**A REPORT TO THE COUNCIL OF THE MUNICIPALITY OF FRENCH RIVER REGARDING THE INVESTIGATION OF:**

1. **A CLOSED MEETING OF COUNCIL HELD ON JANUARY 14, 2011.**
2. **AN ALLEGED CLOSED MEETING OF COUNCIL HELD ON OR ABOUT FEBRUARY 2, 2011**
3. **AN ALLEGED CLOSED MEETING OF COUNCIL HELD ON OR ABOUT FEBRUARY 4, 2011**
4. **AN ALLEGED CLOSED MEETING OF COUNCIL HELD ON FEBRUARY 10, 2011**

**A. THE COMPLAINTS**

Pursuant to Section 239.1 of the Municipal Act (“the Act”) relating to closed meetings of Council, the Municipality of French River received three letters of complaint dated January 17, January 21 and January 24, 2011 relating to the closed session of a Special Meeting of council held on January 14, 2011.

In the course of the initial investigation of the complaints relating to the January 14th council meeting, four further complaints were filed relating to three *alleged* closed sessions of council held 1) on or about February 2nd, 2011

2) on or about February 4th, and 3) on February 10th, 2011. These latter four complaints will be considered following consideration of the January 14th closed session meeting. (See Sections F, G, and H)

It should be stated clearly up front that the complaints filed relating to both the closed session of council held on January 14th and the alleged closed sessions of council held on February 2nd, 4th and 10th, 2011 appear to be part of a much larger issue that is seriously affecting the efficient operation of municipal government in French River. This larger issue which is both a political and human resource issue has also involved the Ministry of Labour as a result of workplace harassment complaints brought under the Occupational Health and Safety Act. Although Amberley Gavel Ltd. recognizes the seriousness of the larger issue, its jurisdiction, as indicated below, is limited, and the comments in this report must accordingly be limited to the areas that fall within its jurisdiction.

*Allegations in the Complaints relating to the Special Meeting of Council held on January 14th*

The three complaints filed relating to the January 14th meeting of council include the following allegations:

* Notice of the Special Council meeting and the closed portion thereof was not properly given
* There were “no staff members present” at the closed session meeting
* The open meeting portion of the Special Meeting was never resumed
* There was no agenda for the closed session meeting
* The minutes of the closed session meeting were not “in good form” and the motion considered in closed session was not valid

One of the three complaints also contained numerous other *allegations* regarding various processes and promises allegedly made by the mayor of the municipality but again, as indicated below, the jurisdiction of an investigator appointed under Section 239 of the Municipal Act is limited to dealing with closed session meetings and the procedures pertaining thereto. This limited jurisdiction was explained to the author of this third complaint and this report does not address those other allegations.

**B. JURISDICTION**

The Municipality of French River has appointed Local Authority Services (LAS) to act as its closed meeting investigator pursuant to Section 239.2 of the Act. LAS has, in turn, delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council of the Municipality of French River. On February 23rd, 2011 the review officer for Amberley Gavel Ltd. conducted four interviews at the municipal offices in French River. Three further telephone interviews were conducted on February 28th, on March 3rd, and on March 6th, 2011

**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.[*emphasis added*]*

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**

At 9:25 A.M. on Thursday, January 13th, 2011 the mayor of the Municipality sent the Clerk/CAO an email advising him that he was calling a Special Meeting of Council to be held at 4 P.M. on the following day, a Friday. The mayor asked the Clerk/CAO to advise the other members of Council of the Special Meeting and to prepare an agenda that would include two items:

1. The “Lakeview Estate Subdivision”
2. A closed session to consider “personal matters about an identifiable individual, including municipal or local board members”

The Clerk/CAO passed on the email to the Deputy Clerk requesting that she prepare the agenda and send out the agenda to all members of Council. Before she sent out the agenda the Deputy Clerk felt that she needed a little more detail regarding the *in camera* session and accordingly emailed the mayor asking that he provide her with the “subject matter” of the closed session in order to be “open and transparent”. The mayor replied almost immediately that the subject matter was “In respect to personnel matters”. The Deputy Clerk then added this “clarification” to the agenda item and had the agenda sent out by email in time to meet the 24 hour notice period.

Notice to the public of this meeting was also provided through postings in accordance with the municipality’s Procedure By-law

The Special Meeting commenced in open session shortly after 4 P.M. on the Friday. Present were the Mayor, five of the six councillors, the CAO/Clerk and several individuals interested in the first item on the agenda – the Lakeview Estates Subdivision. The sixth councillor joined the meeting at approximately 4:40 P.M. prior to the closed session portion of the Special Meeting.

Following the completion of discussion of the subdivision item and the passing of several resolutions relating thereto, and the passing of the motion authorizing the closed session, the mayor, the other councillors and the Clerk/CAO adjourned to a separate meeting room for the closed session portion of the meeting. At that point the mayor then asked the Clerk/CAO to leave the room. The CAO/Clerk advised council that the Municipal Act required “a staff member to be present” to take minutes. The mayor replied that a member of council would take minutes and again asked the Clerk/CAO to leave. The Clerk/CAO then left the room. As per the Mayor’s request a member of council did take “notes” during the closed session meeting. The evidence also indicates that during the closed session council had a lengthy phone conversation with a solicitor (who specialized in employment law) who had been previously contacted by the mayor.

Since Council had only taken office on December 1st and since only one of the seven member Council was an incumbent, staff had prepared an orientation session for Council to commence at 5 P.M. However since council was still in closed session at 5:30 P.M. and not being advised as to how long the closed session was anticipated to last, the Clerk/CAO sent the members of staff involved in the orientation session home at that time and he himself left the municipal offices at approximately 6:30 P.M. with council still in closed session.

Still in closed session, the Mayor and councillors returned to the Council Chamber where they passed a motion to reconvene in open session and then adjourned the Special Meeting of Council.

The evidence indicates that the closed session meeting ended at approximately 7:15 P.M.

**E. COMPLAINTS RELATING TO THE CLOSED SESSION MEETING OF COUNCIL HELD ON JANUARY 14TH, 2011.**

1. ***Allegation that notice of the Special Council meeting and the closed portion thereof was not properly given***

Section 3.3 of the Procedure by-law of the Municipality of French River provides that notice of special meetings of council “shall be delivered by any of the following means (personal delivery, facsimile transmission, electronic

mail) so as to reach his [sic] residence or place of business at least twenty-four hours before the time fixed for the special meeting”.

The evidence indicates that pursuant to the direction given by the mayor on the morning of January 13th, notice of the Special Meeting was given in time to meet the minimum 24 hour notice requirement for special meeting. In addition, the requirement for notice to the public was also met.

However, during the interview process all three complainants attempted to clarify that this part of their complaint related more to the fact that both the open session portion of the Special Meeting relating to the Lakeview subdivision and the closed session portion of the Special Meeting were issues that could have been dealt with during regularly scheduled meetings of council and that to use the “special meeting” provisions of the procedure by-law which required only 24 hour notice was an attempt to limit public input (on the first item) and prevent adequate preparation by members of council (on the second item).

During the interview process this allegation was put to the mayor who had the authority under the municipality’s Procedure By-law to call Special Meetings and his response was twofold – on the Lakeview subdivision issue he felt that that this was an ongoing issue that had dragged on for too long and as the new mayor he felt an obligation to deal with it expeditiously. On the “personal matter” he stated that he had received legal advice that the seriousness of the issue deserved a Special Meeting focused discussion.

With respect to notice, it is beyond the mandate of Amberley Gavel to comment beyond whether or not the requirements of the procedure by-law were met with respect to notice to members of the Council and to the public. The evidence is that the minimum requirements were met for the January 14th meeting.

Nevertheless, Council should consider when it next reviews its Procedure By-law if the notice period is sufficient both to members of Council and to the public, and if their practice has been to restrict the use of Special Meetings for those situations where there is some demonstrated urgency or where there is a major issue that needs focused discussion.

1. ***Allegation regarding “lack of staff member in attendance in the closed portion session”***

It was acknowledged by all the interviewees that only members of council attended the *in camera* session of council. Prior to going into closed session the CAO/Clerk advised council of the need “to have a staff member present” to take minutes. Instead, the mayor simply requested one of the councillors to take notes of the closed session meeting.

Under Section 228 of the Municipal Act it is the responsibility of the Clerk of a municipality “to record…all resolutions, decisions, and other proceedings of council”. It is acknowledged that in certain very specific circumstances it would not be appropriate for the Clerk to attend a closed session of council. Under the Municipal Act, a Deputy Clerk also has all the powers and duties of a clerk. However, it is also acknowledged that in some circumstances it might not be appropriate for even a Deputy Clerk to be in attendance. In these very narrow circumstances the Municipal Act provides an alternative procedure. Under Subsection 228(4) the Clerk may delegate in writing his responsibilities “to any person *other than a member of Council”* [emphasis added].

Accordingly, the proper procedure for the mayor to have followed if he considered it inappropriate to have either the Clerk or Deputy Clerk in attendance would have been for him to request the Clerk to delegate his minute-taking duties either to another staff person or to someone like the municipal solicitor. It then would have up to the Clerk to delegate his authority in writing or for the Council to appoint an Acting Clerk by by-law. None of these steps was taken.

1. ***Allegation that the open meeting portion of the Special Meeting was never resumed***

Following the conclusion of the closed session discussion, the evidence, although somewhat sketchy, is that the council returned to the main council chamber, moved to reconvene in open session and then adjourned. Amberley Gavel Ltd. does not find any breach in procedure in the process followed save for the fact that neither the Clerk nor his delegate minuted this process.

1. ***Allegation that the agenda for the closed session meeting was deficient***

On the instructions of the mayor an agenda was circulated for the Special Meeting that included an item indicating that council would move into closed session to deal with “personal matters about an identifiable individual, including municipal or local board employees in respect to personnel matters”.

The evidence also indicates that the Deputy Clerk appropriately requested the mayor to add some specificity to the original agenda item with the result that he added the phrase “…in respect to personnel matters” to the item. This wording was used in the resolution moved and passed at the Special Meeting prior to going into closed session.

Section 239(4) of the Act not only requires that the resolution identify “the fact of the holding of the closed meeting” but also requires that the resolution identify “the general nature of the matter to be considered at the closed meeting”. These resolutions should not simply mirror the grounds set out in Section 239(2) of the Act. They should be so worded so that a member of the public has some idea of the subject matter of the closed session debate that is to take place.

It is the experience of Amberley Gavel Ltd. (which has undertaken a substantial number of investigations under the Act that many municipal councils often fall short on this requirement. Consequently, Amberley Gavel Ltd. has frequently had to encourage councils to add some specificity to the resolutions used prior to going into closed session.

In this case it is the opinion of Amberley Gavel Ltd. that although the resolution could have added some further specificity without disclosing the substance of the matter to be discussed in closed session (e.g. performance review of senior management), the resolution, as amended by the mayor, does in fact meet the basic standards as set out in the Act.

1. ***Allegation that the closed session minutes were not “in good form” and the motion moved in the closed session was not valid***

As stated above, when council moved into closed session the mayor requested one of the council members to take minutes of the closed session meeting. A council member graciously agreed to do so. The review officer has had an opportunity of reviewing these “minutes”.

The councillor who undertook this responsibility was unfortunately inexperienced in both council procedure and in minute-taking. Accordingly, notwithstanding her best efforts, the notes taken by the council member do not meet minimum standards for taking minutes at a council meeting. The notes are sporadic and difficult to follow.

But, as indicated both in the notes and acknowledged during the interviews, at the end of the *in camera* session a resolution was passed.

However this action was contrary to the provisions in the Municipal Act which prohibit a council from voting on any motion or resolution in closed session. Section 244 reads that “no vote shall be taken by ballot or by any other method of secret voting, *and every vote so taken is of no effect*” [emphasis added].

The only exception to this rule is set out in Subsection 244(6)(b) which allows a vote to be held in closed session *if* “the vote is for a procedural matter or for giving direction or instructions to officers, employees, or agents of the municipality…or persons retained by or other contract with the municipality…” Accordingly, to accomplish what they intended to accomplish in the resolution passed in closed session council should have framed their “resolution” as a direction to the solicitor that they had contacted while in closed session or to another “officer, employee or agent of the municipality”. This they failed to do. Consequently, the resolution that was carried in closed session should not be considered to be effective.

**F. COMPLAINT RELATING TO THE ALLEGED CLOSED MEETING OF COUNCIL HELD “ON OR ABOUT” FEBRUARY 2ND, 2011.**

Two further complaints were received relating to an alleged meeting which “had” to have occurred prior to the meeting of the Committee of the Whole that took place on February 2nd, 2011. Both complaints are similar in their allegations. At the meetings of the Committee of the Whole that occurred on that date a motion was moved to waive the rules of procedure in order to add to the Agenda an item regarding a revised Workplace Violence and Harassment Policy which followed from an Order that had been issued under the Occupational Health and Safety Act.

To the surprise and consternation of at least two of the councillors who had anticipated that the motion would carry, the motion to waive the rules of procedure was lost on a 3-4 vote. The evidence indicates that none of the four councillors (including the mayor) who voted against the motion spoke on the issue. Consequently, the argument of the two complainants was that “obviously” there had to have been a prior “sequential phone call meeting or private [closed] meeting advancing the business of council” of the four councillors who voted against the motion.

During the interview process it was acknowledged by one of the four “dissenting” councillors that there had been some one-on-one prior discussions prior to the meeting of the Committee of the Whole that involved the anticipated motion to waive the rules of procedure.

Accordingly, this complaint can be dealt with fairly briefly with two comments. Firstly, although it might have been helpful if one or more of the “dissenting” councillors had explained why they intended to vote against the procedural motion, there is no legal obligation for any councillor to speak on an issue prior to voting on an issue. Secondly, there is nothing inappropriate for the mayor or any other councillor to individually contact their fellow councillors prior to a council meeting with the intent of encouraging them to vote one way or another on any particular issue. Accordingly, “sequential phone calls” or sequential one-on-one discussions cannot be deemed to be a meeting as defined under the Municipal Act. Rather this is simply part of the political process, trying to persuade one’s colleagues to support or oppose a particular position.

Amberley Gavel is aware of another “closed meeting” report published under Section 239.1 of the Municipal Act that deals with sequential phone calls which were deemed to constitute a meeting. (West Nipissing) This case can be easily distinguished from that report. In the West Nipissing case the sequential phone calls resulted in a council decision that was not followed up by any other formal council confirmation of that decision. In the present case, the sequential phone calls were intended simply to attempt to persuade some other councillors to vote in a particular way at an upcoming meeting.

**G. COMPLAINT RELATING TO AN ALLEGED CLOSED MEETING OF COUNCIL HELD ON FEBRUARY 4TH, 2011.**

A complaint was also received relating to an alleged closed meeting (or meetings) of council that occurred in Orillia on February 4th, and/or 5th, 2011. (Note: although the complaint refers to February “5th”, the evidence indicates that the alleged “meetings” referred to in the complaint took place on both February 4th and 5th.) The uncontested evidence is that on those two days four of the seven member Council attended a two day training session in Orillia. During that training session it was also acknowledged that the four councillors had breakfast and supper together at a restaurant on the evening of February 4th, 2011and the morning of February 5th.

The complainant then alleges that at these breakfast and supper “meetings” these four members of council discussed and agreed to a strategy on a controversial issue relating to the hiring of a consultant to review the municipality’s Workplace Violence and Harassment Policy. The complainant then makes the connection between the breakfast and supper “meetings” and the subsequent vote at a Special Meeting of Council held on February 10th, 2011 to allege that these breakfast and supper meetings constituted “closed” meetings of council contrary to the provisions of the Municipal Act.

The complaint does again raises the vexing question of what constitutes a meeting of council that would trigger the provisions of the Municipal Act.

Unfortunately, the Municipal Act itself is not very helpful in its definition of a “meeting” which is contained in Section 238(1) of the Act:

“meeting” means any regular, special, committee or other meeting of a council or local board

The definition is rather circular and does not advance the conundrum of what constitutes a meeting. Several court decisions have attempted to grapple with the issue and collectively these decisions have established *some* indicia of council meetings:

* Where the purpose of the gathering is to discuss and act upon matters within their political jurisdiction (Southam v.Hamilton- Wentworth)
* Where all members of council are invited to the gathering (Southam v. Ottawa)
* Where the business of council is dealt with in such a way as to move the business materially along (Southam v. Ottawa)
* Where certain formalities are followed (e.g. an agenda, minutes) (Yellowknife Property Owners Assoc. v. Yellowknife)
* Where a decision or consensus is reached (3714683 Canada Inc. v.Parry Sound

I should be noted that 1) not all of these indicia have to be present for a meeting to occur and 2) the presence of any of one of these indicia is not necessarily determinative of the issue as to whether a meeting has occurred. Rather one must look at all of the circumstances of a case with these indicia in mind.

Further, 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 discussions among…members, either alone or with the assistance of staff”.

What makes these particular “meetings” in Orillia admittedly somewhat problematic is that there was a quorum of Council in attendance. (four of seven members). However a gathering of four councillors whether in a social setting or in a city hall environment is not uncommon in small municipalities where a council of seven is the norm. To make quorum the determining indicia in these circumstances would not be realistic.

Further, on the frank evidence of two of the councillors who participated in the training session in Orillia it was admitted that council issues were discussed during their breakfast and supper gatherings and these discussions included the ongoing issue with the Workplace Violence and Harassment Policy. However both councillors denied that any agreement was reached on a specific strategy or the hiring of a particular consultant during these discussions. Amberley Gavel Ltd. accepts this evidence.

Accordingly, although caution should be the watchword when a quorum of council gets together to discuss issues before council Amberley Gavel Ltd. is not satisfied that the gathering of the four councillors at breakfast or at supper during the training session in Orillia should be considered as a “closed meeting” as contemplated under the Municipal Act. The prime purpose of these two “meetings” was sustenance and not strategy.

**H. COMPLAINT RELATING TO AN ALLEGED CLOSED MEETING OF COUNCIL HELD ON FEBRUARY 10TH, 2011**

This complaint, filed by a different complainant, is related to the complaint set out immediately above. This complaint relates to the Special Council Meeting held on February 10th. The second item of the agenda for this meeting read as follows:

To direct staff to commission a review of the Workplace Violence and Harassment Policy by an independent consultant

At the Special Meeting a motion was presented and carried, again on a 4-3 vote to appoint a named consultant to review the Workplace Violence and Harassment Policy. The complaint reads, in part, as follows:

The agenda for this meeting did not include an item to appoint a [specific] consultant and three members of council were completely uninformed as was the public. Three members of council were not given notice that Council intended to suspend the acquisition policy by appointing a consultant nor was the public. Therefore proper notice by the mayor who called this meeting was not done.”

This complaint can also be dealt with briefly. Although an investigator under Section 239.1 of the Act has expanded jurisdiction to consider procedural matter those procedural matters must be “in respect of a meeting or part of a meeting that was closed to the public”. Accordingly, since neither the complaint nor the Minutes of the said meeting disclose any evidence of a closed meeting the investigator has no jurisdiction to consider the validity of the alleged procedural deficiencies set out in the complaint filed

***CONCLUSIONS and RECOMMENDATIONS***

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

1. Notice of the January 14th Special Meeting was properly given in accordance with the Procedure By-law of the municipality.
2. The Council should review its notice period for Special Meetings to both members of Council and the public, and the frequency with which Special Meetings are being called. Consideration should be given to both urgency and transparency in that review.
3. A councillor should not have been asked to take minutes of the closed session portion of the January 14th meeting. Rather the Clerk should have been requested to delegate his minute-taking authority to either another staff person or to an outside agent or consultant present at the meeting. Failing that delegation, an Acting Clerk should have been appointed by by-law, who was not a member of Council.
4. In the circumstances of the case, the January 14th meeting was properly reconvened in open session and then adjourned.
5. The agenda item disclosing the intent to go in camera at the January 14th meeting was properly worded, as amended.
6. The resolution moved and carried in the closed session meeting held on January 14th was not formulated as a direction to any particular staff person or outside agent and accordingly did not meet the requirements of the Municipal Act and should be considered “of no effect”.
7. The complaints relating to the alleged closed meetings that occurred
8. on or about February 2nd, 2011;
9. on or about February 4th and 5th,2011 and
10. on February 10th, 2011

are all denied for the reasons given above.

Only one of the seven members of Council in French River is an incumbent (although the mayor had had previous council experience prior to his election in November). It is this inexperience that partially can be blamed for the procedural errors that are set out above. However based on the training that council has undertaken since the start of this year and the guidance that has been given in this report, it is the hope of Amberley Gavel Ltd. that the council can now address the serious issues facing the municipality in a fair and transparent manner that complies with the provisions of the Municipal Act.

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

AMBERLEY GAVEL LTD.

March, 2011

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