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# OPEN SEASON ON INTEGRITY: HUNTING FOR THE RIGHT SOLUTION FOR BC

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## I. INTRODUCTION

This paper examines the current legislative vacuum in British Columbia in dealing with an elected official's misconduct. The paper then reviews Integrity Office models in other Canadian provinces and takes a look at what type of model could be tailored to suit the needs of BC local governments.

## II. THE ISSUES

During the summer of 2015, in just over 90 days, the following was publicly reported:

- Four of seven councillors in Lantzville resigned leaving the town without enough councillors to convene a meeting[1];
- A White Rock councillor was censured after publishing comments that City lawyers considered to be defamatory[2];
- Volunteer firefighters in Chase complained about bullying by the mayor[3];
- The Pouce Coupe Mayor contacted the RCMP to spur removal of images posted as part of an ongoing dispute with a former elected official[4];
- The Mayor of Saanich admitted that he misled the media about an extramarital affair[5], and subsequently made complaints of misconduct against police and staff at City Hall; and
- The Mayor of White Rock called the RCMP to City Hall in an attempt to remove a former council member from the premises after a verbal altercation over a proposed development application[6].

These examples illustrate the range of concerns local governments may face with the behaviour of a small percentage of their elected officials.

[1] The Vancouver Sun "Bitterness lingers as Lantzville's Council Implodes" by Rob Shaw, May 27, 2015
[2] Peace Arch News. "White Rock councillor censured over online defamation" by Melissa Salley, April 28, 2015. Updated Apr. 28, 2015
[3] CBC News. "Volunteer Firefighters in Chase, BC being bullied by Mayor says complainant" by Doug Herbert, June 19, 2015
[4] Alaska Highway News. "Tensions Flare in Pouce Coupe council dispute." by Johnny Wakefield, June 18, 2015.
[5] The Globe & Mail. "BC Mayor admits he lied to hide extra marital affair." by Justine Hunter, January 12, 2015
[6] Peace Arch News. "White Rock mayor calls in RCMP to eject former councillor" by Melissa Smalley, September 29, 2015

The *Community Charter* was enacted in 2004 and ethical considerations for elected officials were addressed in Part 4, Division 6 and 7 of the *Community Charter* with legislation speaking to conflict of interest; inside influence; outside influence; exceptions from conflict restrictions; gifts; contracts; and the use of insider information. However, legislation directly addressing the "ethical" standards to which elected officials should generally adhere, or explicitly allowing the adoption of enforceable Codes of Conduct, does not exist.

A Council or Board's options to deal with an elected official's misconduct are limited to potential disqualification proceedings and censure. Disqualification is an extreme measure, requiring application to the BC Supreme Court for the disqualification to occur and is available only for conflict of interest violations, failure to make oath of office, unexcused absence from council meetings, and unauthorized expenditures [7]. Alternatively, a Council or Board can pass a motion of censure against an elected official for a breach of duties. Censure is a more commonly used remedy, but it is also cumbersome. For example, if a Council or Board chooses to exercise this remedy, it owes a duty of procedural fairness to the elected official who is being censured. Failure to follow appropriate process may give rise to a judicial challenge against the motion, resulting in it being quashed. Such proceedings are divisive and expensive.

For example, in *Barnett v. Cariboo (Regional District)*, [2009] B.C.J. No. 713, Barnett applied for judicial review of what he alleged was an unlawful meeting of the Cariboo Regional District that purported to pass a resolution restricting his ability to interact with staff. Barnett argued that the CRD did not have jurisdiction to pass the resolution, or in the alternative, that he was denied reasonable notice and procedural fairness. As a foundational consideration, the judge took no issue with the submission that the CRD's Board was entitled to govern its own internal procedure by regulating the conduct of its members. The powers conferred on the Board under the *Local Government Act* are broad, and must be interpreted with a broad and purposive approach which permits the Board to exercise power that is necessarily or fairly implied by statute. The judge found that the weight of statutory and judicial authority suggests that a Board has the ability to determine its own internal procedures, which must include the ability to control misconduct by a Director. Although the Court determined the CRD had jurisdiction, the CRD's failure to give Barnett an opportunity to be heard, or to an impartial hearing, made the disciplinary process inappropriate. The judge clarified that the Board might properly proceed in dealing with the alleged misconduct if the process to do so was clearly articulated.

Further, in *Skakun v. Prince George (City)*, [2011] B.C.J. No. 2531, a City Councillor released a confidential report regarding workplace harassment. A prosecution under the *Freedom of Information and Privacy Act* resulted in a conviction and a fine, and in addition City Council passed a motion to consider censuring and possible sanctions against Skakun for breaching his oath of office. In response, Skakun sought judicial review of the council's motion, claiming that the City had no statutory power to censure for misconduct. In its analysis, the Court acknowledged the reasonable implication that Council has an obligation to regulate a

[7] *Community Charter*, S.B.C. 2003, c. 26, s. 110-111

councillor's misconduct when there is a substantial falling away from the expected standard. The judge warned that although Council may need to state the standard of expected conduct, and may have the ability to do so, the power should be exercised with great care and discretion. Ultimately, the application for judicial review of the Council's actions was dismissed.

In theory, and as supported by the above-mentioned case law, local governments could continue to self-regulate misconduct concerns through censure proceedings. In actuality, when members of a Council or Board are asked to pass judgment on the actions of another elected official with whom they regularly work, the political sensitivities can be challenging and the working relations strained between the elected officials and local government staff.

However, misbehaving elected officials are not unique to British Columbia. In fact, provinces across Canada have faced the same issues and responded by adopting legislation requiring or allowing local governments to implement Codes of Conduct and third party oversight. Reviewing these existing models provides valuable insight into what type of model may be most effective for British Columbia.

## III. MODELS ELSEWHERE

### A. Ontario

The *Municipal Statute Law Amendment Act*, 2006 amended the *Municipal Act* to add an "Accountability and Transparency" part. Under this part, Section 223.3 enables municipalities to adopt a Code of Conduct for members of Council and local boards, and to appoint an Integrity Commissioner ("IC") to address the application of the Code. The legislation also provides that the IC can be delegated, any or all, of the procedural and policy decision-making authority surrounding the enforcement of Codes of Conduct for elected officials.

Pursuant to section 223.4, an IC has the power to respond to investigation requests related to suspected contraventions of the Code of Conduct as reported either by elected officials or the public, and has the right of free access to all records of a municipality, a Councillor or a local board that the IC believes is necessary to investigate an inquiry. The IC may recommend a reprimand or a suspension of the remuneration of the local board or Council member for a period of up to 90 days. This financial penalty is central to the IC's jurisdiction functioning effectively.

This provincial legislation empowers municipalities to adopt a bylaw establishing the Office of Integrity Commissioner. Approximately 10 percent of Ontario local governments have elected to do so. The most notable example is Toronto.

1. City of Toronto

The City of Toronto was the first municipality in Canada to create the Office of the Integrity Commissioner. Under the *City of Toronto Act,* the IC is responsible for performing in an independent manner the functions assigned by City Council with respect to the application of the City's Code of Conduct and related policies. The *Toronto Municipal Code* stipulates the requirements for the IC, including a five year appointment, and sets out the IC's mandate:

- **Advisory**: To provide advice on the application of a Code of Conduct and other City or local board by-laws, policies, and protocols to a member's conduct, and general advice with respect to a member's obligations under the *Municipal Conflict of Interest Act*;

- **Complaint Investigation**: To conduct inquiries under the Act on whether a member of Council or a local board has contravened a Code of Conduct;

- **Reporting**: To provide opinions on policy matters and make other reports to Council or a local board on issues of ethics and integrity; and

- **Education**: To provide educational programs to members of Council, local boards, and their staff on issues of ethics and integrity.

Toronto's Integrity Office directive has influenced other local governments across Ontario. The mandatory nature of Toronto's model has provided a baseline for other Ontario municipalities, but local government needs vary, such as is demonstrated by the City of Vaughan.

2. City of Vaughan

In 2009, the City of Vaughan appointed a part time IC who works with the Accountability and Transparency Committee, enforces the Code of Conduct of Members of Council, and supports confidentiality, accountability and transparency regarding City Council functions. The bylaw establishing the Code of Conduct is comprehensive, and has been a model adopted by other municipalities. Producing an annual report is also part of the IC's stipulated duties. The 2011 report detailed the number of formal (11) and informal (21) complaints received in 2009, and noted that the number of informal advisory opinions doubled over the same time period. These numbers seem to support the inference that Councillors were better informed on the application of the Code of Conduct. The City of Vaughan IC confirms that in her opinion, the educational and training roles of her Office were critical and that public reporting rather than sanctions was the strongest deterrent to Councillors' misbehaviour.

3. City of Mississauga

The City of Mississauga illustrates another approach to the Office. The Code of Conduct adopted by Mississauga is substantially similar to that of the City of Vaughan. The approaches differ, however, when it comes to the formal complaint process. Where the City of Vaughan requires complaints to be submitted to the City Clerk and the elected official involved, under Mississauga's bylaw complaints are sent directly to the IC. Although the IC in Vaughan ultimately receives all reports, the City Clerk's role as an intermediary removes some of the IC's discretionary ability about whether to conduct an investigation or not.

The 2014 annual report released by the City of Mississauga stated that elected officials requested advice 22 times throughout the year, and that no formal complaints were filed. The IC also reported that he received 18 requests for investigation and summarily dismissed 11 of them. These numbers suggest a positive role for the IC in a more advisory capacity to the elected officials rather than simply a punitive investigatory and regulatory role.

As mentioned, approximately 40 municipalities out of 422 in Ontario have created an Integrity Commissioner Office. Notably, most of these have opted to implement the Office by sharing the IC between multiple municipalities. From a budgetary standpoint, a shared IC is an efficient solution to fund an Office.

## B. Alberta

Section 145 of the *Municipal Government Act* (MGA) provides Council with discretion to pass a bylaw in relation to the conduct of elected officials, members of council committees and other bodies established by Council.

In March, 2015 s. 145 of the MGA was amended to require that Council establish, by bylaw, a Code of Conduct governing councillors' conduct. The amendments call for all local governments to develop and adopt a Code of Conduct that meets minimum standards outlined in the MGA. The Code of Conduct must also address enforcement and administration of the Code of Conduct at the local level. The amendments to the MGA have received Royal Assent but are not yet in force.

In early 2015, members of Calgary's City Council voted to create a part time IC. The proposed position stems from numerous complaints against members of Council over inappropriate behaviour at City hall.[8] On April 27, 2015 Calgary City Council affirmed its commitment to becoming the first Council in western Canada to appoint an IC. The stated goal of the position is to serve as a valuable resource to both Council members and Calgarians in regard to matters relating to Council members' ethical duties.[9]

### C. Saskatchewan

Section 55(b)(ii) of *The Cities Act* provides that Council may establish "rules for the conduct of Councillors, of members of Council committees and of members of other bodies established by council". A recently proposed amendment requires mandatory adoption by all municipal councils of a Code of Ethics that includes a model code of ethics developed in consultation with municipal partners. The amendments were introduced in late October 2015 and have not yet been enacted.

## IV. ANALYSIS OF MODELS

Overall, several Provinces are looking to create Codes of Conduct to assist elected officials. However, the Ontario experience is by far the most relevant and indicates that a provincially legislated voluntary model is viewed favourably, with ICs agreeing that optional participation encourages local government buy in. Unfortunately, the Office is usually created in response to a scandal, which is not ideal for creating appropriate legislative responses.

Further, appointment and removal of the IC present a challenge. In Ontario, the IC is selected after open "bidding" and a RFP process. Council may terminate the IC at its pleasure, subject to a vote by Council members. The dependence upon Council discretion in selecting and removing an IC arguably interferes with the impartial role of an IC. In theory, an IC's investigation could have negative ramifications on the Council and individual elected officials.

Budget is another area of concern. Existing models in Ontario allow for either a set amount of dedicated funding, regardless of the number of investigations, a per hour payment directly to the IC, or some combination of set amount with discretionary funding should investigations occur. As mentioned above, some Ontario local governments can share IC services. Accordingly, most IC are part time contractors.

A recurrent theme in all Ontario models examined is the importance of the educational component of the IC's Office. Structured programs offered through an IC's Office give elected officials the guidance and information they need to know without creating a punitive

[8] Vancouver Metro "Apologies demanded for drinking innuendo that made Calgary council the 'laughingstock of the country'" by Robson Fletcher, January 25, 2015.

[9] Integrity Commissioner – Proposed Terms of Reference and Recruitment Strategy. Corporate Administrative Report to the Priorities and Finance Committee City of Calgary, April 21, 2015.

atmosphere. A proactive model, where the local government approaches accountability through pre-emptive educational programs, may solve many of the problems elected officials and local governments face before the misconduct even starts. This proactive solution would offer greater opportunities for both formal and informal conflict resolution, and may reduce the number of formal complaints. This would seem to be, inarguably, the most important component of the Office of the IC ("OIC").

## V. A MADE IN BC SOLUTION?

Elected official's misconduct is a serious concern and many would say anecdotally is on the rise. Local governments are poorly equipped to deal with such situations and have resorted to censure proceedings in an attempt to control elected official's misconduct. Such hearings are legally cumbersome, expensive and usually result in inadequate resolution. The environment created by the censure hearing often divides elected officials from local government staff and can have long term negative consequences on the work environment. It would appear there are better ways to deal with such challenges.

Several other Canadian jurisdictions have adopted, or are looking to adopt, Codes of Conduct that are administered by an appointed OIC. This OIC has the benefit of dealing directly with elected officials in primarily an educational capacity. The IC is the "sounding board" for the elected officials - a person not currently available to elected municipal officials in BC. The educational component aside, the IC is also charged with the investigation and enforcement of the Code of Conduct removing other elected officials and local government staff from the process. Sanctions come directly from the IC. This is the significant benefit of removing the corporate local government from the investigative process and is, arguably, much more equitable for the elected official.

It would seem that the Province would be well advised to empower BC local governments with similar powers to Ontario local governments so that those local governments that wish to establish OICs could do so. BC is uniquely positioned to review the advantages and disadvantages of the Ontario legislation and customize the legislation to our jurisdiction accordingly. The creation of BC OICs would be a significant step forward for local government, elected officials and the public.

## NOTES