**REPORT TO THE CORPORATION OF THE TOWNSHIP OF GREATER MADAWASKA REGARDING THE INVESTIGATION OF THE CLOSED MEETINGS OF COUNCIL HELD ON MAY 14th AND MAY 21st, 2015**

1. **COMPLAINT**

The Corporation of the Township of Greater Madawaska received two complaints dated May 22nd, 2015 and June 9th, 2015 relating to two closed session meetings of the Township Council held on May 14th, 2015 and May 21st, 2015. The first closed session meeting occurred during a regular meeting of Council and the second during a special meeting held to deal specifically with the filling of a vacancy on Council. The essence of both complaints is that these closed meetings were in contravention of the open meetings provision of the *Municipal Act, 2001*[[1]](#footnote-1),as amended by Bill 130[[2]](#footnote-2) (“*Municipal Act*” or *“Act*”).

This request was sent to the offices of Amberley Gavel Ltd. (“Amberley Gavel”) for investigation.

1. **JURISDICTION**

The Township appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act*.

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to the Township Council.

1. **BACKGROUND**

Section 239 of the *Municipal Act* provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of open and transparent government.

The section sets forth exceptions to this open meetings rule. It lists the reasons for which a meeting, or a portion of a meeting, *may* be closed to the public. The section confers discretion on a council or local board to decide whether or not a closed meeting is required for a particular matter. That is, it is not required to move into closed session if it does not feel the matter warrants a closed session discussion.

Section 239 reads in part as follows:

Meetings open to public

**[239.](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s1)**[(1)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s1)  Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

[(2)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s2)  A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(a) the security of the property of the municipality or local board;

(b) personal matters about an identifiable individual, including municipal or local board employees;

(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

(d) labour relations or employee negotiations;

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

The *Act* also provides for closed sessions of a council, board, or committee when engaged in educational or training purposes:

 (3.1)   A meeting of a council or local board or of a committee of either of them may be

 closed to the public if the following conditions are both satisfied:

1. The meeting is held for the purpose of educating or training the members, and
2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

The *Act*, under subsections 239(5) and 239(6), does not permit a council, committee, or local board to vote while in closed session unless the *Act* requires or permits the meeting to be closed by virtue of one of its exceptions and the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

1. **INVESTIGATION**

Since the two complaints engaged substantially the same matter, we determined that they would be investigated together.

Documents provided by the Township and reviewed during the course of the investigation included the Agenda and Minutes of the Open and Closed Sessions of Council on May 14th and May 21st, 2015, and other relevant documentation.

On May 22nd an investigator for Amberley Gavel travelled to the Township offices and conducted four interviews with the Mayor, the Township Clerk/CAO, and the two complainants. Follow up questions were also responded to by email by the Clerk/CAO.

**BACKGROUND**

As a result of the failure of a newly elected member of the Township Council to file financial statements relating to her election campaign a vacancy occurred on the Township Council pursuant to the provisions of the Municipal Elections Act and Section 263 of the Municipal Act. The Township Council declared the seat vacant on April 14, 2015. The newly elected councillor chose not to contest the declaration of vacancy.

Following the declaration of vacancy, the remaining members of Council were the Mayor, and three councillors. The Mayor was a first term Mayor although she had previously sat for one term as a councillor and two of the remaining three councillors were also novices at their position.

Council was advised by the Township Clerk that under Section 263(1) of the Municipal Act it had the option to fill the vacancy either by holding a by-election or by a process of appointment. The Act however does not dictate the process to be used if the appointment option is chosen.

At the Council meeting of April 14th, 2015 Council unanimously decided not to exercise the by-election option because of the cost involved and decided to appoint a new councillor following receipt of applications for the position. Notices inviting applications were posted on the Township’s website and advertised in the media. As a result, eight applications were received by the deadline date of May 5th, 2015.

Prior to the May 14th meeting the Township Clerk spent extensive time and effort in preparing 1) a template of interview questions and 2) options for the managing of the interviews in either open or closed sessions.This greatly assisted Council in their decision making process.

The agenda for the meeting of May 14th, a regular meeting of Council, indicated the intent to go into closed session for two items including the following:

15. **Closed Session**

15.05.1 1. Personal matters about an identifiable individual, including municipal or local board employees – **Vacant Seat**

Near the end of the May 14th meeting Council went into closed session as per the agenda items. Following an approximately one hour closed session discussion Council moved back into open session and moved and carried the following motion:

 That Council approves the process for selecting a candidate to fill the vacant seat by conducting interviews in a Closed Session of Council;

And furthermore that a Special Council Meeting be called for May 21st, 2015 to be held at 10 A.M. at Council Chamber;

And furthermore the interview questions are to be amended and forwarded to Council;

And furthermore if a Candidate is unable to attend the interview they will be disqualified.

In accordance with this motion a Special Council meeting was held on May 21st, 2015 and during this Council meeting all eight applicants went through a closed session interview. All candidates were asked the same specified questions. Procedurally, there were actually nine closed session meetings – eight closed session meetings for the individual interviews of the eight applicants and then a ninth meeting to discuss the results of the interviews.

Following this “ninth” *in camera* meeting Council moved back into open session and moved the following motion, in part:

That Council appoints Wayne Fraser as Ward 1 Councillor

1. **ANALYSIS AND FINDINGS**
2. **The Closed Meeting of Council on May 14th, 2015**

During the closed session of Council on May 14th, Council discussed two items – “the vacant seat” issue and an unrelated litigation issue. However the evidence indicated that most of the approximate one hour session was spent on the vacant seat issue.

The legislative rationale for going into closed session on this issue, as set out in the Council motion, was the “personal matters about an identifiable individual” exception set out in Section 239 of the Act. The Township Clerk further clarified that since the applications that had been received for the vacant position contained some “personal information” regarding the applicant’s educational and employment history it was considered appropriate to review these applications in closed session.

The evidence gathered by the investigator indicated that the closed session discussion relating to the vacant seat issue included:

a) whether to proceed with the interviews or simply to appoint on the basis of the applications received

b) whether to interview all eight applicants

c) whether the interviews should be undertaken in open session or closed session

d) the format of the interviews

e) a review of the interview questions that had been prepared by the Township Clerk and

f) the consequence of the failure of a candidate to appear for the interview

As a consequence of these *in camera* discussions it was decided:

1) to proceed with interviews of all eight applicants in a closed session special council meeting to be called for May 21st,

2) to disqualify any candidate who failed to appear at the interview

3) to make various amendments to the interview questions that had been drafted for the council’s consideration and

 4) to make the applications available to members of the public subject to the blocking out of certain information that might be considered “violations of privacy”.

*It is the opinion of Amberley Gavel* that Council decided too hastily to go into closed session to discuss issues relating to the vacant Council seat on May 14th. Open sessions should be the “default setting” for all Council discussions. Going into closed session should only be an option after careful consideration of the very narrow grounds for going into closed session set out in Section 239 of the Act. It is the view of Amberley Gavel that this careful consideration was not given prior to deciding to hold the vacant seat discussion *in camera* on May 14th. The only rationale for going into closed session on that date was that there was some information contained in the applications for the position that was or might be considered “personal”.

Most of the discussion that took place in the closed session did not revolve around any personal information contained in the applications. The minutes of the closed session meeting, the interviews conducted by the investigator, and the motion that flowed from the closed session meeting all confirmed that the closed session discussions did not meet the strict criteria for closed session discussions.

The fact that much of the discussion was “technical” in nature and consequently would possibly not have had much public interest (e.g. a review of the draft interview questions) is not a justification for excluding members of the public from the opportunity to listen to the discussion if they chose to do so.

Further, it is always open for any member of Council during a public meeting who wishes to discuss “personal” information to move that Council adjourn into closed session for that portion of the discussion. It is also an option at any time for the Chair of a meeting to rule that a councillor is raising issues that might more appropriately be discussed in closed session and suggest the councillor to cease such discussion until the council has moved into closed session. This is common practice throughout the province.

Finally, it should also be remembered that the “exceptions” for open meeting discussions set out in Section 239 of the Act are discretionary – Council may decide to keep the meetings open although there may be a concern that one of the exceptions apply. This discretionary aspect, we suggest, is particularly relevant in the circumstances of this case where there was an apprehension of possible personal information in the applications submitted. These were applications for *public* office and it could reasonably be assumed that all the applicants anticipated that the information in their applications would or could be made public.

1. **The Closed Special Meeting of Council of May 21st, 2015**

The special council meeting of May 21st was dedicated solely to the process of interviewing the eight applicants for the vacant council position and the selection of the successful candidate following the interviews. The meeting began at 10 a.m. and did not conclude until 4:22 p.m.

As indicated above there were actually nine closed session meetings that occurred on May 21st – eight separate meetings dedicated to interviewing the eight candidates and then a ninth meeting to discuss the results of the interviews. All nine meetings were initiated by the same rationale (taken from Section 239 of the Act): “Personal matters about an identifiable individual, including municipal or local board employees”. The first eight motions that used this rationale were followed by the name of the interviewee and the ninth motion simply added “Vacant Council Seat” to the rationale.

Following the May 14th closed session meeting the Township Clerk and the Mayor had considered it appropriate to consult the Township’s Ministry “advisor” regarding the process to be followed and the Township solicitor regarding the advisability of holding the interviews in closed session. These opinions were sought and given.

The paper documentation and the interviews undertaken by the investigator confirmed that the decision to hold the candidate interviews *in camera* was primarily based on a concern that personal information could arise during the process. However it was also admitted by both the Mayor and the Clerk that it was felt that a closed session format would encourage more “frank” discussions.

1. The eight closed session meetings dedicated to interviews

*It is the opinion of Amberley Gavel* that the first eight closed session meetings – the eight interviews – should have been held *primarily* in open session. Only when personal information regarding the individual was being sought or given should Council have considered going into closed session. This may have lengthened an already lengthy series of meetings but this is not a ground for avoiding the strictures of the Municipal Act. Nor is the wish to have a “frank” discussion with each candidate.

It should be recalled that the process chosen by Council to fill the vacancy – appointment, albeit clearly a legal option, replaced the normal process for becoming the Ward 1 representative on Council - election by the residents. The latter process is an extremely “public” process and it is the expectation of those putting their names forward for election that they will be subject to much public scrutiny during the process. Such public scrutiny is also to be expected during an appointment to a public body such as a Township Council.

The practicality of the situation also supports the conclusion that the interviews should have been undertaken in open session. The residents of Ward 1 had been deprived, albeit for valid financial reasons, of their right to express their preference at the ballot box in a by-election. At a minimum they should have had an opportunity, if they chose to exercise it, of *listening* to the candidates for office expound on the reasons why they should be the preferred candidate.

1. The ninth closed session meeting dedicated to a discussion of the results of the interviews

During the interview process with the investigator it was revealed that immediately following the commencement of the “ninth” closed session meeting it was decided that each councilor should rank his or her top three candidates. This was done and it quickly became apparent that there was a fair consensus among the members of Council. This discussion was followed by the drafting of a motion that *would* be moved by Councillor MacPherson once they reverted into open session. This motion which was moved and carried once Council went into open session read as follows:

 That Council appoints Wayne Fraser as Ward 1 Councillor

 And furthermore once Mr. Fraser has been notified, a press release will be emailed to all candidates and the media.

*It is the opinion of Amberley Gavel* that the “ninth” closed session meeting held on May 21st should also primarily have been held in open session. As discussed above, Council should only have reverted to a closed session discussion when one or more councillors wished to raise personal information about one or more of the candidates. Each councillor could have, in open session, argued on behalf of their favoured candidate based on the positive attributes of the candidate of his or her choice.

The issue of the appropriateness of holding *in camera* meetings by public bodies to fill vacancies has been the subject of prior decisions both by Amberley Gavel and by the Ombudsman of Ontario who also has jurisdiction under Sub-section 239.1(b) of the Act. The opinions of Amberley Gavel given above in this report are consistent with these prior decisions.[[3]](#footnote-3)

Finally, Council is also reminded that under Sub-sections 239(5) and (6) of the Act a Council is not permitted to take votes during closed meetings unless the vote is on a procedural matter or “for giving directions” to staff, or agents of the municipality.

At the closed session meeting of May 21st the evidence indicated that a consensus was reached in closed session on the preferred candidate by a system of ranking. Each member of Council was asked to write his or her top three candidates on a slip of paper which was then handed to the Clerk. It is also the opinion of Amberley Gavel that this ranking process is a form of voting not permitted in closed session.

**VI.CONCLUSION**

*Amberley Gavel is of the opinion that* both the “vacant seat” closed session meeting of May 14th and the special closed session meeting (or series of meetings) held on May 21st involving the same issue should have been held in open session. Accordingly both

complaints filed are validated.

Only if and when questions or arguments involving personal information were being considered should the Council have adjourned for a short closed session discussion.

During the interview process with both the Mayor and Township Clerk it became clear that the Township was committed to the principle of open and transparent government. Hopefully this report will be considered as part of the learning process on the way to full implementation of this principle.

**VI.RECOMMENDATIONS**

The filling of vacancies by appointment on municipal councils is not an uncommon occurrence in the province. The Greater Madawaska Township Council which was heavily weighted with novice members was not certain on how to proceed with certain aspects of the process and could have been assisted by provincial guidelines if such were available. By copy of this report to the province it is suggested that the province consider issuing a communication to municipalities setting out some guidelines to be followed when the issue of the filling of a vacancy arises.

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**VII. PUBLIC REPORT**

We received full co-operation from all parties that we contacted and we thank them. The Township Clerk was particularly assiduous in providing Amberley Gavel with all requested information and documentation in a timely fashion.

This report is forwarded to the Council of the Township of Greater Madawaska. The *Municipal Act* provides that this report be made public. It is suggested that the report be included on the agenda of a regular meeting of Council at the earliest opportunity.

for

 **AMBERLEY GAVEL LTD.**

**August 2015**

1. S.O. 2001, c. 25. [↑](#footnote-ref-1)
2. *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”). [↑](#footnote-ref-2)
3. See Report by Amberley Gavel to Whitfield-Stouffville Council, June, 2011, p.8;

See Ombudsman opinion letter to Town of Hearst, December 18, 2012;

See Ombudsman Report to Township of Billings, July, 2014, p.4 [↑](#footnote-ref-3)