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Conflicting reactions to law that hangs over Rob Ford

By Christopher Guly

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Toronto Mayor Rob Ford has been granted a reprieve from a judge’s ruling that kicked him out of office over conflict of interest allegations. But the debate continues about the law that slapped him with that penalty in the first place.

Some say it’s time to overhaul *Ontario’s Municipal Conflict of Interest Act* (MCIA) in the wake of the controversy that saw Ford potentially removed over a conflict involving $3,150. Others stop short of that, but call for better education of municipal officials about conflicts and their consequences.

Stephen D’Agostino, for one, believes the act is far too restrictive in punishing contraventions, and places too high of a financial burden on both applicants and respondents. Having “electors,” as defined in the current legislation, “enforce the act at their own expense and at their own peril is just not the right approach,” said D’Agostino, a partner with Thomson, Rogers in Toronto who specializes in municipal law.

“There is no reason why a voter should be required to put his house at risk, which is what happens with litigation in Ontario because it’s so expensive when you equate not only the solicitor-client bill but also the risk of costs. That’s a huge burden to put on a ratepayer.”

In rendering his Nov. 26 decision in *Magder v. Ford*, Ontario Superior Court Justice Charles Hackland acknowledged that the law “is a very blunt instrument [that] has attracted justified criticism and calls for legislative reform.”

That view is echoed by a former judge who adjudicated another conflict of interest case in Mississauga. “It appears to me that if other penalties were available, Justice Hackland might well have chosen them,” said Douglas Cunningham, a former Ontario Superior Court associate chief justice, now in private practice as a mediator and arbitrator.

Cunningham, who headed the judicial inquiry into conflict of interest allegations against Mississauga Mayor Hazel McCallion, called for an amendment to s. 9 of the MCIA that would allow the attorney general to bring an application before a judge to review any allegations that an elected municipal official violated s. 5 regarding direct or indirect pecuniary interests.

D’Agostino supports that: “Even if the attorney general thought there was an outrageous conflict of interest going on, he or she has no ability to go to court under the *Conflict of Interest Act*.”

Not unlike the criticism emerging from Canada’s criminal defence bar regarding mandatory minimum sentences, he would also provide the bench with more discretion when imposing a penalty under the MCIA. “The idea of one strike and you’re out is a very clumsy instrument and doesn’t give the court the opportunity to deal with inequities of any given situation, which might suggest something less than the requirement that an elected official vacate a seat when found to have broken the law.”

Steven O’Melia, a specialist in municipal law and a partner in the Kitchener-Waterloo office of Miller Thomson, questions the viability of having “hard and fast” penalties when dealing with conflict-of-interest situations. “Each case has to be decided on its own merits, and there has to be some latitude in applying the rules.”

In O’Melia’s view, s. 10 (1) (a) of the MCIA is a “mandatory maximum,” unless, as the act states, a “judge finds that the contravention was committed through inadvertence or by reason of an error in judgment.”

However, D’Agostino ultimately believes that a faster administrative process is required beyond the courts, and through the creation of an independent agency that would be a hybrid of Ontario’s Office of the Information and Privacy Commissioner and the provincial, or Toronto’s, integrity commissioner.

This new provincial body overseeing conflict-of-interest regulations would receive and review complaints from the public, as well as provide advice to elected municipal officials. “While every municipality generally has a lawyer on staff and smaller municipalities have access to private law firms, those lawyers cannot provide advice to individual councillors because it would be a conflict of

interest," D'Agostino explained.

An integrity commissioner for Ontario municipalities would be able to explain to councillors and school trustees the parameters surrounding ethical conduct as well as assist them in "clearing the air" quickly when they find themselves accused of a conflict of interest.

Ontario municipal law specialist David Shelly offers a different solution, which municipalities can pursue in light of Justice Hackland's decision. "It should be a wakeup call for councillors to have a code of conduct if they don't have one."

Shelly, who leads the municipal law practice group at Nelligan O'Brien Payne where he is a partner, said municipalities should also run regular sessions for politicians and staff on how to avoid conflict-of-interest situations and have in place a risk-management process that can flag potential contraventions. "That will likely reduce the financial impact on the municipality and individual employees, and reduce insurance premiums."

Shelly, who acts for municipalities, doesn't think amending or modifying the MCIA is the answer. "I don't know if the fallout would be any different," he said. "The bottom line is that municipal councillors must be aware that when they take on responsibilities, there is legislation that guides what they can and cannot do."

John Mascarin believes the MCIA "operates just fine" and would not alter s. 10 (1) (a).

"You can participate in council decision-making when you don't have a financial interest," said Mascarin, a partner with Aird & Berlis in Toronto. "If you do not accept that or you are in breach of that—and it is not inadvertent or an error in judgment—then you're going to get a harsh penalty. So you better read the act and understand it beforehand."