**A REPORT TO THE COUNCIL**

**OF THE TOWNSHIP OF MULMUR**

**AND TO THE MULMUR MELANCTHON FIRE BOARD REGARDING THE INVESTIGATION OF:**

1. **AN ALLEGED CLOSED MEETING OR MEETINGS OF THE TOWNSHIP COUNCIL HELD BETWEEN APRIL 5th, 2011 AND MAY 3rd, 2011**
2. **AN ALLEGED BREACH OF CONFIDENTIALITY THAT OCCURRED AT AN OPEN SESSION MULMUR TOWNSHIP COUNCIL MEETING HELD ON APRIL 20TH, 2011 RELATING TO AN ITEM DISCUSSED AT A PRIOR CLOSED SESSION MEETING**
3. **AN ALLEGED CLOSED MEETING OF THE MULMUR MELANCTHON FIRE BOARD HELD PRIOR TO THE FIRE BOARD MEETING OF AUGUST 31, 2011**
4. **A CLOSED MEETING DISCUSSION OF AN ITEM BY THE MULMUR MELANCTHON FIRE BOARD ON OCTOBER 5TH, 2010 THAT ALLEGEDLY SHOULD HAVE BEEN HELD IN OPEN SESSION**

**A. THE COMPLAINT**

Pursuant to Section 239.1 of the Municipal Act (“the Act”), Amberley Gavel Ltd. received a bi-partite complaint relating to both the Mulmur Township Council and the Mulmur Melancthon Fire Board.

That part of the complaint relating to the Mulmur Township Council alleged:

* that there were one or more closed meetings of the Council held between April 5th, 2011 and May 3rd, 2011 to which all members of Council were not invited
* that at the open Council meeting held on April 20th, 2011 there was an alleged breach of confidentiality of an item discussed at a prior closed session meeting of the Mulmur Township Council.

That part of the complaint relating to the Mulmur Melancthon Fire Board alleged:

* that there was a closed session meeting of the Mulmur Melancthon Fire Board held prior to the regular Fire Board meeting held on August 31, 2011
* that there was a closed session meeting discussion of an item at the meeting held on October 5th that should have been held in open session

It should be clearly stated up front that the complaints filed relating to both the alleged closed sessions of council and the alleged closed session of the fire board were part of a much larger issue that was consuming a significant amount of both staff and council time and the financial resources of the municipality. This larger issue which has both political and personal relationship aspects had also precipitated other investigations and recently civil litigation. Although Amberley Gavel Ltd. recognizes the seriousness of the larger issue, its jurisdiction, as indicated below, is fairly limited, and the comments in this report must accordingly be limited to the areas that fall within its jurisdiction.

**B. JURISDICTION**

Local Authority Services (LAS) has been appointed to act as the closed meeting investigator for both The Township of Mulmur and Mulmur Melancthon Fire Board pursuant to Section 239.2 of the Act. LAS has, in turn, delegated its powers and duties to Amberley Gavel Ltd. to undertake this investigation and report.

On June 20th, 2011 the investigator for Amberley Gavel Ltd. conducted a lengthy interview with the Deputy Mayor of Mulmur Council in Gravenhurst and on June 21st, 2011 the investigator conducted four further interviews at the municipal offices in Terra Nova. During all five interviews the investigator received extensive information and opinions relating to both the specific allegations that are the subject matter of the complaint and the larger issue that forms the background to the complaint.

**C. LEGAL BACKGROUND**

Closed Meetings:

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 is one of the elements of transparent, open government that the Act encourages. However the Act also provides for a limited number of exceptions that allow a local council or committee of council to meet in closed session (i.e. *in camera).*

Section 239 reads, in part, as follows:

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

**Exceptions**

[(2)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%20%5C%20s239s2) 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.

Section 239 also requires that before a council moves into closed session it shall pass a resolution at a public meeting indicating that there is to be a

closed meeting. The resolution must also include “the general nature of thematter to be considered at the closed meeting*”.*

Finally, subsections 239(5) and (6) limit the actions that may be taken by the Council at the closed session. Votes may be taken at the closed session only

for procedural matters or for giving direction or instructions to staff or persons retained by the municipality.

The role of an investigator of a complaint filed under Section 239.1 is fairly narrow. The investigator’s role is to determine “whether the municipality…has complied with section 239 or a procedure by-law under section 238(2) in respect of a meeting or part of a meeting that was closed to the public and to report on the investigation”. Accordingly, the role of the investigator is to examine the *process* followed and not the substance of any particular issue.

**D. FACTUAL BACKGROUND – MULMUR MELANCTHON FIRE BOARD**

Since the issues relating to the Mulmur Melancthon Fire Board (“the Fire Board”) chronologically precede the issues relating to the Township Council, they will be dealt with firstly.

The Mulmur Melancthon Fire Board is a joint agency of the neighbouring townships of Mulmur and Melancthon. Each township appoints two members to the Fire Board since fire services overlap the two townships.

Between August 10 and October 21st, 2010 the Fire Board met in closed session on eight separate occasions to consider “*personnel* matters about an identifiable individual, including employees”. (emphasis added). However the main complaint relating to the actions of the Fire Board focuses only on the August 31st closed session meeting and/or the time immediately preceding the meeting where it is alleged that a contravention of the closed meeting provisions of the Municipal Act occurred.

It should initially be noted that the wording in the motion relied upon by the Board to go into closed session consistently referred to “personnel matters…” However the wording in the Municipal Act uses the slightly different term “personal matters…” Although the “personal” matters discussed may sometimes involve personnel (i.e. employees of the municipal corporation), the exemption in the Act is not limited to discussions relating to employees. To be consistent with the Act, in the future, the wording used should refer to “*personal* matters…”

The complaint filed also included an allegation that the Fire Board discussed *in camera* (on August 31st and October 20th, 2010) the job description of the dispatcher position, an item which should have been discussed in open session.

**E. FINDINGS – MULMUR MELANCTHON FIRE BOARD ISSUES**

The complainant alleges that following a discussion relating to a personal item on the agenda of the *in camera* meeting held on August 31st, 2010 the Chairperson of the Board stated that a “consensus has been reached on how we should proceed”. The complainant further alleges that since there was very little discussion on the way forward, any “consensus” *must have* been reached at a closed session meeting or a “virtual” meeting held prior to the formal closed session meeting and a meeting to which not all members of the Board were invited.

The Chair of the Fire Board was questioned vigorously on this issue. The investigator found that he responded to the questions frankly and with a sincere attempt at assisting the investigator. It should also be noted that the Chair is a “veteran” member of the Mulmur Council, having served on the Council for thirteen years. Accordingly, he had considerable experience in handling the role of the chair of a committee.

He also advised the investigator that to avoid allegations of the nature filed in this case he was and is very sensitive of the need to avoid informal meetings of a quorum of either the Fire Board or of Council. In both cases only three members are required to form a quorum. He further advised that in light of the seriousness of the *in camera* personal issues that the Board was grappling with at this time that he consulted regularly with the solicitor for the Board as the Board worked its way through the issues.

The Chair frankly admitted that in light of the highly controversial personal issue with which the board was dealing, there were undoubtedly *individual* face to face or telephone discussions among the various members of the Board prior to the closed session meeting of the Board held on August 31st. However he denied that he ever met with a quorum of the Board prior to the meeting of August 31st.

The closed session minutes do not specifically refer to the phrase “a consensus has been reached”, allegedly used by the Chair. Further, in light of the passage of time, the Chair could not categorically deny that he made such a statement. However he advised the investigator that if he, in fact, did make that statement it was his honest assessment at the time of the “way forward” opinion of a majority of the members of the Board as determined by the discussion at the meeting.

In the opinion of Amberley Gavel Ltd. informal discussions between councillors relating to an issue that is intended to be on a board or council agenda are a natural and traditional part of the political process. To ascertain the views of one’s colleague or even to encourage one’s colleague to vote in a particular fashion on an issue before a council or a board, whether the issue is to be discussed at an open or closed session, is part of the political process.

The accountability and transparency provisions in the Act relating to closed session meetings are not intended to stifle these types of discussion. As stated by Mr. Justice Dubin in Vanderkloet v. Leeds and Grenville County Board of Education one cannot define “meeting” in so broad a fashion as to “preclude informal discussion among…members, either alone or with the assistance of staff.”

Accordingly, Amberley Gavel Ltd finds that neither on the facts nor the law was there an illegal closed session meeting held prior to the Fire Board meeting of August 31st, 2010.

Finally, the complainant also objects to an *in camera* discussion relating to the job description of the fire dispatcher position held on August 31st, 2010 and on October 5th, 2010. The acting secretary of the Fire Board and the Chair of the Board were questioned recalling their recollection of an *in camera* discussion of the *job description* of the fire dispatcher position at these two meetings. None of them could recollect with any definitiveness the date or dates of such a discussion but the closed session minutes of the Board do indicate that on August 31st “ a draft job description for the dispatcher” was given to the Board by the occupant of that position and on October 5th, 2010 “[T]he issue of the job description…for the dispatcher…was mentioned…”

Both of these two interviewees opined however that the focus of the *in camera* discussion was not on the job description of that particular position but rather on the job performance of the incumbent. In their view, to the extent that there was a discussion of the job description it was “secondary in nature”.

In the view of Amberley Gavel Ltd. a discussion regarding the job performance of an employee frequently involves a reference to his or her job description – it is quite appropriate to determine whether the employee in question is meeting the requirements of his or her job description. The job description is a valid benchmark.

However, to the extent that in our case the Board may have veered from a discussion of the job performance of the individual in question to a discussion focused *solely* on the *job description* of the position that she occupied, such a discussion should not have been held in closed session. Discussions and debates regarding job descriptions for any employee position should be held in open session – such discussions are not covered by the “personal matters” exemption under the Act.

**F. FACTUAL BACKGROUND – MULMUR TOWNSHIP COUNCIL**

To understand the context in which the complaint relating to the Mulmur Township Council has been filed it is necessary to outline, in chronological order, some of the facts relating to the “larger issue” that was bedeviling the Township. In outlining some of these facts, Amberley Gavel Ltd. is very cognizant of the need to respect the confidentiality of some of the information provided to the investigator and accordingly only such facts that are part of the public record will be referred to.

It should again be noted, since it is relevant to the complaint filed, that the Mulmur Council is composed of only five members – the Mayor, the Deputy Mayor and three councillors elected “at large”.

The agenda and minutes of the **April 5th, 2011** Township Council meeting included two items relevant to the complaint filed.

Firstly, the Township Council discussed the sale of a rail line to the Highland Companies for the purpose of a proposed quarry – an extremely contentious issue in Dufferin County of which Mulmur Township is a member. The “consensus” of the Council was that the sale of the rail line was “premature” and further that “the two Mulmur County Council members should vote this way at the County when it comes up”. The Mayor, Paul Mills, and the Deputy Mayor, Rhonda Campbell Moon, are the two representatives from Mulmur Council on the Dufferin County Council.

Secondly, the Agenda of the April 5th meeting also indicated that the Deputy Mayor intended to present a motion to Council asking for a “life safety study” (a fire safety audit) of the North Dufferin Community Centre. When this latter issue was reached on the agenda, the Mayor indicated that at his initiative a Fire Prevention Officer from Orangeville had recently conducted such an audit. Although the Deputy Mayor responded that she was pleased that such an audit had finally taken place, she expressed serious concern regarding the process followed to initiate the audit and the Mayor, in turn, expressed his concern that the Deputy Mayor, albeit a trained fire prevention officer, had undertaken her own personal audit of the same building without any authority from the Council.

The evidence heard by the investigator indicates that the debate that followed quickly degenerated into personal attacks with the result that the Deputy Mayor left the Council Chamber and did not return for the continuation of the Council meeting after a lunch break.

At the **April 14th Dufferin County Council** meeting two motions came forward relating to the sale of the rail line to the Highland Group of companies wanting to develop the controversial quarry. On the first motion the Deputy Mayor of Mulmur voted with her Mayor against the motion to “continue to consider options re the sale of the rail line” but on a second related motion to discontinue discussions with the Highland Companies “regarding the sale of the former rail line” she voted *against* the motion and contrary to the Mayor’s vote. The Deputy Mayor’s vote on this second motion became a very controversial issue among her fellow councillors and among some members of the electorate.

The Deputy Mayor advised the investigator that in light of the first vote, she considered the second vote “moot”. She further argued that, in any case, if the quarry does proceed, notwithstanding the local opposition, *including her own*, the rail line transportation route might be less intrusive on the local community rather than the alternative truck/roadway route and therefore she felt that it should not be ruled out entirely *at this time*. Notwithstanding this explanation, also given by the Deputy Mayor at a subsequent Township Council meeting, the Mayor and two other members of the five member Township Council interpreted her second vote as being contrary to the expressed wishes of the Council as expressed at its April 5th meeting.

On the agenda of the **April 15th** Township Council meeting there appeared a motion (“the April 15th motion”) that cannot be described as other than both harsh and direct. The recitals in the motion express concern regarding 1) “the behavior demonstrated by Deputy Mayor Rhonda Campbell Moon” at the April 5th Council meeting (during the debate on the fire safety audit issue) and her absence during the second half of the meeting and 2) the Deputy Mayor’s second vote on the rail line issue at the Dufferin County Council meeting which was “contrary to the express and recorded wishes of Mulmur Council”. The motion then proceeded to ask for a “formal and public written apology” from the Deputy Mayor on or before April 26th, failing which the Council would ask for her resignation from Council and “take such further and other action” as are considered appropriate. The motion concluded with a direction to the Clerk to issue a media release with respect to the motion. The motion was put forward by Councillor Hawkins and following a “heated debate” the motion passed on a three-two split.

The agenda for the subsequent Council meeting of **May 3rd** included the following item: “Follow up discussion on the conduct of the Deputy Mayor”.

At the meeting Councillor Hawkins again presented a fairly lengthy motion (“the May 3rd motion”) that was clearly disciplinary in nature. The motion indicated that since the Deputy Mayor had failed to file a “formal or written apology and commitment for reformed behavior” she was to be removed from all four committees of Council to which she had previously been appointed by the Council (the Police Services Board, the Shelburne District Fire Board, the Abandoned Cemetery/Heritage Committee and the Provincial Offences Act Committee). It continued with a final direction that the Deputy Mayor would “no longer officially represent the Council or the Corporation of the Township of Mulmur at social functions, seminars, non-Council meetings or conventions.” The disciplinary motion was again carried on a three-two split.

As stated above, this larger issue revolving around the alleged misconduct of the Deputy Mayor and the form of discipline passed by the Township Council had yet to be resolved on the date that the investigation for this report took place.

**G. FINDINGS – MULMUR TOWNSHIP COUNCIL ISSUES**

*The April 15th Motion*

As stated above, one of the issues that precipitated the two motions focusing on the performance of the Deputy Mayor was her second vote on the rail line sale issue at County Council on April 14th. The majority of Mulmur Council felt that this vote was not only inappropriate but contrary to the very specific instructions of Mulmur Council as expressed at the April 5th Council meeting.

However, in the opinion of Amberley Gavel Ltd., a lower tier (township) council cannot dictate how one of its members ought to vote at an upper tier (county) council. The Deputy Mayor is a member of the County Council pursuant to her elected position as Deputy Mayor and not, strictly speaking, as a representative of the township council. Accordingly, to the extent that the April 15th motion was caused to be brought forward because the Deputy Mayor voted “contrary to the expressed and recorded wishes of Mulmur Council”, as stated in the motion, it was based on a significant misunderstanding of the role of the Deputy Mayor at County Council.

*Alleged Closed Session Meetings to draft the April 15th and May 3rd Motions*

As clarified during the investigation process, the major concern of the complainant was that the Mayor “must have had” one or more “illegal” closed session meetings with a quorum of Council prior to the two motions relating to the Deputy Mayor presented at the April 15th and the May 3rd Council meetings.

During the interview process the Mayor frankly acknowledged that the first motion (threatening discipline) was vetted with all members of Council save and except for the intended recipient of the discipline. He also stated that along with one other member of Council he had attended at the offices of the Township’s solicitor to receive advice regarding the process that should be followed. His evidence relating to the second motion was similar – he vetted the motion individually with two other members of Council prior to its presentation at Council.

He also acknowledged that although both motions were put forward at Council by Councillor Hawkins, he, the Mayor, was the primary drafter of both motions although they were revised slightly following discussions with the other members of Council consulted and with the Clerk/CAO.

The Mayor categorically denied however that he ever met with a quorum of Council prior to the two Council meetings in question to discuss the motions or the issue that precipitated the motions. All discussions with other members of Council took place individually either by phone or on a face-to-face basis. This evidence was unqualifiedly substantiated by three of the other persons interviewed during this investigation process.

During the interview process, it became clear that the concerns of the complainant regarding one or more closed sessions meetings “that must have taken place” are derived from a misreading or misinterpretation of the law regarding closed session meetings. This misreading may partially have emanated from a 2008 decision of the Ombudsman of Ontario in the Nipissing case. In that case the Mayor of Nipissing initiated a series of sequential phone calls to the other members of Nipissing Council to authorize an expenditure of funds for a new fire truck. The approval was subject to a very tight time-line. This approval was subsequently minuted as a “Special Meeting” of Nipissing Council. The Ombudsman, perhaps not surprisingly, found that this “phone-around” meeting was a closed session meeting of Council that was not authorized under the Municipal Act.

However this case cannot be interpreted to mean that the Mayor of a municipality cannot consult individually with either all members of Council or a quorum of Council to either advise them of his intended position on a particular issue or even to obtain their support for that particular position. As stated above during the discussion of the Fire Board issue, such discussions are part of the traditional and natural role of politicians and are not meant to be discouraged by the closed session provisions implemented in the Municipal Act in 2001 and 2006.

The Nipissing situation was found to run afoul of the law specifically because the approval of funds was never formally ratified at any subsequent Council meeting held in open session.

Admittedly, particularly in municipalities involving small councils (e.g. five or seven members), members of Council and particularly the mayor, must be extremely sensitive to the possible infringements of the Act when a quorum of Council is present together outside of a formal council meeting. In a particular case it might very well be found that such a meeting of a quorum of council could be considered a violation of the Act. However in the opinion of Amberley Gavel Ltd. that did not occur in this case.

Further, both the Mayor and other members of the Council interviewed acknowledged awareness of the need to be sensitive to this possibility.

Accordingly, it is the finding of Amberley Gavel Ltd. that the Mulmur Council did not participate in any closed sessions meetings to discuss either “the April 15th motion” or the “May 3rd motion” prior to their presentation at open session meetings of Council.

*Alleged Breach of Confidentiality*

Finally, the complaint filed also alleged that during the April 20th, 2011 open Council meeting the Mayor “publicly and on record disclosed a personal matter” relating to the Deputy Mayor that had been discussed in a previous closed session meeting of the Council.

As indicated above, the jurisdiction of an investigation and report under Section 239.1 of the Act is fairly narrow. Alleged breaches of confidentiality fall outside of the mandate of a Section 239.1 investigation. One option available to Mulmur Council to attempt to deal with such issues is through a Code of Conduct.

However, evidence was heard on this issue from all of the five interviewees and the most that can be said is that the evidence is far from clear that any such breach took place. And if a breach did take place, it was minor and inadvertent in nature.

Certainly, all councillors should be extremely sensitive to the need to respect the confidentiality of closed session discussions. Open and honest discussion of issues is required among councillors as much in *in camera* meetings as in public meetings and breaches of confidentiality discourage such openness.

**H.CONCLUSIONS**

In summary, Amberley Gavel Ltd. makes the following findings on the complaints filed:

1. The Mulmur Melancthon Fire Board did not participate in any illegal closed session meetings, as alleged, immediately prior to the meeting of the Board held on August 31st. 2010.
2. The Mulmur Melancthon Fire Board did, on August 31 and on October 5th, 2010, have a closed session discussion relating to the job description of the fire dispatcher position. In light of the passage of time the evidence is not clear however whether this discussion was outside of a discussion of the job performance of the incumbent of the position. To the extent that this discussion was an independent discussion of the job description of the position it should have been held in open session.
3. The Mulmur Melancthon Fire Board should ensure that, if relying upon the exemption in the Act that permits one to go into closed session to discuss “personal matters about an identifiable individual…”, then that wording should be used rather than the incorrect term “personnel matters…” which was consistently used by the Board in the past.
4. To the extent that the April 15th motion of Mulmur Council relating to the Deputy Mayor was based on the Deputy Mayor’s vote at County Council being “contrary to the express and recorded wished of Mulmur Council”, this rationale was inappropriate and the original direction beyond the authority of the Council.
5. The Mulmur Township Council did not participate in any illegal closed session meetings, as alleged, prior to the presentation of the two motions relating to the Deputy Mayor at the April 15th and May 3rd, 2011Council meetings.

It is recommended that this report be placed on the agenda of the next public session of the Mulmur Council and also that of the Mulmur Melancthon Fire Board in accordance with the Municipal Act.

Finally, Amberley Gavel Ltd. would like to thank members of Council and staff of the municipality who co-operated fully during the course of this investigation.

AMBERLEY GAVEL LTD.

Per: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

August 2011