

Questions raised about 'draconian' law that saw Toronto's mayor ousted

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TORONTO - Questions are being raised about an all-or-nothing provision in a previously little-known "draconian" law that was thrust into the spotlight Monday after it was used to unseat the mayor of Canada's largest city.

A judge ordered Toronto Mayor Rob Ford ousted after he found him guilty of violating the Municipal Conflict of Interest Act. Judge Charles Hackland slammed Ford for voting on a matter in which he had a financial interest.

But the judge also raised concerns with the legislation by which he was bound. Under the act, a violation of the act must lead to the politician losing his or her seat. With few exceptions the judge cannot exercise discretion on deciding an appropriate penalty.

"The mandatory removal from office for contravening s. 5(1) of the MCI Act is a very blunt instrument and has attracted justified criticism and calls for legislative reform," Hackland wrote.

Toronto's former integrity commissioner David Mullan several years ago described the provision as a "sledgehammer," Hackland noted.

"The city should make every endeavour to persuade the provincial government to either modernize the Municipal Conflict of Interest Act or confer on the city of Toronto authority to create its own conflict of interest regime in place of or supplementary to that act," Mullan said in 2006.

Mullan called it "Byzantine" for the mandatory penalty to be removing the politician from office, no matter the severity of the conflict.

"The problem presented...is that it does not allow for appropriately broad consideration of the seriousness of the contravention or of the circumstances surrounding the contravention."

An exception is built into the act so that a municipal politician found to have violated the act inadvertently will not lose his or her job.

Hackland is not the only judge to have publicly decried the lack of a range of penalties in the act. Ontario Superior Court Associate Chief Justice Douglas Cunningham said last year that "middle ground" options are needed in the act.

"As it currently stands, the sanctions available under the MCI Act are draconian," Cunningham wrote in his final report in a conflict of interest inquiry involving Hazel McCallion, the mayor of Mississauga, Ont.

Cunningham recommended that judges also be able to suspend a politician, put them on some form of probation, remove them from certain roles such as the head of a committee, reprimand them or order them to apologize.

Ontario Premier Dalton McGuinty showed little appetite for amending the act when asked about it Monday.

"That's something for the appropriate ministry to take a look at if they think that might be of some value, but there's nothing that strikes me as being of an emergency nature here," he said.

"I gather it's an act we inherited so I can't speak to the ideas and policies that ultimately inform that legislation."

A spokeswoman for Bob Chiarelli, the minister of municipal affairs and housing, said the ministry is reviewing the act "and is always open to considering recommendations from municipalities and stakeholders."

"We respect the judge's decision in this case," Kelly Baker said in a statement. "It's up to the city of Toronto to determine next steps on how to fill the vacancy on council."

High-profile Toronto lawyer Marie Henein compared the law to the controversial mandatory minimum sentences. The federal government under Stephen Harper has brought in several new mandatory minimum sentences for various crimes that critics have decried as stripping the discretionary power of judges, who are in the best position to evaluate on a case-by-case basis.

"It's a very confining provision because it doesn't focus on the extent of the transgression, how bad the conduct is, when determining what the appropriate penalty is because it's only removal," Henein said.

"That will be the issue, I think, on appeal as to whether or not it is a correct reading of that provision or whether there is another way to read it."

Decisions under the act that see politicians removed from office are "reasonably rare," said lawyer Stephen D'Agostino, who specializes in municipal law. In part, that is because the only way to haul a politician in court under the act is for a citizen to launch an action.

It costs an "inordinate amount of money" to do so and with municipalities footing the legal bills for politicians who are not found guilty under the act, it leaves an "uneven financial playing field," D'Agostino said.

"It's a matter that really cries out for legislative reform," he said.

"We have all kinds of matters where there are provincial agencies and officials that do hands-on investigations — privacy (commissioner) is an example...I see no reason why you wouldn't want to take this burden off the individual voter and (put onto) the provincial agency or ombudsman."