr. Innes noted that almost 20% of the electors already signed the application. Alternatively, if the Board decides that a plebiscite should be held, the Applicants submit that it should be held at some point after all the studies and evidence are filed, but before the Hearing on the Merits.

Mr. Rogers submits that the Municipality considers a plebiscite would be most appropriately held after the Hearing on the Merits is completed. In his view, the public should have the benefit of reviewing the Board's preliminary opinion on the matter, following the presentation of evidence and cross-examination at the hearing.

The Board has not decided whether a plebiscite should be held in this matter.

At the Hearing on the Merits, the Board will canvass with the parties whether a plebiscite should be held.

14. Effective date of amalgamation

The Board briefly canvassed the Applicants' intention with respect to the proposed "effective date" of amalgamation. At this point, the date of April 1, 2018 may be the most reasonable proposed effective date, based on an Autumn 2017 hearing.

15. Press

The Board confirmed its general direction that it expects the parties to conduct themselves in a prudent and restrained manner in their dealings with the press. The Board directed the parties to be respectful of the Board's process and the other parties in their dealings with the media.

16. Other Items

The Board requests the Town and the Municipality confirm that the service requirements of s. 359(3) of the *Municipal Government Act* have been satisfied as to service of the applications by the Citizens Coalition and the Town on the respective Clerks.

Finally, while not canvassed at the Preliminary Hearing, the Board requests the Applicants to confirm whether any village or service commissions exist within the Municipality of West Hants: see s. 365 of the *Municipal Government Act*.

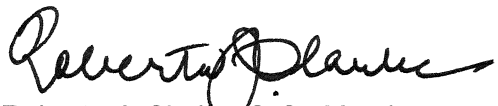
The Board is able to convene a telephone conference on short notice in order to canvass any direction required by the parties.

A Preliminary Order will issue accordingly.

Yours very truly,

Roland A. Deveau, Q.C., Vice Chair

Murray E. Doehler, CPA, CA, P.Eng., Member



Roberta J. Clarke, Q.C., Member

c: S. Bruce Outhouse, Q.C., Board Counsel
c: All Participants Avon Region M07325