

**REPORT TO
THE CORPORATION OF THE TOWN OF ESPANOLA
REGARDING ALLEGATIONS OF AN IMPROPERLY CLOSED MEETING OF
THE COUNCIL FOR THE TOWN OF ESPANOLA
ON JANUARY 13, 2015**

I. COMPLAINT

Amberley Gavel Ltd. (“Amberley Gavel”) received a complaint about an alleged closed meeting of The Corporation of the Town of Espanola (“Town”) Council (“Council”) held on January 13, 2015. The essence of the complaint is that majority of Members of Council met at 7:00 p.m. on January 13, 2015 to discuss matters relating to the upcoming Council meeting which was scheduled for 7:30 p.m. on January 13, 2015. The complaint alleges that thus a closed meeting was held in contravention of the open meetings provision of the *Municipal Act, 2001*¹, as amended by Bill 130² (“*Municipal Act*” or “*Act*”).

II. 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 Ltd. to undertake the investigation and report to the Council of the Town.

III. BACKGROUND

Section 238 of the *Municipal Act* provides that all municipalities must have a procedure by-law governing the calling, place, and proceedings of meetings, including a provision for public notice of 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 requirement is one of the elements of transparent local government.

¹ S.O. 2001, c. 25.

² *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”).

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. (1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

(2) 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).

Section 239(4)(a) of the *Municipal Act* requires that, “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 the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting”.

Further, section 239(6) of the *Municipal Act* prohibits the taking of a vote in a closed meeting unless:

- a) the *Act* permits or requires the meeting to be closed to the public; and
- b) 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.

In addition, section 239 provides for an investigation about whether or not a municipality properly closed a meeting or part of a meeting to the public:

239.1 A person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,

- (a) by an investigator referred to in subsection 239.2 (1); or
- (b) by the Ombudsman appointed under the Ombudsman Act, if the municipality has not appointed an investigator referred to in subsection 239.2 (1).

239.2 (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an investigator who has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation.

IV. INVESTIGATION

The investigation into the complaint began on February 23, 2015. Documents provided by the Town and reviewed during the course of the investigation included the Town's Procedure and Notice By-laws.

All Members of Council, the Clerk Treasurer/Administrator, the Deputy Clerk, and the Town's Administrative Assistant were consulted during the course of the investigation.

V. BACKGROUND

(a) The Complaint

The complainant indicates that he did not witness a meeting taking place but, rather, was told about it after the fact. He alleges that "I have been informed that a meeting amongst a quorum of Council occurred on January 13, 2015. This meeting did not have an agenda nor was any notification to the public made... It is my understanding that the agenda for the upcoming Council meeting was discussed and directions [with respect to] agenda items agreed upon."

(b) The Boardroom at the Town Offices

It is alleged that the closed meeting at issue took place at 7:00 p.m. in the boardroom of the Town's Office. The Council Meeting was scheduled for 7:30 p.m. on January 13, 2015.

We were told that the boardroom is on the first floor of the building; the Council

Chambers are on the second floor. The Mayor has his desk in an area of the boardroom. The boardroom is also where the Members of Council congregate prior to their meetings to hang up their coats and to collect any materials. It is easily accessible from the lobby of the Town building, although it is down a hallway and one cannot see directly into the boardroom if one is standing in the lobby. If you are in the parking lot of the Town Offices, you can see directly into the boardroom through its windows.

The entrance to the building is under video surveillance.

(c) **Definition of a Meeting**

The word “meeting” is not defined in the *Municipal Act*. However, we have previously defined it as a gathering of a quorum of members of council who enter into discussions that materially advance the business of the municipality or that set the foundation for decisions that would materially advance the business of the municipality at a future date.

VI. ANALYSIS AND FINDINGS

Sometime during the day on January 13, 2015, the Clerk Treasurer/Administrator was advised by the Mayor that a Member of Council had suggested to the Mayor that Members of Council should meet prior to the Council meeting scheduled for that evening for a discussion about issues relating to the municipality. The suggestion was that this gathering would occur at 7:00 p.m. The Clerk Treasurer/Administrator advised the Mayor against this idea, indicating that Council could not properly have a discussion without following the formalities required by its Procedure By-Law and the *Municipal Act* (including public notice and an agenda).

She arrived at the Town Offices at about 7:15 p.m. on January 13, 2015. She had a view through the boardroom windows from the parking lot. She saw that a number of Members of Council were in the boardroom at that time, although she could not see who was there or precisely what they were doing. She proceeded to her office without going into the boardroom and could not hear the discussions that were taking place in the boardroom, other than overhearing one Member of Council talking about the recent termination of a Town staff member.

Sometime later in January, she was told by the Mayor that a meeting had occurred on January 13, 2015 but that he had not participated in the meeting. The Mayor told her that he sat at his desk in the boardroom and that he did not sit at the boardroom table or join in the discussion with others in the room.

Another witness indicated that she was in the Town Offices preparing for the upcoming Council Meeting. She was aware that Members of Council were gathered in the boardroom, although she could not say precisely who was there. She overheard one Member of Council talking about a recent termination of employment of a staff member at the Town. She also overheard another Member of Council say something about “OPP Costings” (an issue on the agenda of Council that evening), although she could not hear

precisely what was said. She was hearing only snippets of conversation.

The Mayor advised Amberley Gavel that a majority of the Members of Council took a tour of several municipal sites on January 13, 2015 during the day. At the end of the tour, one Member of Council suggested that they all meet at 7:00 p.m. on that evening, prior to the Council meeting, to discuss the strategic plans of the Town. The Mayor indicated to the Member of Council that a meeting could not occur unless it conformed to the Town's Procedure By-Law and the *Municipal Act*. The Mayor then discussed the matter with the Clerk Treasurer/Administrator.

The Mayor told Amberley Gavel that he sought the advice of a municipal law expert with respect to this proposed meeting. He received an e-mail opinion from this expert on January 13 which advised that a meeting should not take place. The Mayor indicated that he provided this opinion to the Members of Council.

The Mayor further indicated that he arrived at the Town offices at approximately 7:00 p.m. to prepare for the upcoming Council meeting. He said that five Members of Council came in to the boardroom at staggered times between approximately 7:00 pm. and 7:20 p.m. and sat at the boardroom table for a discussion. He told them it was not a good idea to be discussing municipal issues. According to the Mayor, "they didn't seem to listen or pay attention to him". The Mayor testified that he sat at his desk and didn't participate in any discussions. He told us that the discussions were not about municipal issues and that there was no discussion about the recent termination of a staff member since he had already advised the Members of Council about this termination previously.

Several Members of Council confirmed to Amberley Gavel that a Member of Council had suggested that a general discussion of Members of Council occur just prior to the Council meeting scheduled for the evening of January 13. This suggestion was made at the conclusion of the daytime tour. They recalled that the Mayor had advised against it, in light of the procedural and legislative requirements regarding meetings of a municipal council. They further recalled receiving a copy of the Mayor's e-mail from the municipal law expert about the issue.

The Member of Council who had suggested the idea of an informal meeting was forthcoming in his testimony that he thought it might be a useful undertaking to have an open discussion. He indicated that he had previously worked in the private sector and that it was customary practice in that sector for executives to meet informally to discuss strategic plans. However, he testified that he accepted the advice of the Mayor, and the Mayor's counsel, that the *Municipal Act* prohibits informal meetings of a municipal council, for reasons of openness and transparency. Hence, he did not pursue his idea to have an informal discussion prior to the Council meeting.

Another Member of Council advised Amberley Gavel that, when he and the Mayor were in the boardroom just prior to the Council meeting on January 13, he expressed concern to the Mayor that Members of Council were not told about the termination of employment of a Town staff member. In his opinion, this comment was not advancing the business of the Town; rather, it was to express dissatisfaction that Members of Council only heard about the issue from the public. He felt that he ought to have been told about the matter rather than hearing about it in terms of “coffee shop chatter”. He noted that this subject was not a matter that was on the Council Agenda for that evening.

All of the Members of Council who were interviewed asserted that a meeting did not take place. They were consistent in their testimony that Members of Council were arriving at different times between 7:00 p.m. and 7:20 p.m. and were congregating in the boardroom to hang up their coats and gather their materials, as is customary practice. All were consistent in their testimony that the Mayor was sitting at his desk, preparing for the Council meeting. They asserted that no one in the room was having any discussion relating to the upcoming Council meeting or that would materially advance the decision-making of the municipality.

Based on the testimony of those we interviewed, a quorum of Council would have been present in the boardroom at some point between 7:00 p.m. and 7:20 p.m. However, the Members of Council who were present said that the conversation was casual and mostly centred around the weather, common friends, and the personal purchase of tickets to an upcoming charity event. They said that, at all times, the door to the boardroom was opened.

Town staff were asked by Amberley Gavel to secure the video surveillance tape from that evening. The tape shows that Members of Council, with the exception of Councillor Meikleham, arrived through the front door of the Town Offices between 6:48 p.m. and 7:04 p.m. This evidence is inconsistent with what we were told by the Members of Council regarding their arrival times that evening; rather, it seems to be consistent with the claim that Council did schedule an informal meeting for 7:00 p.m. that evening.

VII. CONCLUSION

As a result of this video evidence, and contrary to the testimony of most of the Members of Council we interviewed, Amberley Gavel has concluded that Members of Council did gather together in quorum on January 13, 2015 to have a meeting. It would have been an improper meeting as it had no public notice, agenda, or recorded proceedings as is required by the *Municipal Act*.

We have no evidence to conclude that the discussion at this meeting related to items on the upcoming Council meeting. However, we certainly see how a reasonable person would conclude that they were discussing Town business just prior to the Council meeting, given the suggestion earlier in the day that they meet informally before the Council meeting.

It strains credibility to believe that they were gathered together a full half an hour before a scheduled Council meeting and only discussed the weather, common friends, and the personal purchase of tickets to an upcoming charity event.

However, we were not able to conclude precisely what was discussed during that meeting. Hence, we cannot say with certainty that matters were discussed which materially advanced the decision making of the municipality or which set the foundation for future decisions by Council. But, we have concluded that a quorum of Council initially gathered with the intention of holding what would have been an illegal meeting to discuss municipal issues.

IX. PUBLIC REPORT

This report is forwarded to the Town of Espanola. The *Municipal Act* provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.

We received full co-operation from everyone that we interviewed during this investigation and we thank them for that co-operation.

Nigel Bellchamber

For AMBERLEY GAVEL LTD.

June 2015