ETHICS IN LOCAL GOVERNMENT:

ATLANTIC CANADA CONFLICTS OF INTEREST ENFORCEMENT MECHANISMS—PATHWAYS OR ROADBLOCKS TO A CULTURE OF ETHICS

Legislative Note

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I. INTRODUCTION

Gary Wheeler was an active businessman involved in four private companies. He was also involved in local politics. Between 1974 and 1977, three of these companies entered into contracts with the City of Moncton. Mr. Wheeler was the Mayor for the City of Moncton during that time. Eventually, he was disgraced amd removed from public office. The circumstances of his downfall led to the current conflict of interest provisions of the *Municipalities Act* of New Brunswick.[1] However, even strict conflict of interest rules cannot prevent abuses of public office as evidenced by the Toronto scandal that led to the Bellamy Report in 2005.[2]

The democratic experience is quintessentially human with its many strengths and weaknesses. Conflicts of interest have always had a personal dimension. Ethical lapses are a the perennial bane of democratic governments. Nowhere is that felt more acutely than at the local level given the close proximity between citizens and City Hall.

The issue is always one of trust: trust in public officials who spend public money. Those in control of public funds have a special duty to the public. They must discharge their duty fairly and objectively and they must be seen to be doing so. But that trust can be and is often broken.

As shown by the Bellamy Report, cultures of accommodation often prevail over cultures of ethics. Faced with that truth, have the Atlantic provinces responded

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1 *Municipalities Act,* R.S.N.B. 1973, c. M-22, s. 90.1 to s. 90.9.

2 City of Toronto, *Toronto Computer Leasing Inquiry; Toronto External Contracts Inquiry Vol 1 Facts and Findings (The Bellamy Report)* (Toronto: City of Toronto) online: < http://www.toronto.ca/inquiry/inquiry_site/index.html>.

well to local conflicts of interest? Although all Atlantic provinces have attempted to curtail and prevent municipal conflicts of interest, each has utterly failed to provide a useful and efficient behavioural framework within which municipal officials can thrive ethically.

I. CANADIAN DEMOCRATIC COMMUNITY IN MOTION: THE ERADICATION OF LOCAL CONFLICTS?

Unrelenting public pressure for more ethical and municipal governance has been a staple of democratic reform over the past thirty-five years. Conflict of interest rules have been part of this movement.[3]

The Supreme Court of Canada has provided a helpful but narrow definition of municipal conflicts of interest:

> It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. 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 reasonable, well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.[4]

This test has usually been applied where there is a pecuniary interest in the matter. Of course, there are other interests. They are not inherently anathema to public life. Man is a gregarious animal who must interact with others to thrive and flourish. Interests are inescapable for they are quintessentially human.[5] What becomes important is not so much their presence as what is done about them.[6]

In the context of Canadian municipal politics, a conflict of interest is the clash of a private interest with a public duty.[7] The underlying moral concern addressed by conflict of interest legislations has been delineated as follows:

> This enactment, like all conflict of interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well meaning men and women may be impaired where the personal financial interests are affected. Public office is a trust conferred by public authority for public

3 *Municipalities Act*, *supra* note 1.

4 Old St. Boniface Residence Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170, at para 92, 75 D.L.R. (4th).

5 Gregory J. Levine, *The Law of Government Ethics - Federal, Ontario and British Columbia* (Aurora: Canada Law Book, 2007) at 9.

6 *Ibid.*. at 11

7 *Ibid.* at 8. This definition is relevant to all walks of public life.

> purpose. And the *Act*, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interests may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.[8]

II. CONFLICTUAL INTERESTS IN LOCAL GOVERNANCE AND THE URBAN PHENOMENON

Exploding urban growth in Canada is defining and shaping city politics. Already in 1995, a study noted that three-quarters of Canadians lived in urban settings, a trend that continues to this day. This trend has resulted in population overspills in suburban and rural areas.[9] Urbanization of Canada is further magnified by amalgamation initiatives that have led to megacities like Winnipeg Unicity, Toronto Megacity, or Halifax Regional Municipality. City politics matter.[10]

Nation-wide, municipal government is evolving, growing, and becoming more complex. In recent history, with the transfer of fiscal and infrastructure responsibility to local governments, cities are assuming more and more importance. The budget of the City of Toronto, Canada's largest city, is larger than the budgets of six provinces. Yet, this is the level of government that is closest to the people in that it is the most visible with close interaction between voters and councillors.[11]

In this socio-demographic landscape, avoidance of conflicts of interest in municipal governments is critical for two reasons. First, decisions made by municipalities should reflect the values of the electorate without being skewed by the private interests of councillors and officials. Second, because these decisions affect the rights and privileges of individual citizens, those affected should have confidence that the process leading to those decisions is fair.[12]

Local government has been described as the cornerstone and training ground for democracy.[13] Local self-government can be considered a matter of democratic principle. If municipalities are to play an important role in the twenty-first century,

8 *Moll v. Fisher*, (1979), 23 O.R. (2d) 609 at para. 6, 96 D.L.R. (3d) 506.
9 Igor Vojnovic, "Municipal Consolidation, Regional Planning and Fiscal Accountability: The Recent Experience in Two Maritime Provinces", (2000) 23:1 Canadian Journal of Regional Science 1.
10 Patrick J. Smith & Kennedy Stewart, "Making Local Accountability Work in British Columbia, Report 1 - Reforming Municipal Non-Electoral Accountability" *Institute of Governance Studies, Simon Fraser University* (June 1998) 2 online: Legislative Assembly of British Columbia< http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/322342/intro.pdf>.
11"Forum on Municipal Governance and Accountability: A Summary Report" *Institute on Governance* (15 June 2006). online: Institute on Governance < Institute on Governance, Forum on Municipal Governance and Accountability>.
12 Felix Hoehn, *Municipalities and Canadian Law - Defining the Authority of Local Governments* (Saskatoon: Purich Publishing, 1996) at 106.
13 *Report of Lord Durham on the Affairs of British North America* (Quebec: 1839) at 60 & 67, and Alexis de Tocqueville, *Democracy in America*, (Oxford: Oxford University Press, 1835).

they must reassert themselves as municipal governments, centred on elected bodies that make political decisions. The municipal council must be recognized as a political mechanism for expressing and responding to the collective concerns of members of the community.[14] The modern view of the local government is that municipalities are a responsible order of government accountable to the people.[15] Accordingly, political issues must inform the actions of Canadian municipalities if they are to remain significant cultural repositories and centres of our democratic traditions.[16] It follows that if city politics matter, so do generally municipal ethics and more specifically, conflict of interest.[17]

III. THE ESSENCE OF THE PROBLEM

Typically, municipal conflict of interest statutes do not declare "conflict of interest" an offense. It is the failure to disclose a conflict of interest which creates the offense.[18] What is so abhorrent in undisclosed conflicts of interest?

Undisclosed conflicts of interest in public life are toxic to a democratic socio-political environment. They violate core values of the democratic process in a way that undermines the fabric of the democratic community. Their fumes are noxious to our political culture. They are a scourge to eradicate by devising value-based mechanisms that achieve balance between competing values of efficiency and process. When that balance is reached, an ethical local authority is an efficient authority by all standards.

Effective local governance requires a bond of trust between the community and those who serve the community in public life. That trust requires for transparency and openness from municipal councils and local administrations, and clarity about where decisions are taken and who is to be held accountable for them.[19]

A strong foundation of ethical values affects the architecture of public governance. In Canadian local politics, the public expects its officials to serve the public's interests only. After all, public office is a public trust conferred by public authority for public purpose.[20]

Often, ethical lapses from public authorities result not so much from malevolent misconduct, but rather from a dark subculture of accommodation in servicing

14 C. Richard Tindal & Susan Nobles Tindal, *Local Government in Canada*, 6th Ed. (Toronto: Thomson Nelson, 2004) at 371.

15 *Municipal Government Act*, S.N.S. 1998, c. 288, preamble.

16 Patrick J. Smith, *supra* note 10 at 15.

17 *The Bellamy Report*, *supra* note 2, speaks eloquently to the critical importance of integrity and fairness at the local level.

18 *R. v. Carson*, (1986), 71 N.B.R. (2nd) 119 (Q.B.) Miller J. appealed on other grounds, (1987), 78 N.B.R. (2nd) 364 and (1987), 81 N.B.R. (2nd) 189 (C.A.).

19 Scotland, The Scottish Office, *A New Ethical Framework for Local Government in Scotland, The Scottish Office*, online: The Scottish Office <*http://www.scotland.gov.uk/library/documents3/ethic-02.htm*>.

20 *Moll v. Fisher*, *supra* note 8.

self-interest and efficiency at the cost of integrity. Indeed, it raises an ongoing tension between the ever-increasing emphasis on efficiency and the requirements of due administrative process.

In local governance, an ethical framework is a set of principles that govern the behaviour of the elected and appointed officials. Values like accountability, integrity, honesty, openness, and observance of the law should determine the way these officials behave in carrying out their duties in the public interests. Building that bond of trust between local governments and their communities requires a deep understanding of the inherent values of ethical behaviour for the democratic process and an unwavering commitment to promoting a positive value-based code of ethics that is process-oriented.

Accountability implies that high ethical standards are expected from elected and appointed officials in the conduct of local public affairs. Indeed, they must be driven by an ethical obligation to exercise the power entrusted to them with the utmost care and strictly to the benefit of those to whom they are responsible. Their decisions, therefore, must be motivated by considerations of public interest and their actions subjected to public scrutiny at all times. Thus, the purpose of ethics in this context is to promote integrity and inform proper standards of value-based acceptable public behaviour.

Accountability in local governance should be an opportunity to demonstrate achievements and stewardship. It should be the condition *sine qua non* for establishing effective relationships, for getting things done, and for taking responsibility. There is a clear link between accountability and public trust.

As ethical issues in local governance are increasingly brought to the attention of academics and the general public alike, the issue gradually shifts from traditional enforcement mechanisms predicated on prosecution and punishment to mechanisms which promote ethics as principles of good conduct. In local governance, a positive ethical environment values accountability not as a negative tool of assigning blame and punishing wrongdoing, but rather as a powerful positive incentive.

IV. MUNICIPAL CONFLICT OF INTEREST LAWS IN ATLANTIC CANADA

Provincial involvement in municipal conflict of interest has often been reactive, mostly in response to scandals. Provincial political embarrassment precipitated by inappropriate municipal actions has provided the necessary impetus to legislate. Thus, first generation municipal conflict of interest laws have been mostly punitive in nature, reflecting the outrage of the moment.

The genesis of the current statutory municipal conflicts of interest provisions in New Brunswick can be traced to *The Queen v. Wheeler*.[21] The *Municipalities Act* was amended in early 1980 in large measure as a result of that case. Prior to *Wheeler*, there were no straightforward provincial guidelines and the provincial approach was a patchwork quilt of *ad hoc* measures.

In *Wheeler*, the appellant had sought the issuance of a writ of *quo warranto* to disqualify Gary Wheeler, the Mayor for the City of Moncton. While in office, Mr. Wheeler held shares in four different private companies and also held various officer functions in them. Three of these four companies had concluded contracts with the City of Moncton, but when these contracts were introduced to the municipal council, Mr. Wheeler had disclosed his interest and had refrained from participating in discussions and from voting.

The only statutory provision at the time that dealt with conflicts of interest was in the enabling act of the City of Moncton, the *Moncton Consolidation Act of 1946*.[22] Section 6 of that *Act* provided as follows:

> "No person shall be qualified to be elected or to serve as Mayor or Alderman so long as he shall hold in an office or place of profit in the gift or disposal of the Council, or during such time as he shall directly or indirectly otherwise than as a shareholder in an incorporation company, have any interest in any contract made with the City of Moncton...."

The Court of Appeal of New Brunswick had relied on the wording "otherwise than as a shareholder" in s. 6 to shield Mr. Wheeler from the application of that statute. In so doing, the Court of Appeal of New Brunswick applied an English case that held that an officer in a company did not have any direct or indirect interest in the contracts of the company.

The Supreme Court of Canada decided, however, to do away with English case law. The Court noted, at paragraph 12, that a statutory provision, including words "direct or indirect interest in a contract", should receive a liberal interpretation and should be deemed remedial. The Supreme Court of Canada therefore set out on a path of its own to determine the extent of the interest that an individual may have had in the following way:

> "It is unrealistic to believe that as a general principle of human conduct, a director or officer of a contracting company does not have at least an indi-

21 [1979] 2 S.C.R. 650 [*Wheeler*]. In Ontario, the 1972 *Municipal Conflict of Interest Act* came in the wake of Regina ex rel. *McClain v. Whitton* [1968] 1 O.R. 128 (H.C.) and *Regina ex rel. Kamstra v. Caldarelli et al. (No. 2)* [1972] 1 O.R. 200 (H.C.).
22 N.B. 1946 c. 101 chap. 101, s. 6.

rect interest in the company's contracts."[23]

The Court held the mayor had acted in violation of the statute and removed Mr. Wheeler from the office of Mayor of the City of Moncton. The Court pointedly noted that it had reached that conclusion although the evidence clearly showed that the Mayor had always acted in good faith and in a transparent fashion. The Court noted that there certainly was no evidence of any attempt on the part of the mayor to be deceptive in the form and mode of disclosure he chose by him but that nonetheless, the rigors of the statute had to be met. The Court also took the liberty of observing that the *Act* dated from 1946 while the province of Ontario had adopted conflict of interest provisions in 1972. The Court finally noted that the policy concept behind such legislation was a matter entirely within the authority of the Legislature and not for the courts to determine.

The context of the *Wheeler* case is important since at that time, no provincial statutory provisions in New Brunswick dealt with municipal conflicts of interest. The criticism of the Supreme Court of Canada had a significant impact and soon thereafter, the *Municipalities Act* was amended to provide the current conflict of interest provisions for local governance.

The influence of the *Wheeler* case on the government of the day can be seen from an excerpt from the Hansard of the Debates surrounding the Bill introduced at the Legislature. The government of the day adopted as a principle that businesspeople should be involved in local affairs.

This public policy choice was showcased in New Brunswick in 1981 by the then Minister of Municipal Affairs:

> The principle behind this conflict of interest legislation is that a businessman or a person who might do business with the municipality can be elected as a member of a council and still do business with the council. It is a difference between this legislation and the Conflict of Interest Act under which members of the legislature have to file each year: they are not allowed to do business with the government. All a councillor, a mayor or an employee has to do is file a list of his interests, but he does not have to give any details about these interests.[24]

The Minister then added:

> The government felt that in the best interest of a municipality, there

23 *R. v. Wheeler*, *supra* note 21 at para. 12.

24 New Brunswick, Legislative Assembly, *Journal of Debates (Hansard)*, 3rd Ed., 49th, Vol. VIII, (1981) at 3449 (Hon. Horace Smith).

> should be a representation of business as well as of other groups in the community. We don't feel these people should be restricted from running for council and contributing their business expertise.[25]

This was the social and judicial context of the time when the *Municipalities Act* was amended. The resulting statutory provisions on municipal conflicts of interest showed a clear public policy choice by the Legislature to allow business people to be involved in municipal politics without prejudice to their business interests.

The fundamental feature of contemporary municipal conflict of interest rules everywhere including Atlantic Canada is that they are the result of legislation rather than the end product of judge-made law. The Supreme Court of Canada has pointedly stressed the importance of conflict of interest legislation as a mean of securing core values of democracy:

> ... qualifications for the election to and the holding of high office in all levels of government are a matter of considerable importance in the functioning of the democratic community. The sanctity of these offices and the strict adherence to the conditions of occupying those offices must be safeguarded if democratic government is to perform up to design. Therefore, these enactments as they are brought before the courts in applications in quo warranto and otherwise, must be given their full application according to law.[26]

Policy concepts behind this legislation are matters within the exclusive purview of legislatures rather than the courts:

> Some Legislatures in our country have recently adopted a different approach to this problem... The Province of Ontario, for example, ... in 1972 enacted a simple provision requiring only the disclosure of interest by the office holder to the public body in question. ... All these considerations are, ..., exclusively for the Legislature.[27]

The legislative challenge is therefore to devise a local government framework that promotes rules of ethical conduct which fulfill the ideals of the democratic local community.[28] However, lack of harmony has woven a municipal ethic patchwork quilt varying from province to province. The Atlantic provinces' responses to conflict of interest issues and their enforcement mechanisms are a case in point.

V. CURRENT MECHANISMS OF CONFLICT OF INTEREST

25 *Ibid.* at 3450-3451.
26 *Wheeler, supra* note 21 at para. 19.
27 *Wheeler, supra* note 21 at para. 21.
28 *Wheeler, supra* note 21.

PREVENTION

Understanding the current enforcement mechanisms in Atlantic Canada requires a consideration of the common conceptual underpinning to all provincial jurisdictions on municipal conflicts of interest.

There are several mechanisms by which conflicts of interest are regulated at the municipal level. Besides the classic common law rules governing municipal office holders, the *Criminal Code of Canada* provides for extreme municipal misconduct. Moreover, conflict of interest statutes are in effect from province to province. They vary in scope, stringency, and sophistication from one province to the next.

While some provinces have enacted specific conflict of interest legislations, others have added in the general municipal statutes provisions dealing with conflict of interest. The central thesis of these enactments is that a local political decision-maker should not be influenced in his voting by having a personal interest in the matter being voted on.[29]

There are basically two ways conflict of interest statutes may deal with the problem. One is to disqualify anyone with a conflicting interest from seeking or holding public office. This is a codification of the law relating to fiduciaries. The other approach promotes disclosure and withdrawal. It is now the generally accepted municipal government standard. The basic tenets are timely disclosures of the interest, abstaining from the discussions and from voting on the matter out of which the conflictual interest arose. Penalties such as vacating seats and prohibitions from running for office for a certain number of years are common.[30]

The disclosure approach to conflict of interest allows people with potentially conflicting interests to serve, provided they comply with disclosure and abstention. Thus, the requirement of disclosure replaces disqualification as a check on conflicts of interest.[31]

Disclosure and abstention have therefore been the predominant legislative experience in the various Canadian jurisdictions.[32] Under the disclosure and abstention model, the evil to eradicate is not the conflict of interest itself, which is accepted as an unavoidable feature of the human experience, but rather the failure to disclose this conflict of interest and abstain from discussions and voting, which is deemed repulsive to democratic values.

29 Stanley M. MaKuch, Neil Craik & Signe B. Leisk, *Canadian Municipal and Planning Law*, 2d ed., (Toronto: Thomson Carswell, 2004) at 259.
30 *Ibid.* at 261.
31 *Ibid.* at 262.
32 Michael Richard O'Connor, *Open Local Government 2: How Crucial Legislative Changes Impact the Way Municipalities Do Business in Canada* (St. Thomas, Ontario: Municipal World Inc. 2004) at 156.

One of the central features of all municipal conflict of interest legislation is that it creates an onus on the elected or appointed officials to continuously reassess their situation in relation to existing conflict of interest rules. They are self-regulating systems to a large extent.

However, forcing withdrawal when in conflict and fostering a culture of ethics are not necessarily on the same plane. It has been shown in recent legal history that ethical behaviour should and must be predicated on codes of ethics and a comprehensive system of ethical education aimed at elected and appointed officials.[33] Simplistic enforcement mechanisms are not conducive to a flourishing and dynamic ethical culture. Their effectiveness should be anchored in administrative policies in the nature of codes of ethics. When statutory enforcement mechanisms and codes of ethics are implemented in symbiosis, the seeds are sown for the flourishing of a dynamic and progressive culture of ethics.

VI. PATCHWORK QUILT OF ENFORCEMENT MECHANISMS IN ATLANTIC CANADA

The scope and breadth of legislation on conflict of interest in Atlantic Canada varies from one jurisdiction to the other. The common feature to all conflict of interest statutes across Atlantic Canada is the fact that none defines what constitutes a "conflict of interest". Only Nova Scotia has conflict of interest provisions outside the core municipal legislation. All other Atlantic provinces have conflict of interest legislations imbedded in their core municipal acts. New Brunswick and Nova Scotia subject both elected officials and appointed officials to conflict of interest legislation. Prince Edward Island and Newfoundland and Labrador provide for prevention of conflict of interest legislation for elected officials only. Enforcement provisions vary wildly.

1. Prince Edward Island

In Prince Edward Island, s. 23 of the *Municipalities Act* prohibits any member of council from deriving any profit or financial advantage from his position as a member of council.[34] Where a member of council has any pecuniary interest in or is affected by any matter before the council, he shall declare his interest therein and abstain from the voting and discussion thereon.

Only elected officials are therefore subject to the conflict of interest provision in Prince Edward Island since the core municipal acts are silent regarding appointed officials. There are no other devices or mechanisms mandated by the Province to foster ethical conduct. Enforcement

33 Such is the thrust of the recent amendments to the *Ontario Municipal Act, 2001*, S.O. 2001, c. 25. These views were at the heart of the recommendations of the *Bellamy Report* in Toronto, *supra* note 2.
34 *Municipalities Act*, R.S.P.E.I. 1988, c. M-13, *Charlottetown Area Municipalities Act*, R.S.P.E.I. 1988, c. C-4.1, s. 20, 95, *City of Summerside Act*, R.S.P.E.I. 1988, c. S-9.1, s. 20 contain similar wording.

mechanisms are not spelled out, indicating that violations must be challenged by judicial review in the nature of *quo warranto* in the civil courts by private litigants.

2. Newfoundland and Labrador

In Newfoundland and Labrador, Section 207 of the *Municipalities Act, 1999*, provides for conflict of interest of members of council.[35] The *Act* prohibits a councillor from voting or speaking to a matter before council or a committee of the council where the councillor, his or her spouse or a relative of the councillor has a monetary interest directly or indirectly in the matter. The same prohibition applies if the councillor is an employee, agent, or otherwise of a company.

As in Prince Edward Island, only elected officials are subject to conflict of interest provisions. One key feature of the Newfoundland and Labrador legislation is the fact if in doubt, a member of council can refer the matter to a decision of the council, which is deemed to be final. Furthermore, municipal councils have an extraordinary power.[36] A council can, by resolution, declare vacant the office of an elected councillor where he or she has failed to disclose being in a conflict of interest in a matter being discussed by council. Other enforcement mechanisms are not spelled out, suggesting that unsanctioned violations by councils may be challenged by judicial review in *quo warranto* by private litigants.

3. New Brunswick

All members of municipal councils, members of local boards, and senior appointed officers must disclose any conflict of interest between their personal affairs or businesses and matters considered by the council or local board of which they are members. In compliance with the current trans-Canada model, the *Act* requires that a conflict be disclosed and that the individual refrain from taking part in any discussion or votes on the matter, and withdraw from the meeting, both while the matter is under consideration and while voting on it is underway. [37]

The enforcement tool in New Brunswick is that of public quasi-criminal prosecution in Provincial Court on summary conviction proceedings. The limitation is three years from the commission of the offense. The New Brunswick Department of Environment and Local Governments offers neither guidelines nor codes of conduct for guidance to municipal governments.

A number of amendments to the *Municipalities Act* came into effect in 2003. Only one of these amendments affected the conflict of interest framework, but with

35 *Municipalities Act*, R.S.N.L. 1999, c. M-24, *City of St. John's Act*, R.S.N.L. 1990, c. C-17, s. 10, *City of Corner Brook Act*, R.S.N.L. 1990, c. C-15, s. 22, *City of Mount Pearl Act*, R.S.N.L. 1990, c. C-16, s. 22 contain similar wording.

36 *Municipalities Act*, 1999, R.S.N.L. 1999, c. M-24

37 *Municipalities Act*, R.S.N.B. 1973, c. M-22, Subs. 513(2)(a), Ss. 90.1 to 90.91.

adverse results as will be explained later.

4. Nova Scotia

The Municipal Conflict of Interest Act covers a broad range of elected and appointed officials as in New Brunswick.[38] The nomenclature of the *Act* closely mirrors the Ontario sister *Act*.[39] Likewise, the *Act* requires that a conflict be disclosed and that the individual refrain from taking part in any discussion or voting on the matter and withdraw from the meeting, both while the matter is under consideration and when voting on it is underway.

Since 2000, Service Nova Scotia and Municipal Relations has published a comprehensive manual that includes both a code of ethics and a set of conflict of interest iuidelines for those under its jurisdiction called the *Local Government Resource Handbook*. It is the only Atlantic Canadian province that both legislates on municipal conflicts of interest and provides complementary tools of support by way of codes and guidelines.

VII. ENFORCEMENT SCHEMES IN ATLANTIC CANADA

1. Prince Edward Island

The defining feature of the conflict of interest provision in Prince Edward Island is its blatant insufficiency to provide for a modern world where conflictual interests can easily confront any elected official and, for that matter, any appointed official. The other key feature of the Prince Edward Island legislative response to municipal conflicts of interest is its lack of clarity and guidance. In effect, it is so rudimentary as to be inefficient if compared to the more detailed and appropriate municipal conflict of interest legislative framework in Nova Scotia and in New Brunswick. In a sense, the status of conflict of interest legislation in Prince Edward Island is such that it may contribute to a democratic deficit, a topic outside the reach of this essay.

There is little redemptive value in Prince Edward Island's *Act* other than the fact that it substantially codifies the common law rule. Historically, the purpose of this rule has been to ensure public confidence in the decision making process. Elected officials should base their decisions solely upon the public interest and not allow, or be reasonably perceived to be allowing, any countervailing private interest to influence their mind. This test has usually been applied where there is a pecuniary interest in the matter.[40]

38 R.S.N.S. 1989, c. 299.

39 LeRoy M. Lenethan, Q.C., "Municipal Conflict of Interest" (Presented to Session I - Municipal Conflicts of Interest, 8th Annual Professional Development Conference, Canadian Bar Association, Halifax, Nova Scotia, 29 January 1999).

40 David Hooley, "Conflict of Interest" *FPEIM Newsletter* (17 February 2007), online: FPEIM <http://www.fpeim.ca>.

On 23 May 1989, however, in a remarkable display of leadership that spoke eloquently to the perceived need for ethical standards, the Federation of Prince Edward Island Municipalities took the initiative of adopting conflict of interest guidelines for municipal officials, elected and appointed, which were broadly tailored on the Alberta model.[41] Indeed, several concerns and issues were raised in these guidelines:

1. the need to raise the awareness of municipal councillors to conflictual interests; and
2. the regular increase in cases, both at provincial and federal levels, where charges of conflict of interest had been levelled against elected officials.

In September 2004, in a submission to the *Municipalities Act* Review Committee, which was the logical extension of its earlier initiative, the Federation pointedly expressed its concern that the lack of details in the *Act* could lead to a broad interpretation of conflicts of interest such that it might increase the probability that a member of council would unknowingly vote on a matter that could later be deemed to have been a conflict.[42] Thus, the Federation recommended that the *Act* be amended to provide greater clarity pertaining to conflict of interest and to provide protection against inadvertent violations of conflict of interest provisions.

The Federation also recommended expansion of conflict of interest provisions to all members of municipal committees including those not members of council and municipal employees. The most significant criticism levelled by the Federation Prince Edward Island Municipalities against s. 23 of the *Municipalities Act* is the utter lack of guidelines in the *Act* other than to abstain from discussion and voting. The Federation noted, for example, that there were no guidelines as to whether a person must leave the chamber council or stay and whether the same holds true in a committee situation. Section 23 of the *Act* is also silent as to whether the public minutes should record the conflict and how much detail an individual must go into regarding the conflict. The Federation also noted that the *Act* referred only to a member's personal interests and did not deal with a family member's interest or a company in which the person has ownership.

The Federation's recommendations have yet to be translated into legislative action. However, the current legislative review undertaken in Prince Edward Island has resulted in the June 2005 Report of the *Municipalities Act* Review Committee, titled "Municipal Legislative Reform".[43] The recommendations of this Committee, if not discarded in the wake of the recent change of government, would provide for changes in conflicts of interest coverage. It appears, however, to fall short of the com-

41 "Conflicts of Interest Guidelines" FPEIM (1989), online:
<http://74.125.93.104/search?q=cache:_i4yQrd-0kgJ:www.fpeim.ca/conflict.pdf+FPEIM+conflicts+of+interest&cd=4&hl=en&ct=clnk&gl=ca&client=firefox-a>.

42 "An Act for the Future", FPEIM, online < http://www.fpeim.ca/mun%20act%20submission.pdf>.

43 Prince Edward Island, Municipalities Act Review Committee, *Municipal Legislative Reform* Charlottetown: 2005).

prehensive scheme suggested by the Federation in its Conflict of Interest Guidelines. More disturbing is one of the recommendations of the Review Committee on an alternate devise for determining conflicts of interest predicated on the Newfoundland and Labrador Municipal Council mode, a recommendation opposed by the Federation.[44]

2. Newfoundland and Labrador

Section 207 of the *Municipalities Act, 1999* in Newfoundland and Labrador suffers from the same deficiencies as its sister provision in Prince Edward Island.[45] It is therefore open to a similar assessment. It does not call for any procedure for disclosure, written or otherwise, of any conflict of interest. Interestingly enough, however, the City of St. John's By-law 1305 on Conflict of Interests provides for greater clarity and procedures to follow whenever a member of council has a conflict of interest.[46] The problem however, is that it goes beyond the wording of its enabling act with attendant concerns for vires.

In 2006, in Newfoundland and Labrador, a Conflict of Interest Review Panel was struck in collaboration between the Department of Municipal and Provincial Affairs and the Newfoundland and Labrador Federation of Municipalities (now called Municipalities Newfoundland and Labrador). The purpose of this joint effort is to examine the reasons for the apparent increase in the number of councillors being dismissed by council and to consider options for a more simplified and accessible appeal mechanism.

Under the current system in that jurisdiction, the municipal council is responsible for determining whether there has been a violation of conflict of interest rules. It is the sole authority vested with the power to remove a councillor upon a conclusion of violation of these rules. The only recourse available then to any councillor so removed is to appeal to the Trial Division of the Supreme Court. The appeal process is notably deficient both in term of personal financial costs involved and in the timeline necessary for any such judicial application. The current appeal system is cost-prohibitive and therefore prevents some councillors from exercising their right of appeal. The inquiry of the Committee is such that changes are considered in possibly narrowing the scope and more clearly outlining the circumstances that would place a councillor in a conflict of interest, clarifying what constitutes an interest in common with other citizens and to provide a mechanism for councillors to be able to make representations to council on personal issues.

The other area of concern is whether a council should at all be vested with the power to determine when a councillor has violated the conflict of interest rules and subsequently vacating his or her seat. The option being considered is whether it would

44 *Ibid.*; Interview of John Dewey, Federation of Prince Edward Island Municipalities.
45 R.S.N.L. 1999, c. M-24.
46 City of St. John's, By-law No. 1305, *City of St. John's Conflict of Interest By-Law.*

be more appropriate for an independent third party to make this determination. The Committee is also examining the possibility of giving a role to the current Regional Appeals Board in a revised appeal system. This Board deals with planning issues and zoning matters. Finally, under the current system in Newfoundland and Labrador, there is no time limit in which an allegation of conflict of interest can be made and there is nothing that provides for the councillor to be allowed to remain on council until an appeal of his or her conflict of interest is finalized. Essentially, the entire system is being reassessed.[47]

3. New Brunswick

Under the current provisions, alleged breaches of the conflict of interest provisions under the *Municipalities Act* involved quasi-criminal proceedings under the *Provincial Offences Procedures Act*.[48] In the usual way, after investigation, a recommendation is made by a law-enforcement agency to the office of the Crown prosecutor who then decides if charges should be laid in Provincial Court.

In 1999, a Ministerial Discussion Paper on the New Brunswick municipal conflict of interest legislation suggested consideration of a code of conduct for municipal officials in New Brunswick.[49] The prosecutorial model of enforcement of conflict of interest was criticized and it was suggested that such concerns be dealt with as civil matters, rather than criminal matters.

The Discussion Paper noted that the strongest argument for having conflict of interest matters decriminalized is the fact that numerous activities for which individuals can be charged are already covered by the Criminal Code of Canada. The requirement for criminal sanctions for instances involving conflict of interest alone may not therefore be required. A further argument is the amount of time spent by law enforcement agencies on investigating alleged violations of conflict of interest provisions. Nonetheless, this recommendation was not followed in the various 2003 amendments to the *Municipalities Act*.

Until 2003, in New Brunswick, a member of Council, if in doubt as to whether he or she was in a conflict of interest, could disclose by affidavit full particulars of his or her interest to the Minister of Municipal Affairs and Environment and request the Minister to determine whether a conflict in fact existed. If the Minister determined on the basis of the contents of the affidavit that the member was not in conflict, the member could debate the matter and vote on it.[50] That was a critical provision of the

47 Interview of John Moore, Director of Regional Operations, Department of Municipal Affairs, Newfoundland and Labrador.

48 S.N.B. 1987, c. P-22.1.

49 New Brunswick, Department of Municipal Affairs and Environment, *Discussion paper - Municipal Conflict of Interest Legislation*, (New Brunswick, 1999).

50 *Municipalities Act*, R.S.N.B 1973 c. M-22, s. 90.4(4) now abrogated. Access to this devise was not available to appointed officials..

Municipalities Act; its rationale was explained as follows by the then Minister of Municipal Affairs:

> The member may have an interest in wanting business in a certain line, but he is not sure whether or not it would put him in conflict so, rather than making a disclosure as provided under the other section of the Act, he can appeal to the Minister who can tell him whether or not, in the opinion of the Minister, he as a conflict. If the Minister advises him that he does not have a conflict, he may go ahead and do business with the municipality. If it is proven later that there is a conflict, there is no responsibility for the member.[51]

The 1999 Discussion Paper questioned the role of the Minister of Municipal Affairs as an adjudicator with respect to municipal conflicts of interest. It suggested that the Minister was literally at the mercy of the information provided to him and since the Minister was a political figure, decisions from the Minister were hopelessly politically tainted. The Discussion Paper suggested that adjudicative matters be dealt with by someone in the judicial system, like a judge from the Court of Queen's Bench.

Regrettably, the 2003 amendments to the *Municipalities Act* abrogated the advisory function of the Minister. That important function was not transferred to an outside authority. This represents a significant step backward in the evolution of a code of conduct for municipal officials in New Brunswick in that it deprived them of an important educational and prevention tool. More importantly, it has contributed to a systemic lack of accountability:

> This is a central problem in New Brunswick... in which the changes... increase efficiency of municipal government, but do virtually nothing to increase accountability, in the form of stronger conflict of interest provisions, regulation of election spending, short municipal terms, impeachment, or enforcement of provincial statutory provisions, particularly those related to openness and process issues.[52]

4. Nova Scotia

Nova Scotia stands out among the Atlantic provinces. Besides being a stand-alone statute, it provides a code of ethics and guidelines on conflicts of interest for members of councils and local boards in an acknowledgment that they are necessary to foster ethical behaviour in public officials.[53]

Ethics in Nova Scotia are being aggressively promoted. As noted on page 1

51 *Supra* note 24 at 3452.
52 Geoffrey R. Martin, "Municipal Reform in New Brunswick: Minor Tinkering in Light of Major Problems" (2007) 41:1 Journal of Canadian Studies 75 at 90.
53 R.S.N.S. 1989, c. 299.

of section 4.2 of the *Code of Ethics* in Nova Scotia, nothing can be more important to a public administrator or administration than the public's opinion about their personal integrity, honesty, and truthfulness. It overshadows all other values of an administrator, including competence, experience, and expertise. Service Nova Scotia and Municipal Affairs further provides a fifteen-page-long document on conflict guidelines.

Violations of the *Municipal Conflict of Interest Act* can be challenged in the Trial Division of the Supreme Court at the suit of an elector (or the Attorney General) under the same processes as in Ontario. This leads to several notable deficiencies which are as relevant to Nova Scotia as they are to Ontario.

Several shortcomings have been noted with the Ontario *Act*. First, by virtue of section 10(1)(b) of the *Act* a judge may not only vacate a member's seat, he or she may also suspend the member from holding such office for a period of up to seven years. This section is prefaced with the word, "may", and as a result, it is discretionary in application. It is submitted that this section usurps the overall will of the electorate. If a member is removed from office pursuant to the *Act*, is it not then the purview of the electorate to weigh and be the ultimate arbiter of that member returning to elected office, provided such a member re-offers at all? That said, the courts have been hesitant to overrule the electorate's right to elect those it sees fit.[54]

Second, although the *Act* has been described as penal in nature, it is prosecuted privately and without the normal protections afforded to an accused. Challenges are commenced by citizens who are electors. As a result, the matter is a civil proceeding, via the more abbreviated form of a lawsuit, being an application. Unlike a crown prosecutor, the applicant litigant is devoid of any public duty or accountability, save and except the final order of the court, which may include a sanction of costs. Numerous cases betray not a true public wrong, rather, a private grievance. Few motivations can be imagined beyond such in the recent case of *Tolnai v. Downey*, where the applicant brought a proceeding against the member, as a result of the member voting to determine if Kiwanis signs should be removed from municipal property, a club which the councillor was also a member.[55] Furthermore, although penal in nature, the *Act* does not clothe the respondent with any of the procedural or statutory safeguards afforded to an accused. The presumption of innocence, the burden of proof beyond a reasonable doubt, and the necessity of mens rea are all absent from such a proceeding.[56]

Finally, the Ontario model offers an all or nothing proposition. Either there is conflict of interest or there is none. This unyielding mechanism is too blunt an

54 Robert M. Forbes, *Protecting the Local Official - Municipal Conflict of Interest, Plus - What it Means - What it Says*, 4th ed. (Burlington: Forbes Publishing, 2006) at 9.
55 *Tolnai v. Downey* (2003) O.J. No. 1578, 40 M.P.L.R. (3d) 243.
56 Robert Mullen, "A Rocky Shore: The Municipal Conflict of Interest Act" (Class presentation, GS Municipal LAW 6113P 6.0, George Rust-D'Eye, Master in Municipal Law, Osgoode Hall, 2007), citing *supra* note 55.

instrument to properly provide sufficient flexibility to adapt to a fast-evolving world.

All these shortcomings are relevant to Nova Scotia.

As an alternative to a court application by an elector, the Council or local board may by resolution request an inquiry into any alleged breach of the Act. The Attorney General may then appoint a judge or other suitable person to head the inquiry. The appointee is required to report to the Attorney General and the Council or local board on the results of evidence taken at the inquiry. There have been only four inquiries to this date and their usefulness in educating the municipal world is non-existent, as the reports are not made public.[57]

VIII. AN ALTERNATE MODEL: ELEMENTS OF LAW REFORM

There is a much needed and long overdue reform of systems of conflict of interest rules in Atlantic Canada. It would greatly enhance public confidence in local governance without compromising the privacy interests of those public representatives. It would also provide local officials with invaluable assistance in preventing even the appearance of a conflict of interest.

In the matter of ethics legislation, Nova Scotia stands out as being the foremost province in Atlantic Canada. Not only does it have a detailed statute on municipal conflict of interest but it promotes both a code of ethics and detailed guidelines on conflicts of interest in a much useful handbook for the benefit of local governance. At the other end of the spectrum, legislative involvement in conflicts of interest in Newfoundland and Labrador and in Prince Edward Island is alarmingly limited.

Newfoundland and Labrador and Prince Edward Island must be more aggressively involved in providing the appropriate consensual framework for ethical behaviour and conflict of interest rules in a way that would foster the development of a culture of ethical behaviour to a level compatible with the public trust conferred to local government officials. Nova Scotia could certainly consider the possibility of embedding the provisions of the *Municipal Conflict of Interest Act* in the *Municipal Government Act* as this simple consolidation would facilitate access to conflict rules and allow for viewing the ethics and procedures regimes in a holistic fashion.[58] Improvement of the present situation in Nova Scotia could also involve a complete overhaul of the current conflict of interest rules in the context of the proclamation of rules of transparency and accountability. This course of action would be informed by the forward thinking of the *Municipal Government Act* embodied in the preamble of the *Act*, which acknowledges that municipalities are a responsible order of government

57 Interview of Justice Solicitor Cathleen O'Grady,, Service Nova Scotia and Municipal Relations.
58 R.S.N.S. 1989, c. 299; S.N.S. 1998, c. 18; Gregory J. Levine, "Municipal Act, 2001 Review - Some Suggestions Respecting Enhancing Government Ethics Regimes within the Municipal Act and the Municipal Conflict of Interest Act" (October 2004), online: < http://www3.telus.net/GovtEthicsLaw/MunActOntRev04.htm>.

accountable to the people.

The prosecutorial model of conflict of interest legislation enforcement in New Brunswick is vulnerable to criticism. Although judges certainly have the competence, independence, and profile to administer conflict rules effectively and to promote public confidence, there are several disadvantages to giving this responsibility to the judiciary. First, in most parts of Canada, the judiciary is already overworked and therefore, the administration of the conflict of interest legislation is not likely to receive the attention it deserves without creating additional backlogs in the courts. Secondly, given the highly volatile political circumstances surrounding some conflict of interest allegations, judges are likely to be dragged into politics, and this can hardly be good for the image of independence and impartiality which is so important to a successful adjudicative process.[59] Finally, the stigma associated with being prosecuted may discourage potential candidates from running for office.

1. Advisories

New Brunswick's the short experience with the advisory process was aborted in 2003. The Legislature had several options and it is submitted that it chose the worst one in that it took away a potentially valuable educating tool in ethics generally and conflicts of interest in particular. Although issues of ministerial fairness were legitimate in considering the value of this advisory mechanism, the authority for such advisory could easily have been transferred over to either the provincial commissioner of ethics under the *Members' Conflict of Interest Act* or transferred over to the office of the Ombudsman for the province of New Brunswick who already has jurisdiction over municipalities.[60] These lateral transfers of power could have been achieved with minimal statutory and budgetary adjustments.

The importance of an advisory mechanism has been noted in the Manitoba Law Reform Commission Report of December 2000 "The Legislative Assembly and Conflict of Interest" in the context of conflicts of interest and Members of the Legislative Assembly:

> Ethical decisions are often difficult. Cases often fall into an ethical area which is grey rather than black and white. Ministers and MLA's frequently face such difficulties. The difficulties are compounded by the need to preserve the appearance as well as the fact of ethical conduct. Their difficulties is further compounded by the fact that a decision made in good faith may be second-guessed later, with serious or even disastrous consequences for the career of the one who makes it. A minister or MLA should be able to obtain advice which is authoritative in the sense that one who acts upon it will be protected from later

59 I. Greene, "Government Ethics Commissioners: The Way of the Future?" (1991) 34 Can. Pub. Admin. 165, at 168.
60 S.N.B. 1999, c. M-7.01.

charges of a breach of conflict of interest rules."[61]

The inquiry process devised in Nova Scotia could develop into a fully functional advisory process if either the inquiry reports were made public or if, even better, the authority to conduct such inquiries were transferred to the Ombudsman for the Province of Nova Scotia. For the time being, the inquiry process is of limited value to foster an ethical culture as it is shackled by rules of privacy and outright secrecy.

Any system of conflict of interest in all provinces should necessarily include an advisory mechanism either similar in nature to that in New Brunswick, which was abrogated in 2003, or for example, similar to that which is in effect in British Columbia for Members of the Legislative Assembly.[62]

2. Commissioner of Ethics or Ombudsman

Other mechanisms and tools could be suggested to enhance government ethics regimes in the Atlantic provinces, including the creation of a mechanism to monitor conflicts of interest and integrity issues beyond the court model now in force. Such possibilities could include tools along the lines of the now-defunct *Local Government Disclosure of Interest Act* of Ontario and the extension of the jurisdiction of either the provincial ombudsman to cover ethical and administrative municipal matters or the extension of the jurisdiction of the provincial commissioners of ethics. Prince Edward Island does not have an ombudsman, but it does have a conflict of interest commissioner for provincial members of the legislature. Thus, by the simple expedient of widening the scope of authority of that commissioner of ethics, Prince Edward Island could provide an extremely valuable tool for fostering a culture of ethics at the local governance level.

Throughout Atlantic Canada, recourse to adversarial models of conflict of interest enforcement may favour deterrence, but it is not conducive to the fostering of a benevolent ethical culture. Although the deterrence approach has the advantage of providing for certainty, its effectiveness is less acute than an approach predicated upon a value-based code of ethics and compliance.

The compliance approach puts greater focus on education, persuasion, and clarity of process. A compliance regime rather than one concerned with enforcement depends on a code of practice rather than rules of conduct. The effectiveness of a code of conduct or code of ethics is in turn directly related to its clarity and to its acceptance by those who have to apply it.

3. Codes of Conduct

61 Alberta, Conflict of Interest Review Panel, *Report on Conflicts of Interest Rules for Cabinet Ministers, Members to Legislative Assembly, and Senior Public Servants* (Alberta: 1990), at 88.
62 *Members' Conflict of Interest Act*, RSBC 1996, c. 287.

The value of the code of conduct or code of ethics model for establishing organizational ethics has been noted by the Bellamy Report:

> Attempts to legislate ethics actually have weakened political accountability. The law is too blunt an instrument to define or ensure proper behaviour. Public employees act ethically when they adhere to high standards of conduct and when they possess sensitivities that cannot all be etched in law. In creating an ethical government, the hard part is accomplishing what the law cannot guarantee. Ethic laws and regulations are designed to make governments scandalproof, but no institution can be made scandal-proof through regulation alone.[63]

A code of ethics is essentially a guide for specific and general situations, but also a mechanism for fostering and enforcing ethical behaviour. A code of ethics can be tailor-made to a particular organization or circumstances and promotes overall ethics as value-based standards of right or wrong in the conduct of municipal affairs.

Codes of ethics and formal laws should be complementary. The first principle of ethical behaviour in an environment characterized by municipal conflict of interest legislation and a code of ethics is respect for the law. All policies and actions designed at the strengthening political and moral authority of the local government should start with the development of an important tool of ethical standards. It is a basic principle that in order to build respect for the actions of public institutions, it must be shown or perceived that high moral standards and respect for the rule of the law apply first and foremost to those who have been vested with the public trust in a public office, elected or appointed.[64]

Although the role of the law is critical, it is ultimately a last line of defence to catch and sanction behaviour that has fallen below the socially tolerable minimum. It can be said that if laws are necessary to deter those who seek to abuse their powers, it is ethics that set out the justified uses of that power and the institutional and individual behaviour that are most likely to assist the public and municipalities to further the values that justify their continued existence. Generally, laws set minimum standards for acceptable conduct and subject violators of legal rules to punishment. Ethical obligations, however, extend beyond moral minimums so that legality is not necessarily the same as ethics. Ethics and values are, however, critical to design effective integrity systems and to fight abuses of powers. In a fast-evolving, modern world, both ethics and laws have a complementary role to play in the pursuit of ethical local governance. Laws unsupported by the values of citizens are very difficult to enforce, but ethics without legal support can become little

63 *Supra* note 2 at 5.

64 Barbara Kudrycka, "Ethical Standards for Councillors and Employees of the Local Self-Government", online: United Nations Public Administration Network < http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan005578.pdf>.

more than a naive attempt at correctness.[65] If the law is to extend further into the conduct of councillors and local board members, there must be an accompanying concern for the member's ability to learn and comply with the obligations.

The most critical element of any code of practice must be the recognition that ethical issues are not determined once and for all, but are part of an evolving landscape of custom and practice.[66] Although both a provincial statute and a local code of ethics can be amended and corrected from time to time, the amendment process relative to a code of ethics is simpler and faster than the more formal process of legislative amendments. It may be that such a code of ethics could then be made to reflect the unique differences between elected officials and appointed officials at the local level. Indeed, such standards could be somehow different both in terms of rights and duties in application to politicians and public servants. They should be much higher than demands placed on ordinary citizens. Justification for such differentiation rests with the theory of public trust. The electoral mechanisms and expectations are also part of the notion of authority based on the concept of trust.

Nova Scotia's code of ethics and guidelines for municipal conflict of interest are critical tools for the promotion of integrity and efficiency in local organizations. It is important that rules of ethical conduct are accompanied by interpretative tools. Commentaries to ethical codes or standards should have rather broad scope. It is not enough to provide the rules of ethical behaviour and possible sanctions for non-compliance. It is important to formulate such commentaries in such a way that will help in internalizing these norms by the individual elected and appointed officials. The relationship between law and ethical standards is obvious. This in turn leads to an observation relevant to Nova Scotia.

The *Municipal Conflict of Interest Act* in Nova Scotia can be seen in a way as a snapshot of the legal scenery as it stood in 1982. The *Act* has been rigidly in effect since then without any accommodation for the passage of time. The *Code of Ethics and Conflict of Interest Guidelines* were, however, suggested in 2000 thus creating a systemic imbalance between the enforcement scheme and the compliance model. Revisiting the statute to modernize it and possibly changing its title to "*Local Transparency Act*" would propel Nova Scotia into the next generation of conflict of interest legislation.

One interesting model to regulate municipal conflicts of interest may be found in the *Local Government Disclosure of Interest Act.*[67] The *Disclosure Act* was initially adopted in 1995, but it was never proclaimed and finally, it was discreetly repealed on 1 January 2003.

65 Charles Sampford, "Ethics vs Law: An Open-and-Shut Case?" *Transparency International's Quarterly Newsletter* (June 2002) 1.

66 Michael Hunt, "Ethics and British Local Government: The Relevance of Compliance Strategies" (Paper presented at the Ethics and Integrity of Governance: The First Transatlantic Dialogue, Leuven, Belgium, 2-5 June 2005).

67 S.O. 1994, c. 23 ("the *Disclosure Act*").

The *Disclosure Act* would have been a step forward in the legislative response to the increasing challenges of municipal conflicts of interest in that it would have addressed, in a substantive fashion, many of the current shortcomings. One of the most significant highlights of the *Disclosure Act* would have been the creation of a provincial-wide commissioner to exercise the duties as set out of the *Act*. The commissioner was statutorily granted the power to provide guidelines and administer the *Act*, including the authority to conduct investigations. Equipped with the right to access all relevant documents and the power of a commission pursuant to part 2 of the *Public Inquiries Act*, the *Disclosure Act* took part of a significant process out of the public's hands. The commissioner would then make a finding and if duly satisfied that the *Act* had been violated, he could bring his own application to the court. If the commissioner found no grounds for the complaint, only then could a private citizen mount a court application to find a conflict of interest. The complaint mechanism represented a sound alternative to the prosecution model. In Atlantic Canada, either the provincial ombudsman or the legislative commissioners of ethics could assume that role.

Finally, unlike the *Municipal Conflict of Interest Act*, the *Disclosure Act* only demanded that the court suspend a member from his or her seat. Discretion was afforded to the court to vacate the seat, disqualify the member from office, and demand restitution in appropriate circumstances and these provisions provided for fine-tuning of the scales of justice.

The commissioner model set out in the *Local Government Disclosure of Interest Act* would be a significant step forward in the context of ethic laws in local governance in that it would provide a forum for and a platform of education and promotion of ethical values in the conduct of municipal affairs.

CONCLUSION

But for Nova Scotia, the current Atlantic Canadian models of municipal conflicts of interest enforcement mechanisms lack the ingredients necessary to foster a positive ethical culture at the local level by strictly putting emphasis on deterrence and punishment rather than on education and promotion of ethical behaviour. Only Nova Scotia has a provincially mandated code of ethics and guidelines on conflicts of interest.

Providing strictly for conflicts of interest is not enough as typically, conflict of interest legislation does not necessarily have as its primary purpose the improvement of ethical standards for those who are subjected to it. Conflict of interest legislation is largely intended to assist officials by providing an objective standard against which they may gauge their actions and satisfy themselves and the public that they are acting appropriately.[68] On the other hand, the purpose of ethics laws lies not in the promulgation of rules nor in the amassing of information nor even in the punishment of wrongdoers, but, rather, in the creation of a more ethical government, in both fact and perception.

68 G. Evans, "Round Table: Ethics and Conflict of Interest" (1994) 18:4 Can. Parl. Rev. at 26.

In practical terms, the purpose of ethics laws is to promote the reality and perception of integrity in government by preventing unethical conduct before it occurs. Ethics laws focus on prevention, not punishment. They assume that the vast majority of public servants are honest and want to do the right thing; ethics laws are not meant to catch corrupt officials. Ethics laws do not regulate morality (or even ethics) but, rather, conflicts between official duties and private interests. Essentially, ethics laws should encourage good people to serve in government by providing guidance to officials and reassurance to citizens that their public servants are serving the public and not themselves.[69]

In public life, the cornerstone that underpins sound moral and ethical principles and values is the integrity, honour, and trustworthiness of our democratically elected officials at all levels of government. Conflict of interest legislation throughout Atlantic Canada has been a first generation legislative response to shore up that cornerstone. However, second generation legislative responses are needed to create a framework for a culture of ethics in local governance. New tools and devices by means of codes of conduct and codes of ethics as well as other mechanisms are required to create a climate conducive to a vibrant and dynamic ethics culture. Atlantic Canada has yet to meet these noble goals.

69 Rick O'Connor & Peter-John Sidebottom, *Introduction to Municipal Ethics* (Faculty of Law, York University, 2007).