Note: This article is applicable to Ontario. However many of the legal issues are directly applicable to British Columbia Municipal Officials. - cjk

The Conduct of Elected Municipal Officials – Can Their Behaviour be Regulated?**

**This paper was originally presented at the LSUC Six-Minute Municipal Lawyer 2014, May 13, 2014, and has been reprinted with permission.

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"With great power there must also come – great responsibility!"
Stan Lee, *Amazing Fantasy #15* (August 1962)

A. INTRODUCTION

The last four years have witnessed some truly questionable behaviour on the part of elected municipal representatives in Ontario (and beyond) – and not all of it emanating from the larger-than-life persona of Rob Ford in the City of Toronto. The heads of council in major Canadian cities, including Montreal, Winnipeg, Laval, Brampton, London, Mississauga and, of course, Toronto, have all been leading players in various scandals involving corruption, conflicts of interest, ethical behaviour, bias and, in general, conduct unbecoming of democratically elected leaders. Members of council have been equally productive on the bad-behaviour front as they have, in addition to taking part in the foregoing transgressions, also harassed municipal co-workers, berated municipal staff, driven under the influence of alcohol, committed assault and attended meetings in contravention of the open meeting rule.

In November 2013, Toronto City Council took the unprecedented step of stripping Mayor Ford of the majority of his non-statutory powers and placing them in the body of Deputy Mayor Norm Kelly. And yet, Mayor Ford remains the Mayor of Toronto. The general public finds it perplexing that an alleged crack-smoking, alcohol-abusing, serial liar, remains in office.

The regulation of the conduct of local governmental representatives appears to be clearly lacking and the only real mechanism for change (or punishment) is at the ballot box every four years.

Four-year terms were implemented in Ontario in 2006. The *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched., currently provides as follows:

> **Four-year term**
>
> **6**. (1) The *term of all offices* to which this Act applies is *four years*, beginning on December 1 in the year of a regular election.
>
> …
>
> **Term continues**
>
> (3) The holders of offices *continue* to hold office until their successors are elected and the newly elected council or local board is organized.

The truth is that once a person is elected as a municipal councillor, it is very, very difficult to remove them from their office.

B. DECLARATION OF OFFICE

Both section 232 of the *Municipal Act, 2001*, S.O. 2001, c. 25 and section 186 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, expressly provide that a person cannot take a seat on municipal council until they make a declaration of office. The declaration is a standard form established by the Minister of Municipal Affairs and Housing and provides as follows:

> I, _____, having been elected or appointed to the office of _____ in the municipality of _____ do solemnly promise and declare that:
>
> 1. I will truly, faithfully and impartially exercise this office to the best of my knowledge and ability.
>
> 2. I have not received and will not receive any payment or reward, or promise thereof, for the exercise of this office in a biased, corrupt or in any other improper manner.
>
> 3. I will disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*.
>
> 4. I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (or the reigning sovereign for the time being).

While the declaration of office is a required formality for a member to take office, there is no recourse for any violation of the oath. There are no reported judicial decisions that have considered the declaration of office or the implications of a contravention of it (although it was referred to in Justice Cunningham's report on the Mississauga Judicial Inquiry – *Updating the Ethical Infrastructure* (October 3, 2011)).

C. CRIMINAL CODE

The first and second declarations of the municipal oath of office relate to the requirement that members lawfully perform the exercise of the office held by them as councillors. As noted by Leo Longo in his paper, "Duties of a Municipal Councillor" (*IMLA Conference*, September 19, 2006), the declarations "capture the essence…of the *Criminal Code,* R.S.C. 1985, c. C-46, which address the offences of breach of trust, municipal corruption, selling or purchasing an office, influencing appointments and securing secret commissions."

> **Breach of trust by public officer**
>
> **122.** Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.
>
> **Municipal corruption**
>
> **123.** (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who directly or indirectly gives, offers or agrees to give or offer to a municipal official or to anyone for the benefit of a municipal official — or, being a municipal official, directly or indirectly demands, accepts or offers or agrees to accept from any person for themselves or another person — a loan, reward, advantage or benefit of any kind as consideration for the official
>
> *(a)* to abstain from voting at a meeting of the municipal council or a committee of the council;
>
> *(b)* to vote in favour of or against a measure, motion or resolution;
>
> *(c)* to aid in procuring or preventing the adoption of a measure, motion or resolution; or
>
> *(d)* to perform or fail to perform an official act.
>
> **Influencing municipal official**
>
> (2) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who influences or attempts to influence a municipal official to do anything mentioned in paragraphs (1)(*a*) to (*d*) by

(*a*) suppression of the truth, in the case of a person who is under a duty to disclose the truth;

(*b*) threats or deceit; or

(*c*) any unlawful means.

Definition of "municipal official"

(3) In this section, "municipal official" means a member of a municipal council or a person who holds an office under a municipal government.

Selling or purchasing office

124. Every one who

(*a*) purports to sell or agrees to sell an appointment to or a resignation from an office, or a consent to any such appointment or resignation, or receives or agrees to receive a reward or profit from the purported sale thereof, or

(*b*) purports to purchase or gives a reward or profit for the purported purchase of any such appointment, resignation or consent, or agrees or promises to do so,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Influencing or negotiating appointments or dealing in offices

125. Every one who

(*a*) receives, agrees to receive, gives or procures to be given, directly or indirectly, a reward, advantage or benefit of any kind as consideration for cooperation, assistance or exercise of influence to secure the appointment of any person to an office,

(*b*) solicits, recommends or negotiates in any manner with respect to an appointment to or resignation from an office, in expectation of a direct or indirect reward, advantage or benefit, or

(*c*) keeps without lawful authority, the proof of which lies on him, a place for transacting or negotiating any business relating to

(i) the filling of vacancies in offices,

(ii) the sale or purchase of offices, or

(iii) appointments to or resignations from offices,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Secret commissions

426. (1) Every one commits an offence who

(*a*) directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent — or, being an agent, directly or indirectly, corruptly demands, accepts or offers or agrees to

> accept from any person, for themselves or another person — any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favour or disfavour to any person with relation to the affairs or business of the agent's principal; or
>
> (*b*) with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account or other writing
>
> (i) in which the principal has an interest,
>
> (ii) that contains any statement that is false or erroneous or defective in any material particular, and
>
> (iii) that is intended to mislead the principal.
>
> …
>
> **Punishment**
>
> (3) A person who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Criminal charges obviously require proof beyond a reasonable doubt and each of the aforementioned offences carry possible imprisonment for up to five years on conviction.

D. MUNICIPAL CONFLICT OF INTEREST

First enacted 42 years ago, the *Municipal Conflict of Interest Act, 1972*, S.O. 1972, c. 142, was intended to be a complete code respecting conflict of interest respecting local government. This was noted in the introduction of the first reading of the statute in 1972: "This is an important piece of legislation which embodies a new code to govern the entire field relating to conflicts of interest as they may arise in relation to members of municipal council and local boards." It has also been referred to in a number of judicial decisions as a complete code, such as *Harding v. Fraser* (2006), 23 M.P.L.R. (4th) 288 (Ont. S.C.J.):

> The *Municipal Conflict of Interest Act* is a specialized statute and comprises a complete code dealing with conflict of interest.

More recently, Justice J. Douglas Cunningham in his *Report of the Mississauga Judicial Inquiry - Updating the Ethical Infrastructure* (City of Mississauga, 2011) indicated the exact opposite and noted that the *Municipal Conflict of Interest Act* is <u>not</u> a compete code dealing with conflict of interest in the municipal context.

The current *Municipal Conflict of Interest Act,* R.S.O. 1990, c. M.50, has been in the media spotlight the past two years with high profile cases involving Toronto Mayor Rob Ford and Mississauga Mayor Hazel McCallion (both of whom managed to defend allegations of contravention seeking to remove them from office).

The general purpose of the *Municipal Conflict of Interest Act* is not to outright disqualify council members from holding office but instead to regulate how they are to be involved in the decision-making process where they have a pecuniary interest in a matter that is to be considered in a meeting before the council or a committee. The statute prohibits a member (which is very broadly defined) from participating, voting or attempting to influence a vote on any matter that is considered by the council or a committee where the member has a financial interest in the matter. The main provision is subsection 5(1):

> **When present at meeting at which matter considered**
>
> **5**.(1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,
>
> (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
>
> (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
>
> (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

There are a number of exemptions in section 4 of the *Municipal Conflict of Interest Act* which provide a member does not have to declare their interest and recuse themselves from further participation in the matter. Of particular note are the two general exemptions set out in clauses 4(j) and (k), which provide as follows:

> **Exceptions**
>
> **4**. Section 5 does not apply to a pecuniary interest in any matter that a member may have,
>
> …
>
> (j) by reason of the member having a pecuniary interest which is an interest in common with electors generally; or
>
> (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

These two general exemptions have been variously construed and applied. In general, they predominantly appear to have been consistently interpreted broadly by the courts in favour of council members.

If a municipal council member is found to be in contravention of section 5 of the *Municipal Conflict of Interest Act*, the possible sanctions are severe. Pursuant to the mandatory language of clause 10(1)(a) of the statute, a judge is *required* to declare the seat of the member vacant where there is a contravention of the Act and no saving provisions are applicable. However, the courts have demonstrated a historical reticence to remove elected officials from their positions for contraventions of the *Municipal Conflict of Interest Act*.

Subsection 10(1) also provides for discretionary penalties including a disqualification from holding municipal office for up to 7 years and restitution if the member has incurred a financial gain by virtue of their contravention.

As noted above, there are two so-called “saving provisions” in subsection 10(2). If a judge finds that a member or a former member contravened section 5, the judge may nevertheless determine that the member’s seat is not to be declared vacant or the member is not disqualified from holding office if the contravention was committed:

- through inadvertence, or
- by reason of an error in judgment

The judgments are rife with examples of members being excused by one of the saving provisions set out in subsection 10(2).

There have been numerous calls for a reform of the *Municipal Conflict of Interest Act*, including:

- expanding its application beyond just the “pecuniary interest” of members
- allowing for a different enforcement mechanism – the current statute can only be enforced by a private person (an elector in the municipality)
- expanding scope beyond only deliberative and legislative meetings of council and committees
- allowing for additional or different sanctions to be imposed
- permitting a greater involvement by integrity commissioners

E. WORKPLACE HARASSMENT

On June 1, 2010, the Province of Ontario enacted Bill 168, the *Occupational Health and Safety Amendment Act* to impose, *inter alia*, obligations on employers with respect to workplace harassment. The *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1*,* now requires that all employers prepare workplace harassment policies and review these policies as often as is necessary. All employers with more than five regularly-employed workers must post the written policies in a conspicuous location in the workplace.

Prior to the enactment of Bill 168, employers had the duty to take every precaution reasonable in the circumstances for the protection of workers. However, the *Occupational Health and Safety Act* did not outline specific requirements for employers with regards to workplace harassment. Following the enactment of Bill 168, the statute clearly defines the workplace conduct from which employers must protect their workers.

The *Occupational Health and Safety Act* defines "workplace harassment" to mean "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome. "Worker" is defined broadly to include anyone who performs work for compensation. The *Occupational Health and Safety Act* protects all municipal workers (which includes elected officials) from workplace harassment and prohibits all municipal workers (including council members) from engaging in workplace harassment. In the municipal context a "workplace" includes city or town hall.

The *Occupational Health and Safety Act* imposes an obligation on employers to develop and maintain programs to implement workplace harassment policies. These programs must include measures and procedures to report incidents of workplace harassment to employers or supervisors and set out how employers will investigate and deal with incidents and complaints of workplace harassment. Employers are also obligated to provide workers with information and instruction. It is clear that the workplace harassment is intended to and does include elected municipal representatives.

On April 28, 2014, the Town of Milton released the results of a workplace investigation conducted in response to a harassment claim filed against a member of council. The investigation concluded that the councillor's actions and behaviour resulted in an unsafe working environment under the *Occupational Health and Safety Act*. It is interesting to note that the investigation report concludes that the councillor was, in view of the provisions of the

Municipal Act, 2001 and the municipality's own councillor code of conduct, to be held to a higher standard of conduct than that of a reasonable person. Significant sanctions were imposed on the councillor including that he attend an anti-harassment training session and that he was not permitted access to all areas of the town hall, including public areas, except when accompanied by senior management or when attending a council or committee meeting.

F. PROCEDURAL BY-LAWS

Subsection 239(2) of the *Municipal Act, 2001* mandates that a municipality must enact a procedural by-law (a complementary requirement is contained in subsection 189(2) of the *City of Toronto Act, 2006*):

> **Procedure by-laws respecting meetings**
>
> **239**.(2) Every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings.

Procedural by-laws have historically contained provisions pertaining to the "proper conduct" of council members at council and committee meetings, including requirements purporting to impose professional and courteous standards for discourse, discussion and debate at meetings.

Additional provisions in procedural by-law also attempted to regulate or prohibit various discussions or disclosure of confidential information and imbued the head of council, chairs or speakers of meetings with the authority to regulate inappropriate language or conduct, including the authority to order the removal of council members or others not behaving in an appropriate manner at meetings.

G. CODES OF CONDUCT

The *Municipal Statute Law Amendment Act, 2006* amended the *Municipal Act, 2001* to add new Part V.1, entitled "Accountability and Transparency" (also contained in Part V of the *City of Toronto Act, 2006.* The new Part authorizes municipal councils to establish codes of conduct for members of both the council and local boards. A code of conduct generally provides for requirements or standards for ethical behaviour and for compliance with rules, practices, policies and guidelines.

A code of conduct represents the collective will of the council members as to the conduct expected of their members acting in their capacity as members, whether or not at a meeting of the council.

Express statutory authority for a municipal council to establish a code of conduct for its members, and those of its local boards, is contained in section 223.2 of the *Municipal Act, 2001* (and section 157 of the *City of Toronto Act, 2006*) as follows:

> **Code of conduct**
>
> **223.2** (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to establish codes of conduct for members of the council of the municipality and of local boards of the municipality.
>
> **No offence**
>
> (2) A by-law cannot provide that a member who contravenes a code of conduct is guilty of an offence.

As noted above, the statutes specifically provide that the contravention of a code of conduct is *not* a provincial offence.

The authority for the establishment of a code of conduct is permissive for all municipalities in Ontario, except for the City of Toronto where it is mandatory.

A code of conduct, in and of itself, cannot be enforced. A code of conduct requires that a municipality appoint an Integrity Commissioner. Section 223.3 of the *Municipal Act, 2001*, (and section 158 of the *City of Toronto Act, 2006*) empowers a council to appoint an Integrity Commissioner who reports directly to council and who is responsible for performing in an independent manner the functions assigned by the municipality with respect to the application of the code of conduct. There are currently 43 municipalities in Ontario that have appointed an Integrity Commissioner.

Integrity Commissioners can investigate and report on potential contraventions of a municipality's code of conduct. Unless expressly authorized by the council which appointed them, an Integrity Commissioner can only recommend penalties to be imposed on a member if a contravention is found. It is clear that only one or two penalties may be imposed pursuant to either subsection 160(5) of the *City of Toronto Act, 2006* or subsection 223.4(5) of the *Municipal Act, 2001*:

1. A reprimand; or

2. Suspension of the remuneration paid to the member in respect of his or her services as a member of Council or a local board, as the case may be, for a period of up to 90 days.

The penalty provisions in subsection 160(5) of the *City of Toronto Act, 2006* were considered in *Magder v. Ford* (2013), 7 M.P.L.R. (5th) 1 (Ont. Div. Ct.) and were determined to be finite and not subject to expansion or enlargement.

H. ILLEGAL MEETINGS

All meetings of municipal council must be open to the public (see subsection 239(1) of the *Municipal Act, 2001* and subsection 190(1) of the *City of Toronto Act, 2006*). Both statutes contain a number of exemptions to the open meeting rule and permit closed meetings to discuss a number of specific subject matters (if the council deems it appropriate).

The *Municipal Statute Law Amendment Act, 2006* also amended both the *Municipal Act, 2001* and the *City of Toronto Act, 2001* by adding an accountability provision in each statute respecting the right of a person to question and have investigated whether the municipality or city has complied with the open meeting rule or with its procedural by-law in closing a meeting to the public:

> **Investigation**
>
> 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).

A similar provision is contained in section 190.1 of the *City of Toronto Act, 2006*.

Numerous investigations have occurred throughout the entire province under section 239.1. It is curious that the Ontario courts have developed a body of case law that specifies what constitutes a meeting for the purposes of the *Municipal Act, 2001*. Interestingly, the Ontario Ombudsman, who acts as default investigator for municipalities that have not chosen to appoint their own closed meeting investigator, has developed his own "working definition" when investigating alleged illegal meetings.

In his investigation into whether members of council for the City of London held an improper closed meeting on February, 23, 2013, the Ombudsman provided as follows in his report, entitled "In the Backroom" (October, 2013) [at para. 18]:

> …After a review of the relevant case law and principles of openness, transparency, and accountability, I formulated a working definition. To constitute a meeting covered by the *Municipal Act*:
>
> > Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.

Interestingly, in *Southam Inc. v. Ottawa (City)*, [1991] O.J. No. 3659, 5 O.R. (3d) 726 (Ont. Gen. Div.), which is relied upon as an authority for the Ombudsman's working definition, Justice Farley outlined that, in assessing whether a meeting is taking place, it is not sufficient that a matter be discussed or dealt with but that it be "materially" advanced towards a decision. As Farley J. wrote:

> Clearly, it is not a question of whether all or any of the ritual trappings of a formal meeting of council are observed …. The key would appear to be whether the councillors are requested to attend (or do, in fact, attend without summons) a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to <u>move them materially along the way in the overall spectrum of a Council decision</u>. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process? (emphasis added)

There are no sanctions or penalties for a breach of the open meeting provisions.

I. JUDICIAL INQUIRIES

Both the *Municipal Act, 2001* and the *City of Toronto Act, 2006* contain provisions authorizing a municipal council to request a judicial inquiry into various dealings. Subsection 274 of the *Municipal Act, 2001* (a complementary provision is contained in subsection 215(1) of the *City of Toronto Act, 2006*) provides as follows:

> **Investigation by judge**
>
> **274**. (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,
>
> (a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;
>
> (b) inquire into any matter connected with the good government of the municipality; or
>
> (c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors.

The Supreme Court of Canada in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, noted that the purpose of a public inquiry is to inform and educate; to uncover the truth [at para. 37]:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events….There are no legal consequences attached to the determination of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.

A municipal judicial inquiry is very expensive, very time-consuming and may, ultimately, set out a long list of very worthy recommendations that may not be acted upon. A good example is the above-noted Mississauga Judicial Inquiry which ran for several months at a cost of over $6 million. When Justice Cunningham's final report – *Updating the Ethical Infrastructure* – was released on October 4, 2011 it set out numerous recommendations to amend *Municipal Conflict of Interest Act*, *Municipal Act, 2001*, the City of Mississauga's code of conduct and other legislation. To date, the province has not yet implemented a single recommendation set out in the report.

A judicial inquiry commissioner has no right, power or authority to penalize, punish or sanction any person or municipality; the commissioner can only issue recommendations and the requesting municipality and/or province do not have to accept or act on the recommendations.

J. COMMON LAW

(a) Bias

It is a central principle of the law that a decision-maker should be free of bias and should be perceived to not be biased in making their decisions.

The law, however, recognizes that municipal councillors wear many hats and take on various roles. The leading case on the issue of municipal councillor bias is *Old St. Boniface Residents Association v. Winnipeg (City)* (1990), 2 M.P.L.R. (2d) 217 (S.C.C.), where the Supreme Court of Canada provided as follows:

> Some degree of prejudgment is inherent in the role of municipal councillor but a disqualifying bias can be made when a councillor has a personal interest in the matter. Where such an interest is found, both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty.

In a companion decision, a majority of the Supreme Court of Canada in *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 SCR 1213, held that a member of a municipal council is not disqualified by reason of his bias unless he has prejudged the matter to be decided to the extent that he is no longer capable of being persuaded. The majority held that the relevant test is not whether a council member has a closed mind. In this case, the alderman had not reached a final opinion which could not have been dislodged and he was, accordingly, not disqualified by bias.

A council member must be *amenable to persuasion*. The test sets an almost impossible standard of proof.

(b) Breach of Fiduciary Duty

In *Sims v. Fratesi* (1996), 36 M.P.L.R. (2d) 294 (Gen. Div.), it was held that "[a]n elected official stands in a fiduciary relationship with the electorate."

What is required to establish proof of a breach of fiduciary duty by a member of a municipal council? The Ontario Court of Appeal recently considered the question in *Toronto Party for a Better City v. Toronto (City)* (2013), 11 M.P.L.R. (5th) 1 (Ont. C.A.); affirming (2011), 84 M.P.L.R. (4th) 335 (Ont. S.C.J.).

The Court of Appeal determined that while municipal councillors owe a fiduciary duty to municipal taxpayers, a breach of that duty does not result in damages unless there is evidence of one or more of the following:

(a) malice,

(b) conflict, and/or

(c) misfeasance.

On appeal, the not-for-profit appellant argued that a member of council has the same relationship to the municipal corporation that a corporate director has to their business corporation. The Court of Appeal determined that the fiduciary duty of municipal councillors could not be equated to the fiduciary duty of corporate directors; there is no absolute duty imposed on a municipal councillor.

The Court of Appeal also noted that the imposition of absolute liability was at odds with subsection 391(1) of the *City of Toronto Act, 2006* (a corresponding provision is contained in subsection 448(1) of the *Municipal Act, 2001*) which provides as follows:

> **Immunity re performance of duty**
>
> **391**.(1) No proceeding for damages or otherwise shall be commenced against a member of city council, an officer, employee or agent of the City or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.

The threshold standard for proving a breach of fiduciary duty on the part of a member of council is very high.

K. CONCLUSIONS

The law that purports to regulate the behaviour of local government representatives is essentially a patchwork of various pieces, many of which do not carry any meaningful or significant form of sanction or penalty. While some rights of recourse carry very substantial penalties (i.e. imprisonment, loss of office, disqualification from holding a seat on council), the burden of proof is significantly onerous and the scope of challenge is very narrow. Other remedies carry sanctions that amount to little more than a slap on the wrist, if they have any penalties at all while all the while being time-consuming and expensive to pursue.

No wonder that the electorate is left to question the wisdom of extending the term of municipal office to four years and prolonging the only true recourse available to citizens and taxpayers: the ballot box. For many disgruntled voters, the municipal election date of October 27, 2014 cannot arrive soon enough.

John Mascarin would like to acknowledge the assistance provided to him by both Ceili Andrews and Aaron Baer, students-at-law, at Aird & Berlis LLP, in the research and preparation of this paper.