**REPORT TO**

**THE CORPORATION OF THE MUNICIPALITY OF SHUNIAH**

**REGARDING THE INVESTIGATION OF THE SPECIAL MEETING OF COUNCIL OF OCTOBER 8, 2013**

**COMPLAINT**

Amberley Gavel Ltd. Received a request for an investigation respecting a closed meeting of the Council of The Corporation of the Municipality of Shuniah (“Municipality”) held on October 8, 2013. The essence of the complaint is that the holding of a closed meeting was 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*”).

The main issues raised by the complainant with respect to the October 8, 2013 meeting are:

* there was no authority to hold the closed meeting, and
* the C.A.O. refused to attend the closed meeting because it was an “illegal” meeting.

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

**JURISDICTION**

The municipality 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 City Council.

**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 transparent local government.

The section sets forth exceptions to this open meetings rule. It lists the reasons for which

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 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" \l "s239s1)**[(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" \l "s239s2)  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).

**INVESTIGATION**

Documents provided by the municipality and reviewed during the course of the investigation included the City’s Procedure By-law, the Agenda and Minutes of the open and closed meeting of Council on October 8, 2013, and other relevant documentation. In addition, the CAO, Clerk, and the three members of council in attendance at the October 8, 2013 meeting were interviewed. Reeve Harding and Councillor Bishop were not in attendance.

**FACTUAL BACKGROUND**

A special meeting of council was petitioned by three members of council on October 7, 2013. This was done by telephone and there is no trail either by written petition or emails requesting the special meeting. The three members requesting the special meeting were Councillors Landry, Blunt and Giardetti, the same three who attended the meeting on October 8th.

The meeting was scheduled by the Clerk on October 7th. It was schedule for 9:00 AM on October 8th in the council chambers. Notice of the meeting was posted on the municipal website at approximately 11:00 AM on October 7th.

The meeting was scheduled to begin at 9:00 AM and in fact began at 9:15 according to the minutes of the meeting. The entire meeting including the closed portion lasted 15 minutes, 13 of which were closed to the public.

The C.A.O. attended the open portion of the meeting at the outset but did not attend the closed portion or the open portion after the closed meeting.

Minutes of both the open and closed portions of the meeting were prepared by the Clerk.

**ISSUES**

Was the special meeting called in accordance with section 240 of the Municipal Act?

Was notice to members and the public given in accordance with the procedure by-law?

Did the public resolution that was passed authorizing the closed meeting meet the requirements of subsection 239 (4)?

Did the resolution passed by council at the closed meeting comply with the requirements of subsection 239 (6)?

**Petition for Special Meeting**

A special meeting of council may only be called by the Head of Council or by a petition of a majority of members of council. Paragraph (b) of section 240 of the Municipal Act provides that, “upon receipt of a petition of the majority of the members of council, the clerk shall call a special meeting for the purpose and at the time mentioned in the petition”.

The evidence in this case is that there was no petition. There was a series of telephone calls. There was no email or written petition confirming those calls. The Act requires that the petition specify both the purpose and time. This becomes difficult if not impossible to confirm after the fact and becomes important in this circumstance given what was intended to be the purpose of the meeting.

A series of telephone calls does not in our opinion satisfy the requirements of section 240 of the Municipal Act for a petition.

**Notice of Special Meeting**

The requirements for special meetings of council are set out in sections 3.4 to 3.9 of Procedure By-law 2205-06. Section 3.4 provides for the calling of special meetings of council; it parrots the wording in section 240 of the Municipal Act.

Section 3.5 provides that, “A Special Meeting shall be held no sooner than twenty-four (24) hours following the Reeve’s summons or receipt of the petition, as the case may be”.

At 8:53 AM on October 7, 2013, the Clerk sent an email to all members. It read in part, “I would like to know who is available for a special meeting of Council tomorrow morning?”

The Clerk acknowledges that the notice to the public advising of the 9:00 start of the meeting was not posted on the municipal website until approximately 11:00 AM on October 7, 2013. The use of the word “shall” in section 3.5 is mandatory. The Clerk had no discretion to shorten this time frame without the express prior approval of council.

The Chief Administrative Office advised the Clerk that the notice was deficient. We agree that the notice requirements of the municipalities’ procedure by-law were not met.

A motion was introduced and passed at the public portion of the meeting to suspend the rules of order because the mandatory time for notice had not been met. Suspending the rules to circumvent the mandatory notice requirements established by council in it’s Procedure By-law demonstrates that there was no intent to be accountable or transparent. Even if such procedure were upheld by a court, it defeats any goal of transparency.

**Public Resolution authorizing a Closed Meeting**

Subsection 239 (4) of the Municipal Act requires that council pass a resolution at a public meeting, that subsection reads:

***“Resolution***

*[(4)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm)  Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,*

*(a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or*

*(b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.”*

The requirement is two-fold. First, the fact of holding the meeting and secondly the general nature of the subject-matter. It requires that the subsection authorizing the closure be indicated in the public resolution.

The public resolution passed by council reads as follows:

*“THAT in accordance with Section 239 (2) of the Municipal Act, we adjourn at the hour of 9:16 am to go into closed session to discuss*

1. *Legal matters.”*

This resolution does not meet the requirements of section 239. It is not transparent. Further, it does not state which of the exceptions enunciated in subsection 239 (2) apply.

The Ontario Court of Appeal in the 2007 decision of *Farber v Kingston (City), 279 D/L.R. (4TH) 409* has provided guidance to municipalities on the issue of what is appropriate and required for municipal councils to include in the public resolution authorizing a closed meeting. In that case the public resolution stated that council was going into the closed meeting for “legal matters”. The identical wording was used in the October 8, 2013 Shuniah resolution. Mr. Justice Goudge, JA rejected the wording and stated the following.

*“In the circumstances of this case, I do not think that the description “legal matters” is sufficient. In my view, the clear legislative purpose informing* [*s. 239*](https://www.canlii.org/en/on/laws/stat/so-2001-c-25/latest/so-2001-c-25.html#sec239_smooth) *is to maximize the transparency of municipal governance so far as that as possible in the circumstances. In RSJ Holdings Inc. v. London (City) (2005),* [*2005 CanLII 43895 (ON CA)*](https://www.canlii.org/en/on/onca/doc/2005/2005canlii43895/2005canlii43895.html)*, 16 M.P.L.R. (4th) 1 at para. 16, this court said the following:*

[*Section 239(1)*](https://www.canlii.org/en/on/laws/stat/so-2001-c-25/latest/so-2001-c-25.html#sec239subsec1_smooth) *of the* [*Act*](https://www.canlii.org/en/on/laws/stat/so-2001-c-25/latest/so-2001-c-25.html) *requires that all meetings shall be open to the public unless the subject matter being considered comes within an exception listed in subsection (2). In light of the increased powers of municipalities, the mandatory wording of* [*s. 239*](https://www.canlii.org/en/on/laws/stat/so-2001-c-25/latest/so-2001-c-25.html#sec239_smooth) *that meetings “shall” be open to the public except in narrowly defined situations, and the specificity of the exceptions, it seems clear that the purpose of these provisions is to ensure that, in general, municipal authority is exercised openly.*

*[20]         The respondent argues that s. 239(4)(b) requires that the resolution do no more than state the exception in* [*s. 239(2)*](https://www.canlii.org/en/on/laws/stat/rso-1990-c-m45/latest/rso-1990-c-m45.html#sec239subsec2_smooth) *relied on to justify closing the meeting to the public. However, in my view, if the legislative intent was to require no more than that, it would have been easy to say so in s. 239(4)(b). The notion of “the general nature of the matter to be considered” suggests more fidelity to transparent governance than that, while recognizing that a full description of the matter to be considered cannot be revealed to the public because of the very need to go into closed session.*

*[21]         Reading subsections (2) and (4)(b) together in the context of the desirability of open municipal government, I think that the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.”*

**Voting at a Closed Meeting**

Subsection 239 (6) limits the powers of a municipal council by restricting the types of votes taken at a closed meeting. It allows for procedural votes as well as for, “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”.

The minutes of the closed meeting indicate that the resolution passed by council served two purposes. The first was to give direction which is proper. The second part of the resolution however was a decision to exercise a corporate power. It was beyond council’s powers at the closed meeting to do so.

Because the petition to call the meeting lacked certainty because it was verbal rather than in writing, it cannot be ascertained what the intended purpose or purposes were.

**Conclusions**

The special council meeting was called in haste to react to a time-sensitive matter. The timing was to accommodate two members (two of the members petitioning for the meeting) who were leaving town later in the day on October 8, 2013. This rush to meet led to a series of improper actions by staff and the members in attendance. The actions taken resulted in transparency being thrown aside to expedite a meeting. That is not acceptable.

The CAO had indicated to the Clerk that the meeting was improperly called because the notice required had not been met. We agree. However, he also indicated that he had the authority to take the necessary steps to avoid the special meeting. He failed to do so. The Clerk did not follow his advice and the meeting of October 8, 2013 ensued.

Summary of Conclusions:

1. The meeting of October 8 was improperly called. There was no evidence of a petition as required by the Act.
2. Without evidence of a petition, there is no evidence of a "purpose" of the meeting as required by Section 240(b) of the Act.
3. The public were not given sufficient notice of the meeting as required by the municipality's Procedure By-law.
4. Council could not by resolution retroactively suspend a rule contained in the Procedure By-law.
5. The resolution authorizing the closed session was incorrect and insufficient.
6. Even if the meeting had been properly called, and authorized by resolution, the resolution in closed session authorizing a corporate act was not in accordance with the Act.

Amberley Gavel, in the nearly seven years since the Closed Meeting Investigation process has been in place, is unaware of an Investigation that has found so many errors in procedure with respect to an individual closed meeting.

**Recommendations**

The meeting of October 8, 2013 and the events leading up to it clearly demonstrate a need for accountability and transparency training for staff and members of council on the matters of the Procedure By-law and specifically closed meetings.

Finally, Amberley Gavel Ltd. would like to acknowledge and thank the municipal officials, both members of council and staff who cooperated fully during the course of this investigation.

This report is provided to Council in accordance with the requirements of the Municipal Act. We recommend that it be placed on the agenda of the next regular meeting of council or on an agenda of a special meeting of council called for the purpose of receiving it.

December 2, 2014

Amberley Gavel Ltd.

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)