ISSN 1181-9006

The Digest of
MUNICIPAL & PLANNING LAW

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Cited 6 D.M.P.L. (2d)

(2013) 6 D.M.P.L. (2d), May 2013, Issue 5

Published 12 times per year by
CARSWELL, A DIVISION OF
THOMSON REUTERS CANADA LIMITED
One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Production Editor: Tina S. Beier B.A. (Hons.)

Subscription Rate is $544 for 12 issues per annum

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CONFLICTS & THE CHAOS THEORY IN MAGDER v. FORD

by John Mascarin

Introduction

On November 26, 2012, Regional Senior Justice Charles Hackland of the Ontario Superior Court of Justice released his judgment in *Magder v. Ford*[1] wherein he concluded that Toronto Mayor Rob Ford had a pecuniary interest when he spoke and voted on a motion to rescind a previous council order that he repay monies donated by city lobbyists to a charitable foundation that he had established. The learned justice determined that the mayor had contravened subsection 5(1) of the *Municipal Conflict of Interest Act*[2] and that clause 10(1)(a) of the MCIA mandated him to declare his seat to be vacant. The decision was stunning to many observers and to the general public as few truly expected that Ford[3] would actually be ordered to be removed from office. Historically, the courts have demonstrated a great reluctance to remove elected officials from their positions for contraventions of the MCIA or otherwise.[4]

The judicial order to vacate Ford's seat was stayed two weeks later, pending an as-of-right appeal to the Divisional Court pursuant to section 11 of the MCIA.[5] In the appeal decision, issued on January 25, 2013, the Divisional Court (comprised of Then R.S.J., Leitch J. and Swinton J.) found that Ford had not, in fact, violated subsection 5(1) of the MCIA because he did not have a pecuniary interest when he participated in the debate and voted to rescind the aforementioned city council order.[6]

While agreeing with the vast majority of the judicial determinations made by Hackland R.S.J. in the original application

[1] *Magder v. Ford* (2012), 5 M.P.L.R. (5th) 1, 112 O.R. (3d) 401 (Ont. S.C.J.). In order to distinguish between this judgment and the later appeal judgment, the decision on the application will be referred to as the "Superior Court decision" and the appeal decision will be referred to as the "Divisional Court decision."

[2] *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 ("MCIA").

[3] The parties will be referred to simply by their surnames Ford and Magder given that the commentary will discuss the decisions of the Superior Court of Justice and the Divisional Court as well as the application for leave to appeal to the Supreme Court of Canada whereby Ford and Magder are variously referred to as applicant, respondent and appellant.

[4] For example, municipal councillors in Ontario can be removed from office for contravening the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched., s. 80(2)(a), but it has never happened. Elected members of councils, local boards and school boards have been ordered removed from office under the MCIA but it is very rare and remains the exception to the general rule.

[5] *Magder v. Ford* (2012), 5 M.P.L.R. (5th) 27 (Ont. Div. Ct.). The appeal right is limited in that "an appeal lies from any order made under section 10." The appeal is expressly not from "any decision", which would appear to significantly restrict an applicant's ability to appeal from a decision at first instance.

[6] *Magder v. Ford* (2013), 7 M.P.L.R. (5th) 1 (Ont. Div. Ct.).

ruling,[7] the Divisional Court reversed his decision on a very narrow and technical ground[8] by finding that the financial sanction imposed by order of Toronto city council was not authorized by the *City of Toronto Act, 2006*[9] or the City of Toronto's *Code of Conduct for Members of Council*.[10] The Divisional Court pronounced the original decision a nullity and everything that flowed from the decision as being immune from any ramifications consequent upon the order. The trajectory of deterministic predictability was thus initially altered. This meant that Ford did not have a pecuniary interest when he voted at the city council meeting on February 7, 2012 to rescind the repayment order that had been imposed by city council two years earlier. As contentious as the original decision had been, the Divisional Court ruling was almost equally notorious.[11]

On March 15, 2013, Paul Magder, the Toronto citizen who initiated the original application against Ford under the MCIA, submitted an application for leave to appeal the decision of the Divisional Court to the Supreme Court of Canada on three issues.

That there actually is an avenue to appeal beyond the Divisional Court is just one of a multitude of surprising matters arising from this proceeding. Subsection 11(2) of the MCIA provides that "[t]he Divisional Court may give any judgment that ought to have been pronounced, in which case its decision is final" and is often referred to as the "finality" clause.[12] Even though there is no appeal to the Ontario Court of Appeal (normally the court of last resort in the province), there is a way to potentially leapfrog directly to the Supreme Court of Canada.[13]

Background & Legislative Context

The whole sorry saga had its beginnings in a report from the City of Toronto's Integrity Commissioner dated August 12, 2010.[14] In that report, Integrity Commissioner Janet Leiper reported on her investigation into a complaint that Ford had contravened the City's Code by soliciting donations to a charitable foundation. She determined that Ford had breached three articles of the City's Code relating to gifts and benefits, the use of City property, and improper use of influence through his use of the City of Toronto logo, City staff, and his status as councillor to solicit funds for a charitable foundation that he had established to assist children to play organized football, the Rob Ford Football Foundation. In her report, the Integrity Commissioner outlined her consideration of and ultimate discarding of various possible penalties. She ultimately determined that the most appropriate penalty to impose upon Ford was that he be required to repay

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[7] This is acknowledged by the Ontario Divisional Court in its costs ruling in *Magder v. Ford* (2013), 2013 ONSC 1842, 2013 CarswellOnt 3752, Doc. 560/12 (Ont. Div. Ct.) at paragraph. 7:

> First, success in the proceeding was divided. While [Ford] succeeded on the appeal, he was unsuccessful on three of the four grounds he raised on appeal - namely, the interaction of the municipal code of conduct and the *MCIA*, the impropriety of voting when a code sanction has a financial aspect, and the lack of a defense under s. 10(2) because of wilful blindness.

[8] Magder's legal counsel, Clayton Ruby, issued a statement shortly following the release of the Divisional Court's judgment on January 25, 2013 which commenced as follows: "The Court has let Rob Ford off on a technicality." See Stephen Thiele's commentary "Not a Technicality: Magder v. Ford," in *Keeping Current* (Gardiner Roberts LLP, January 28, 2013) where the author asserts that the decision was not based on a mere technicality.

In any event, many would argue that the original application and alleged breach by Ford was a technical non-compliance with the MCIA. In fact, Hackland R.S.J. appeared to concede as much in his reasons for decision (at para. 48), "The respondent's actions, as far as speaking against the proposed sanction is concerned, was an unfortunate but arguably technical breach of s. 5(1) of the *MCIA*."

[9] City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A.

[10] *Code of Conduct for Members of Council* (Toronto: City of Toronto, September 28 & 29, 1999), as amended ("Code").

[11] Both the application and appeal judgments garnered international media attention: See Guy Giorno, "Municipal Conflict of Interest: What's New?" in *Municipal Law 2013: All Things Municipal* (Ontario Bar Association, February 9, 2013) at 1 and John Mascarin, "Eyes Wide Shut - Wilful Blindness & A Conflict of Fordian Proportions", 5 M.P.L.R. (5th) 30 at 31-32.

[12] Several decisions, including *Ruffolo v. Jackson* (2010), 71 M.P.L.R. (4th) 43 (Ont. C.A.), *Amaral v. Kennedy* (2012), 2 M.P.L.R. (5th) 34 (Ont. C.A.) and *Mondoux v. Tuchenhagen* (2012), 100 M.P.L.R. (4th) 179 (Ont. C.A.), have pronounced that "'final' in s. 11(2) means final."

[13] However, s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, provides:

> 40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that Supreme Court judgment is accordingly granted by the Supreme Court.

[14] Integrity Commissioner, *Report on Violation of Code of Conduct* (Toronto: City of Toronto, August 12, 2010). The Integrity Commissioner is a mandatory statutory officer pursuant to s. 158 of the *City of Toronto Act, 2006* who is responsible (under s. 159) to consider matters pertaining to the application of the Code upon members of city council (and local boards). She is entitled, pursuant to s. 160, to conduct inquiries in order to carry out her mandate.

donations received from lobbyists and a corporation engaged in business with the City as a sanction under the Code.[15]

Subsection 160(5) of the *City of Toronto Act, 2006* is a key provision that factors into the ultimate determination by the courts:

> **Penalties**
>
> **160.** (5) City council may impose either of the following penalties on a member of council or of a local board (restricted definition) if the Commissioner reports to council that, in his or her opinion, the member has contravened the code of conduct:
>
> 1. A reprimand.
>
> 2. Suspension of the remuneration paid to the member in respect of his or her services as a member of council or of the local board, as the case may be, for a period of up to 90 days.

In addition to the penalties imposed under subsection 160(5) of the *City of Toronto Act, 2006*, the Code provides for "Other Actions" as possible remedies for a violation of its provisions:

> **XVIII. COMPLIANCE WITH THE CODE OF CONDUCT**
>
> Members of Council are accountable to the public through the four-year election process. Between elections they may, for example, become disqualified and lose their seat if convicted of an offence under the *Criminal Code* of Canada or for failing to declare a conflict of personal interest under the *Municipal Conflict of Interest Act*. In addition, subsection 160(5) of the *City of Toronto Act, 2006*, authorizes Council to impose either of two penalties on a member of Council following a report by the Integrity Commissioner that, in her or his opinion, there has been a violation of the *Code of Conduct*:
>
> 1. A reprimand; or
>
> 2. Suspension of the remuneration paid to the member in respect of his or her services as a member of Council or a local board, as the case may be, for a period of up to 90 days.
>
> **Other Actions**
>
> The Integrity Commissioner may also recommend that Council or a local board (restricted definition) take the following actions
>
> 1. Removal from membership of a Committee or local board (restricted definition).
>
> 2. Removal as Chair of a Committee or local board (restricted definition).
>
> 3. Repayment or reimbursement of moneys received.
>
> 4. Return of property or reimbursement of its value.
>
> 5. A request for an apology to Council, the complainant, or both.[16]

While city council is mandated to pass a code of conduct, its provisions are not prescribed by statute or regulation. In this case, city council itself passed the Code and determined in its wisdom that additional actions were valid and permissible provisions to effectively manage enforcement of the Code.[17] It was and remains within the jurisdiction of city council to amend the provisions of its Code at any time.

The Integrity Commissioner's report was tabled at a city council meeting on August 25, 2010 and was approved without debate. City council adopted the findings of the report that Ford had violated three provisions in the Code and thereby approved of the sanctions recommended by the Integrity Commissioner in Decision CC 52.1. City council also required that Ford provide proof of reimbursement to the Integrity Commissioner.[18] Later in the same meeting, Councillor Del Grande brought forward a motion to reconsider Decision CC 52.1. Before voting on the matter, the Speaker inquired if Ford intended to declare a conflict on the matter. Ford indicated that he intended to vote and did so; the motion was defeated.[19] Ford never spoke to the matter and did not argue the jurisdiction of the Integrity Commissioner to recommend the sanction nor the authority of city council to

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[15] *Ibid.*, at p. 14 (only partially quoted in the Divisional Court decision):

> There is a quantifiable sanction which Council can impose in this case to reflect the importance of the finding that Councillors must not solicit favours or benefits from lobbyists, nor use their influence for private gain, even where others stand to benefit as well. Donations were made by 11 lobbyists/clients of lobbyists during the relevant time period and one corporation engaged in business with the City of Toronto. These amounts, which total 3,150.00, are detailed in Appendix 1 . . . I recommend that Councillor Ford repay the donations which have been classified as improper gifts/benefits. To be clear this would not deprive the [Rob Ford] Football Foundation of donations received and distributed to date. Councillor Ford would be responsible for returning these donations. Such a sanction would convey Council's expectation that Councillor Ford is responsible for ensuring that he does not ask for or receive benefits in violation of the Code of Conduct and that he will be held accountable by Council for such violation. It would also reflect the importance of a Councillor not using influence of office for personal causes.

[16] The Code, *supra*, Article XVIII.

[17] See Leo F. Longo and John Mascarin, *A Comprehensive Guide to the City of Toronto Act, 2006* (Markham: LexisNexis Canada Ltd., 2008) at 200-201 and footnote 7.

[18] Divisional Court decision, *supra*, at paragraph 19.

[19] *Ibid.*, at paragraph 20.

impose it. [20] Although a *prima facie* breach of the MCIA, no application was ever brought by any elector.[21]

Between August 31, 2010 and October 4, 2011, the Integrity Commissioner subsequently wrote to Ford multiple times requesting that he provide confirmation of repayment as imposed by city council. In her report on January 30, 2012 regarding Ford's compliance with Decision CC 52.1, the Integrity Commissioner recommended that city council: (a) adopt a recommendation that Ford provide proof of reimbursement on or by March 6, 2012, and (b) that if proof of reimbursement had not been made by that date, that she would report back to city council.[22]

This recommendation came before city council on February 7, 2012. It was at this meeting that Ford spoke to the report and stated that he no longer used City logo or letterhead or City staff for his charitable fundraising efforts. He further stated that he had written to donors identified by the Integrity Commissioner asking whether they wished to have their funds returned and that three of the eleven donors indicated that they did not want to be reimbursed.[23]

Subsequently during the same meeting a motion to rescind Decision CC 52.1 was tabled. This time Ford voted in favour of the motion (although he did not speak to the matter). The motion passed and decision CC 52.1 was rescinded.[24] The effect of this rescission of the original council order was that the sanction imposed on to Ford to repay the donors to his charitable foundation was removed.

Application Under the MCIA

In one sense the questions at the heart of the matter are very simple: did Ford have a pecuniary interest and did he breach his obligations under the MCIA? However, as demonstrated in the decisions from the Superior Court of Justice and Divisional Court, the answers are elusive. There is an interplay and tension between the MCIA and the *City of Toronto Act, 2006* and the courts fundamentally disagreed on the application to be given to the enforcement remedies provided for in the Code.

Municipal lawyers have tended to answer the aforementioned questions affirmatively on the basis that the original council decision to order Ford to personally repay the donations was, even if ultimately *ultra vires*, nevertheless valid or presumed to be valid *at the point in time* when Ford voted on the motion to rescind Decision CC 52.1. Administrative lawyers have looked at the issue through a different lens and have generally viewed council's lack of jurisdiction as creating an illegal decision which amounts to a nullity and which serves to invalidate subsequent decisions and orders.[25]

The MCIA establishes a legislative framework to govern the participation of local governmental decision-makers when they may have a pecuniary interest in a matter that is being considered by a council, local board or a committee of one of them. The statute is one of general application and only applies to a "pecuniary interest" of a member. The term "pecuniary interest" is not defined in the MCIA but has generally been interpreted to mean "concerning or consisting of money."[26]

The obligations of a member of council when faced with a pecuniary interest are set out in subsections 5(1), (2) and (3) of the MCIA and require disclosure of the interest and then

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[20] Although there was no administrative right to appeal the order of city council, as noted later in this article, Ford had at least three possible avenues to challenge the alleged illegality of the order. He availed himself of none; in fact, he never raised the issue of the potential illegality of the order until his lawyer delivered the responding materials to the application to remove him from office.

[21] Subsection 9(1) of the MCIA provides that "an elector may, within six weeks after the fact comes to his or her knowledge that a member may have contravened subsections 5(1), (2) or (3), apply to the judge for a determination of the question of whether the member has contravened subsections 5(1), (2) or (3)." The test for determining the requisite degree of knowledge was recently stated in *Hervey v. Morris* (2013), 2012 ONSC 956, 2013 CarswellOnt 2774, Doc. CV-11-104113-00, Gilmore J. (Ont. S.C.J.) [at para. 58] as follows:

> The wording of Section 9(1) of the M.C.O.I.A. does not require the elector to have absolute certainty that a conflict existed. The only certainty would be a court's ruling on the issue. What it does require is that the elector have a reasonable subjective belief that a breach of the Act has occurred.

[22] Integrity Commissioner, *Report of Compliance with Council Decision CC 52.1* (Toronto: City of Toronto, January 30, 2012) and at paragraph 21 of the Divisional Court decision, *supra*.

[23] Divisional Court decision, *supra*, at paragraph 22.

[24] *Ibid.*, at paragraph 23.

[25] Some administrative law lawyers, in fact, did not view the matter as a "conflict case" at all (see, for example, Daniel Gogek, "The Rob Ford 'Conflict' Case – Why It Will Be Dismissed" and "The Rob Ford 'Conflict' Case, Part 2 – What Other Cities Have Done") and initially focused on aspects of procedural fairness and the right of a member of council to speak to the imposition of a penalty on a code of conduct matter (something that was extensively canvassed and discussed in Justice J. Douglas Cunningham in his *Report of the Mississauga Judicial Inquiry - Updating the Ethical Infrastructure* (Mississauga: City of Mississauga, 2011). Justice Hackland fully considered and determined the question in the application hearing. The Divisional Court (at paragraphs 39-42) starts to embark on a discussion of the issue but evades making a determination by instead considering whether Ford had a "real" pecuniary interest when he spoke at the meeting of February 7, 2012.

[26] *Mondoux v. Tuchenhagen* (2010), 79 M.P.L.R. (4th) 1 (Ont. S.C.J.).

the member's abstention from participation and voting on the matter.[27] Subsection 5(1) of the MCIA provides:

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

In making his decision on the application, Hackland R.S.J. determined that Ford had been ordered to personally repay $3,150 by city council; that he spoke on a matter relating to the order and that he voted on a motion to rescind the order; that the amount was not so insignificant or trivial as to not have influenced his decision to participate or vote on the matters; that he was not saved either by inadvertence or an error in judgment; and that, in the foregoing circumstances, he was mandated by the MCIA to order Ford removed from office.

Justice Hackland concluded that the reimbursement obligations under the "Other Actions" provisions of the Code (supplementary enforcement provisions) were properly and logically connected to the permissible objectives of the *City of Toronto Act, 2006*. The learned justice reasoned that the provisions were supported by the broad general powers granted to the City under the statute which were to be broadly and generously interpreted in accordance with the dictates of the statute itself and as advocated by a number of leading judgments respecting the interpretation of municipal powers as pronounced by the Supreme Court of Canada over the past 20 years.[28]

On appeal, the Divisional Court looked at the issue more narrowly and pointed to the express wording of subsection 160(5) of the *City of Toronto Act, 2006* which (as noted above) states that city council may impose one of two penalties: 1. a reprimand; or 2. suspension of remuneration. As noted by the Divisional Court (after quoting from the French version of the statute), "The literal reading of both versions of the provisions is that there are only two sanctions or penalties that Council can impose for a breach of the *Code*." [29] The Divisional Court acknowledged the adoption of the generous approach to the interpretation of municipal powers by the courts but pointed to the well-known and oft-quoted reference from the Supreme Court of Canada in *R. v. Greenbaum* that "[m]unicipalities are entirely the creatures of provincial statutes. Accordingly they can exercise only those powers which are explicitly conferred upon them by a provincial statute . . . ."[30] The main issue that the Divisional Court took with respect to the penalty is explicitly stated as follows:

> What is objectionable in the present case is the fact that a so-called remedial measure is being used for a punitive purpose. In Decision CC 52.1, City Council ordered Mr. Ford to pay monies to certain donors when he had never received such monies personally. While the application judge called the reimbursement obligation a remedial measure, in our view, this was a penalty imposed on Mr. Ford.[31]

The Divisional Court held that the sanction imposed by Decision CC 52.1 was *ultra vires*, as it was not authorized by the Code or by the *City of Toronto Act, 2006* and that is amounted to a nullity. As such, the Divisional Court reasoned that Ford could not have had a pecuniary interest in any matters before city council on February 7, 2012 that dealt with Decision CC 52.1 and, accordingly, that he could not have contravened section 5 of the MCIA when he voted in favour of rescinding Decision CC 52.1.

Analysis

Although the Divisional Court's decision overturned Hackland R.S.J.'s original ruling, the panel primarily agreed with the majority of the application judge's rulings in his decision. The Divisional Court essentially upheld three out of four of Hackland R.S.J.'s significant determinations by concluding that: (1) subsection 5(1) of the MCIA applied when city council was dealing with a matter relating to the application of a code of conduct to a member of council; (2) the exemption under clause 4(k) of the MCIA did not apply to Ford; and (3) Ford did not commit an honest error in judg-

[27] "The very purpose of the statute is to prohibit any vote by one who has a pecuniary interest in the matter to be considered and voted upon. It is only by strict observance of this prohibition that public confidence will be maintained": *Greene v. Borins* (1985), 28 M.P.L.R. 251 (Ont. Div. Ct.).

[28] Superior Court decision, *supra,* at paragraphs 38 and 39, citing *Shell Canada Products Ltd. v. Vancouver (City)*, 20 M.P.L.R. (2d) 1, [1994] 1 S.C.R. 231, [1994] 3 W.W.R. 609, 20 Admin. L.R. (2d) 202, 110 D.L.R. (4th) 1, 88 B.C.L.R.(2d) 145, 163 N.R. 81 and *Nanaimo (City) v. Rascal Trucking Ltd.*, 9 M.P.L.R. (3d) 1, [2000] 1 S.C.R. 342, [2000] 6 W.W.R. 403, 183 D.L.R. (4th) 1, 20 Admin. L.R. (3d) 1, 76 B.C.L.R. (3d) 201.

[29] Divisional Court decision *supra*, at paragraph 66.

[30] *Ibid.*, at paragraph 64, quoting from *R. v. Greenbaum*, 14 M.P.L.R. (2d) 1, [1993] 1 S.C.R. 674.

[31] *Ibid.*, at paragraph 68.

ment under subsection 10(2) of the MCIA which would have excused a contravention under the statute.[32]

It was only with respect to the remaining issue, concerning whether Decision CC 52.1 was *ultra vires* the City's powers, that the Divisional Court disagreed with the applications judge. This difference of opinion, on a very fine and, yes, technical point of law, served to overturn the decision to remove Ford from office.

(a) Standard of Review

By virtue of the conflicting judicial pronouncements by differently-constituted appeal panels of the Divisional Court in late 2011 (in *Tuchenhagen v. Mondoux*[33]) and in mid-2012 (in *Amaral v. Kennedy*[34]) the proper standard of review to be applied by the Divisional Court on an appeal under section 11 of the MCIA was left open to some debate. The question was whether an appeal hearing under subsection 11(2) would proceed as an appeal on the record or as a trial *de novo*.[35]

The Divisional Court adopted the approach in *Amaral v. Kennedy* which provides for an appeal to be conducted as a true appeal based on the record and not as a hearing *de novo*. The Divisional Court itemized each of the standards of review on an appeal from a judicial decision as follows:

- on questions of law: correctness
- on questions of fact: palpable and overriding error
- on questions of mixed fact and law: correctness if there is an extricable error of law

(b) The MCIA and Code of Conduct

The Divisional Court held that Hackland R.S.J. was correct in finding that the MCIA applied to any matters before city council dealing with the Code. Justice Hackland determined that "s. 5(1) of the *MCIA* means what it clearly says and that there is no interpretive basis for excluding the operation of s. 5(1) from municipal *Code of Conduct* matters. There is no basis on which the court can restrict or read down the meaning of 'any matter' to exclude potential financial sanctions arising from *Code of Conduct* violations."[36]

Hackland R.S.J. refuted Ford's argument that the MCIA and the Code were two separate and distinct regimes and noted that "[b]oth are aimed at ensuring integrity in the decision-making of municipal councillors."[37] But most importantly (and correctly), he simply could not read an exemption into section 4 of the MCIA that excluded matters dealing with the Code from the application of section 5 of the MCIA.

On appeal, it was held that "the application judge was correct when he held that the *MCIA* applies to a *Code* matter before Council, provided that the council member has a pecuniary interest in that matter. The words of s. 5(1) are clear: the member shall disclose a pecuniary interest in any matter before Council, and he or she shall not take part in a discussion or vote on the matter."[38]

The Divisional Court also dismissed Ford's rather tortured argument that the MCIA was limited to circumstances where the City also had to have a financial or commercial interest at stake in the matter in which the councillor had a pecuniary interest. The Divisional Court dismissed the purposive analysis argument that the intent of the MCIA was to promote transparency in decision-making and that it did not apply to matters relating to a code of conduct. The Divisional Court bluntly stated that "where a matter involving councillor misconduct is before Council and the resolution proposed engages the councillor's pecuniary interest because of proposed financial repercussions or sanctions, s. 5(1) of the *MCIA* is engaged."[39]

The Divisional Court does part with Hackland R.S.J.'s determination that Ford had a pecuniary interest when he first stood before city council and pleaded that he was only trying to help kids play football and that the reimbursement requirement was "absurd." The Divisional Court determined that Ford did *not* have a pecuniary interest when he spoke because the matter then specifically before city council was the Integrity Commissioner's recommendations in her Report of January 30, 2012 that Ford be required to report on his steps to comply with Decision CC 52.1 by a fixed date. The Divisional Court found that "financial sanction had already been imposed" by the earlier order and that there was no financial penalty being imposed under current report. The Divisional Court writes that the "pecuniary interest of the member must be a real one."[40] Accordingly, Ford did not have a pecuniary

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[32] *Supra*, see note 7: "While [Ford] succeeded on the appeal, he was unsuccessful on three of the four grounds he raised on appeal . . .".

[33] *Tuchenhagen v. Mondoux* (2011), 88 M.P.L.R. (4th) 234 (Ont. Div. Ct.).

[34] *Amaral v. Kennedy* (2012), 96 M.P.L.R. (4th) 49 (Ont. Div. Ct.)

[35] See John Mascarin and Piper Morley, "The Standard of Review of Appeal for Municipal Conflict of Interest Decisions", 5 D.M.P.L. (2d) (July 2012), 1-4.

[36] Superior Court decision, *supra*, at paragraph 23.

[37] *Ibid.*, at paragraph 27. See also *Lorello v. Meffe* (2010), 99 M.P.L.R. (4th) 107 (Ont. S.C.J.) at 113: "The MCIA governs the conduct of local government members regarding conflicts of interest. It reflects the need for integrity and accountability as the cornerstones of a strong local government system."

[38] Divisional Court decision, *supra*, at paragraph 35.

[39] *Ibid.*, at paragraph 38.

[40] *Ibid.*, at paragraph 42. This appears to be the first time that a court has interpreted plain words "pecuniary interest" in the MCIA as "real pecuniary interest." The Divisional Court's reasoning appears to be found in the subsequent paragraph where it notes that "since a pecuniary interest results in a prohibition against participation in a public meeting which, if not obeyed, attracts a severe penalty, it is appropriate to

interest when he first spoke.[41] When Ford subsequently voted on the motion to rescind, the situation was, in the view of the Divisional Court, different:

> However, the matter before Council changed when thereafter a motion was made to rescind Decision CC 52.1. From that point, Mr. Ford clearly had a pecuniary interest in the matter before Council, as he would be relieved of the reimbursement obligation if the motion passed. Therefore, the application judge correctly found that Mr. Ford had a direct pecuniary interest when he voted on that motion, and s. 5(1) of the *MCIA* was engaged.[42]

The distinction between the two matters made by the Divisional Court is interesting and ultimately not particularly helpful in applying and interpreting the MCIA. The Integrity Commissioner's report set out the following two recommendations (paraphrased earlier above but now quoted verbatim):

> The Integrity Commissioner recommends that:
>
> 1. City Council adopt a recommendation that Mayor Ford provide proof of reimbursement as required by Council decision CC 52.1 to the Integrity Commissioner on or before March 6, 2012, and
>
> 2. City Council adopt the recommendation that if proof of reimbursement has not been made by March 6, 2012, that the Integrity Commissioner report back to Council.[43]

While the earlier order clearly imposed the sanction, it is difficult to read the plain language in the Integrity Commissioner's recommendations and see how it is possible that all three judges on the panel failed to discern an actual pecuniary interest. The first recommendation expressly specifies that "proof of reimbursement" is to be provided by a set date. How this cannot be interpreted as an impact on the financial interest of Ford is, quite frankly, perplexing. This is particularly the case given that the Divisional Court had, earlier in its reasons, clarified that the "modern approach to statutory interpretation" is to be applied to the MCIA notwithstanding that it is considered a penal statute.[44]

(c) Remote or Insignificant Exemption

Clause 4(k) of the MCIA provides that section 5 does not apply where the interest of the council member is so "insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."[45] Justice Hackland determined that the repayment of $3,150 by Ford was of significance to him and influenced him to speak to the matter and subsequently to vote on the rescission of Decision CC 52.1:

> While s. 4(k) appears to provide for an objective standard of reasonableness, I am respectfully of the view that the respondent has taken himself outside of the potential application of the exemption by asserting in his remarks to City Council that personal repayment of $3,150.00 is precisely the issue that he objects to and delivering this message was his clear reason for speaking and voting as he did at the Council meeting.

On appeal Ford argued that Hackland R.S.J. applied the "wrong test" for a determination of this issue. The pertinent test is the one established in *Whiteley v. Schnurr* which has been consistently applied in numerous decisions under the MCIA:

> Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question?[46]

The Divisional Court held that Hackland R.S.J. correctly applied the "objective standard of reasonableness" in finding that a reasonable person, aware of Ford's comments, would conclude that the amount was likely to influence his actions.[47] The Divisional Court also noted that "the amount in

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strictly interpret the pecuniary interest threshold." This is plainly discordant with the Divisional Court's own earlier reasons at paragraphs 33-34 that the MCIA should not be strictly construed.

[41] *Ibid.*, at paragraph 45.

[42] *Ibid.*, at paragraph 46.

[43] *Report of Compliance with Council Decision CC 52.1, supra*, at note 21.

[44] Divisional Court decision, *supra*, at paragraphs 33-34. See also note 38 above.

[45] *Ibid.*, at paragraph 75.

[46] *Whiteley v. Schnurr* (1999), 4 M.P.L.R. (3d) 309 (Ont. S.C.J.). However, it is noteworthy to cite the following portion of the reasons following the articulation of the question:

> In answering the question set out in this test, such elector might consider whether there was any present or prospective financial benefit or detriment, financial or otherwise, that could result depending on the manner in which the member disposed of the subject matter before him or her. The foregoing example is illustrative and not exhaustive; the circumstances of each case will determine what factors should be considered in determining the applicability of s. 4(k). To attempt to set down a comprehensive "checklist" of factors could tend to narrow the scope and ambit of the analysis necessary for the review process.

[47] Divisional Court decision, *supra*, at paragraph 78.

issue, $3,150, was not an insignificant amount, even for a person of Mr. Ford's means."[48]

(d) Saving Provision – Honest Error in Judgment

Subsection 10(2) of the MCIA contains two saving provisions, whereby a judge may determine that a member has contravened the requirements of subsections 5(1), (2) or (3) but that the breach was committed either by inadvertence or by reason of an error in judgment. In this case, the member is "saved" because the member would not have his or her seat declared vacant.

On the original application, Ford argued both branches of the saving provision: that he acted inadvertently or made an error in judgment.[49] He dropped the inadvertence argument on the appeal.

Justice Hackland considered the defence of error in judgment and determined as follows:

> The case law confirms that an error in judgment, in order to come within the saving provision in s. 10(2) of the *MCIA*, must have occurred honestly and in good faith. In this context, good faith involves such considerations as whether a reasonable explanation is offered for the respondent's conduct in speaking or voting on the resolution involving his pecuniary interest. There must be some diligence on the respondent's part; that is, some effort to understand and appreciate his obligations. Outright ignorance of the law will not suffice, nor will wilful blindness as to one's obligations.[50]

It is important to recall that Ford (in a relatively unusual instance) testified *viva voce* before the court at the application hearing. He admitted that he had not read the MCIA, that he was unaware of what the statute obligated a member to do, that he had not attended the council orientation meeting which included a session on the MCIA and that he had not read the councillor's handbook which discussed a council member's obligations under the statute. In likely the most quoted portion of his judgment, Hackland R.S.J. wrote:

> In view of [Ford's] leadership role in ensuring integrity in municipal government, it is difficult to accept an error of judgment defence based essentially on a stubborn sense of entitlement . . . . In my opinion, [Ford's] actions were characterized by ignorance of the law and a lack of diligence in securing professional advice, amounting to wilful blindness. As such, I find his actions are incompatible with an error in judgment.[51]

Ford contended that willful blindness is not a valid consideration when determining error in judgment (although it may be in the case of inadvertence).

The Divisional Court commented that "an error in judgment can arise from either a mistake of law or of fact. However, the determination of whether the error occurred honestly or in good faith is a question of fact."[52] Accordingly, the question was whether Hackland J. committed a "palpable and overriding error" in concluding that Ford's supposed error in judgment occurred honestly and in good faith. The Divisional Court reviewed the evidence and reasons of Hackland R.S.J. and determined that he was correct in holding that subsection 10(2) did not apply to excuse Ford's contravention of the MCIA.[53] Indeed, the Divisional Court quoted the decision on the application:

> There must be some diligence on the respondent's part; that is, some effort to understand and appreciate his obligations. Outright ignorance of the law will not suffice, nor will wilful blindness as to one's obligations.[54]

The Divisional Court's reasons on this ground are instructive for future courts considering the defence of error in judgment:

> While he may have honestly believed his interpretation was correct, it would undermine the purposes of the *MCIA* if a subjective belief about the meaning and application of the law was sufficient to excuse a contravention of s. 5(1). When an individual seeks to rely on an error of law, good faith requires that he or she make some inquiry about the meaning and application of the law, rather than rely on his or her own interpretation. Wilful blindness to one's legal obligations cannot be a good faith error in judgment within the meaning of s. 10(2).
>
> Accordingly, in order to obtain the benefit of the saving provision in s. 10(2), the councillor must prove not only that he had an honest belief that the *MCIA* did not apply; he must also show that his belief was not arbitrary, and that he has taken some reasonable steps to inquire

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[48] *Ibid.*, at paragraph 79. Ford's remuneration from the City of Toronto during 2012 was listed at $172,686.87 pursuant to the "sunshine list" published under the *Public Sector Salary Disclosure Act, 1996*, S.O. 1996, c. 1, Sched. A. Of course, Ford comes from a well-off family and is independently wealthy (Enzo Di Matteo, "Five Reasons Not to Vote for Rob Ford," *NOW Magazine*, October 24, 2010).

[49] As noted by M. Rick O'Connor and George H. Rust-D'Eye in *Ontario's Municipal Conflict of Interest Act – A Handbook* (St. Thomas: Municipal World Inc., 2007) at 76, the two saving provisions are often pleaded together although they are two distinct defences: "inadvertence refers to a failure to direct one's mind to one's duty, whether the other involves advertence to one's duty, resulting in a judgment call, which proves to be in error."

[50] Superior Court decision, *supra*, at paragraph 53.

[51] *Ibid.*, at paragraph 58.

[52] Divisional Court decision, *supra*, at paragraph 81.

[53] *Ibid.*, *supra*, at paragraph 90.

[54] *Ibid.*, at paragraph 84 citing the Superior Court decision, *supra* at paragraph 53.

> into his legal obligations. In our view, the application judge properly stated that it was relevant to consider the diligence of the member respecting his obligations under the *MCIA* when determining the good faith of the member - for example, his efforts to learn about his obligations and his efforts to ensure respect for them. Wilful blindness is not confined, as the appellant contends, to a consideration of inadvertence. Therefore, the appellant has demonstrated no error in law by the application judge.[55]

The Divisional Court noted that the applications judge was aware that Ford had declared a pecuniary interest in previous unrelated matters before city council and that there was no transparency concern with respect to Ford's interests on February 7, 2012. Justice Hackland had not committed a palpable or overriding error in arriving at the determination that Ford had not established a *bona fide* error in judgment.

In summary, the Divisional Court substantially upheld Hackland R.S.J.'s decision on three of the four primary grounds of appeal.

(e) Legality of Decision CC 52.1

The Divisional Court determined that the financial sanction imposed by Decision CC 52.1 was not authorized by either the Code or the City of Toronto Act, 2006, and that it was therefore a nullity.[56] Under this heading, the Divisional Court considered (i) the doctrine of collateral attack, and (ii) whether the penalty contained within Decision CC 52.1 was a nullity as being ultra vires the City's powers.

(i) Collateral Attack

In his submissions to the Divisional Court, Magder argued that Ford was precluded from raising the validity of council's reimbursement order in Decision CC 52.1, as it was an impermissible collateral attack on that decision and on the findings of the Integrity Commissioner.[57] The Divisional Court examined this argument, and cited the following definition of "collateral attack":

> Collateral attack cases involve a party, bound by an order, who seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.[58]

The Ontario Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.* has recently commented that "[t]he rule against collateral attack seeks to maintain the rule of law and preserve the repute of the administration of justice."[59]

Magder contended that the Supreme Court of Canada's ruling in *R. v. Consolidated Maybrun Mines Ltd.*[60] applied to prohibit Ford from appealing Decision CC 52.1 via proceedings under the MICA.

The Divisional Court, however, held that *R. v. Consolidated Maybrun Mines Ltd.* did not apply, as the issue of legislative intention raised in that case was not triggered in *Magder v. Ford*, as there is no competing appeal or review mechanism established by the Legislature to determine the validity of city council's order. The Divisional Court held:

> Although an application for judicial review of Decision CC 52.1 would have been a possible remedy, this is not a situation where the legislation authorizes another tribunal to deal with the validity of the Code or Council's decision. Moreover, in the present case, the appellant faces a very severe penalty under the MCIA if he contravenes s. 5(1) by speaking or voting on a matter that affects his pecuniary interest. Indeed, the penalty of removal from office has been described as "draconian". Finally, and most importantly, the appellant argues that the Council had no jurisdiction to impose the sanction that it adopted in Decision CC 52.1.[61]

While the Divisional Court provides for the possibility that Ford could have applied for judicial review of Decision CC 52.1, it fails to note that other avenues of challenge were also available to Ford. The Divisional Court omits mention of a challenge to Decision CC 52.1 by an application to the court for declaratory relief pursuant to Rule 14.05 of the Ontario *Rules of Civil Procedure*.[62] Even more notable for its absence is any reference to the ability of any person to commence an application to quash pursuant to section 214 of the *City of Toronto Act, 2006*. This is important because an application to quash is limited to a one-year period from the

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[55] *Ibid.*, at paragraphs 89-90.

[56] *Ibid.*, at paragraph 47.

[57] *Ibid.*, at paragraph 51.

[58] *Ibid.*, at paragraph 53 citing Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 3rd ed. (Markham: LexisNexis Canada Ltd., 2010), p. 463

[59] *Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.* (2012), 113 O.R. (3d) 673 (Ont. C.A.) at 694.

[60] *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.

[61] Divisional Court decision, *supra*, at paragraph 58. In his leave application to the Supreme Court of Canada, Magder argues that Ford never challenged the initial report of the Integrity Commissioner or the city council order imposed on August 25, 2010. Furthermore, he argues that Ford brought the accusation of illegality years later, in separate proceedings that did not involve the City or the Integrity Commissioner as parties. See *Memorandum of Law of the Applicant, Paul Magder*, at paragraph 58.

[62] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 14.05.

date that city council passed a by-law, order or resolution.[63] Clearly, the legislative intent under the *City of Toronto Act, 2006* (and under the *Municipal Act, 2001*) was to impose a one-year limitation period on the ability of a person to quash a by-law, order or resolution passed by a municipal council (although it is acknowledged that it is possible to challenge the validity of a municipal council's decisions outside the one year period).

It is interesting to note that while the Divisional Court allowed for the existence of a possible remedy by a judicial review of the order (and failed to mention the other avenues of challenge by an application for declaratory relief or an application to quash), it still found that the doctrine of collateral attack was not engaged and that it was permissible for Ford to raise the illegality of city council's decision in his defence of the proceedings under the MCIA. The court ignored the direct route of appeal and limitation period as set out in section 214 of the *City of Toronto Act, 2006*.

The other difficulty with the collateral attack on Decision CC 52.1 is that the determination of invalidity was made in the absence of any representations or submissions from either the City of Toronto or the Integrity Commissioner who were not parties to the conflict of interest application and appeal proceedings.

(ii) Nullity

In deciding the proper judicial approach to the determination of the validity of municipal actions, as noted above, the Divisional Court relied on the Supreme Court of Canada's decision in *R. v. Greenbaum*.[64] The Divisional Court also cited *Montréal (City) v. 2952-1366 Québec Inc.*,[65] in which the Supreme Court of Canada analyzed the approach to the interpretation of general powers accorded to municipalities and the interaction of such general powers with more specific powers.[66] The Divisional Court held that the sanction provided for in Decision CC 52.1 was not authorized:

> Subsection 160(5) of the *COTA* sets out a clear limit on the sanctions that Council can impose for a violation of the *Code*. Consistent with what the Supreme Court said in cases like *Spraytech* and *Montreal* above, it is inappropriate to invoke a general power found elsewhere in the COTA to extend the specific power conferred by the Legislature in s. 160(5). Subsection 6(1) of the *COTA*, the instruction to interpret the powers of the City broadly, does not permit such a sanction, given the clear limits in s. 160(5). Nor does s. 7 assist, which states that the City "has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act." Finally, the power in s. 8 to provide any service or thing that the City considers "necessary or desirable for the public" cannot be used to extend the sanctions that may be imposed on councillors, given the wording of s. 160(5). Accordingly, the application judge erred in failing to find that Decision CC 52.1 was *ultra vires* by imposing a sanction not authorized by the *COTA*.[67]

In addition, the Divisional Court held that Decision CC 52.1 went beyond the "Other Actions" contemplated by the Code, because it required Ford to reimburse funds which he never received personally.[68] Since Ford never personally received any of the money donated for the football foundation that he established in his own name, the Divisional Court held that the sanction was not authorized by the Code or by the *City of Toronto Act, 2006*.[69]

The decision of the Divisional Court turned on two factors: (1) that the "Other Actions" outlined in the Code were not permissible under the statute, and (2) that Ford never personally received the money and he should not be required to personally repay it.

The Divisional Court applied a very restrictive reading of the "Other Actions" in the Code. However, consider that the Code expressly provides that the Integrity Commissioner may recommend "Repayment or reimbursement of moneys received." First, the provision does not provide that "received" means received by the member of council (although that is not an absurd inference). Second, such an interpretation would be unduly restrictive and it would exclude moneys received by anyone other than the member of council,

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[63] *City of Toronto Act, 2006*, *supra*, at s. 215(4):

> **215.** (4) An application to quash a by-law, order or resolution in whole or in part, subject to section 250, shall be made within one year after the passing of the by-law, order or resolution.

The Supreme Court of Canada in *R. v. Consolidated Maybrun Mines Ltd.* (as noted by the Divisional Court) adopted five factors listed by Laskin J.A. in the Ontario Court of Appeal that are to be considered in determining whether a court can rule on the validity of an administrative order collaterally attacked in penal proceedings which include, *inter alia*, the wording of the statute from which the power to issue orders is derived and the purpose of the legislation. It is noteworthy that the ability to quash a city by-law, order or resolution is available for only one-year from the date of passage (the same limitation is set out in s. 273 of the *Municipal Act, 2001*, S.O. 2001, c. 25).

[64] Divisional Court decision, *supra*, at paragraph 64.

[65] *Montréal (City) v. 2952-1366 Québec Inc.* 15 M.P.L.R. (4th) 1, 2005 SCC 62, [2005] 3 S.C.R. 141, 258 D.L.R. (4th) 595, 201 C.C.C. (3d) 161, 33 C.R. (6th) 78, 134 C.R.R. (2d) 196, 32 Admin. L.R. (4th) 159.

[66] Divisional Court decision, *supra*, at paragraph 65.

[67] *Ibid.*, at paragraph 69.

[68] *Ibid.*, at paragraph 70.

[69] *Ibid.*

including persons or entities related to or associated with the councilor. Third, would any reasonable person truly believe that moneys paid to a charitable foundation bearing the name of the member of council would not stand to the very appreciable benefit of the member? The fact that lobbyists donated their funds to the Rob Ford Football Foundation rather than directly to Ford himself is hardly relevant.[70]

This does not, however, serve to uphold the "Other Actions" set out in the Code. As noted in an earlier commentary on the decision of the Superior Court of Justice,[71] no mention was made by the Divisional Court of subsections 12(1) or 12(1.1) of the *City of Toronto Act, 2006*. Subsections 12(1) and (1.1) serve to limit back the broad applicability of the general municipal powers in the *City of Toronto Act, 2006* and make it clear that the two penalties set out in paragraphs 1 and 2 of subsection 160(5) of the statute are the only two sanctions that may be imposed.

Curiously largely missing in the media and academic scrutiny of the decision is the fact that city council could have monetarily penalized Ford in the amount of $3,150. City council could have financially penalized Ford by ordering a suspension of his remuneration as mayor for a period of time equal to $3,150. The funds that were not paid to Ford could then have been used by the city itself to reimburse the lobbyists who donated the funds. Ford would have been out of pocket in the amount of $3,150 but the penalty would have fit within the clear confines of the penalty provisions of the *City of Toronto Act, 2006*. Viewed in this light, the Divisional Court's difficulty with city council's reimbursement order appears to be more of a concern of form over substance.

The most troubling aspect of the Divisional Court's determination that Decision CC 52.1 is a nullity is how it collides directly with the principle of presumption of validity commonly afforded to municipal by-laws, orders and resolutions.[72] The decision appears to impose a new requirement for the triggering of a council member's obligation under section 5 of the MCIA: that "any matter" in which the member may have a pecuniary interest must somehow be a "lawful matter."[73] Such an interpretation will lead to an uncertainty as to the application of the statute and when a member must comply with the obligations set out in section 5 of the MCIA.[74]

Magder has raised the issue of the retroactive application of the remedy as a ground for leave to appeal the decision contending that the Divisional Court assumed that Ford was entitled to a retroactive remedy, which would require every municipal act taken as a result of an invalid by-law, order or decision to be unwound.[75]

Costs Ruling

The Ontario Divisional Court released its ruling on costs on April 2, 2013 and ordered that each party bear its own costs of the appeal, the stay application and the application.[76] The Divisional Court noted that although the general rule specifies that costs follow the event and that Magder was not a

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[70] The Integrity Commissioner noted as follows in her *Report of Violation of Code of Conduct, supra*, at 11:

> In this case, [Ford] identified the favour that he wanted. He was asking lobbyists and a corporation in business with the City of Toronto to donate to his charity. Councillor Ford made the decision to who he would ask for donations, and these donations benefited both the schools who received grants but also Councillor Ford.

[71] John Mascarin, "Eyes Wide Shut - Wilful Blindness & A Conflict of Fordian Proportions", 5 M.P.L.R. (5th) 30 at 55.

[72] *Ibid.*, at 57.

[73] The Ontario Divisional Court writes as follows in its ruling on costs in *Magder v. Ford* (April 2, 2013), Doc. 560/12 (Ont. Div. Ct.) at paragraph. 9: ". . . at the time that [Magder] launched this application, the decision imposing the sanction of reimbursement on [Ford] had not been found to be invalid, and [Ford] had not challenged its validity. In the circumstances, it was reasonable for [Magder] to pursue the application."

[74] Mascarin, "Eyes Wide Shut - Wilful Blindness & A Conflict of Fordian Proportions", *supra*, note 11 at 56

> The requirements under subsection 5(1) of the MCIA apply in respect of "any matter" in which a council member has any pecuniary interest where the member "is present at a meeting of the council . . . at which the matter is the subject of consideration." It would lead to an unworkable result if "any matter" were to be read down as meaning any "valid matter" or "authorized matter" (or some other similar term). This would lead to uncertainty as to the application of the statute. First, it would put a member of council in the position that he or she would have to make a legal determination that a matter before council was "legally valid". Second, it would erode the policy basis of the prohibition by potentially allowing council members to sometimes address a matter in which they have a pecuniary interest if the matter is somehow legally questionable. Third, it would create confusion and chaos with respect to the application of any order under the MCIA if a subsequent court challenge invalidates a by-law, resolution or other municipal action.

[75] *Memorandum of Law of the Applicant, Paul Magder*, at paragraphs 8 and 70.

[76] "It's ridiculous. It's outrageous," Ford said in an interview with Newstalk 1010. He added: "I won fair and square, and I should be awarded costs. But what can you do." Daniel Dale, "Mayor Rob Ford calls court costs decision ridiculous", *Toronto Star* (April 2, 2013).

With typical aplomb, Magder's lawyer Clayton Ruby retorted:

> "The Court would have given costs to Mayor Ford, as the law usually requires, were it not for Ford's impropriety in voting on an issue before City Council that concerned his pecuniary interest and Ford's 'wilful blindness.' In the end, he lost three issues out of four. Mayor

public interest litigant, there were three grounds to justify no award of costs to Ford:

- success in the proceeding was divided and Magder was ultimately successful on three of the four primary issues;
- the "proceeding raised novel issues with respect to matters of public importance"; and
- it was reasonable for Magder to have commenced the application since the validity of original order of city council had not been challenged by Ford.[77]

The Divisional Court's cost ruling confirms that there is no blanket public interest exemption for electors who pursue applications under the MCIA, that the courts have awarded costs in such cases and that applicants should be aware of the cost consequences of commencing applications under the statute. The ruling also makes it very clear that Magder was primarily successful and that the proceeding raised novel issues of "public importance."[78]

Conclusions

The decisions of the Divisional Court in *Magder v. Ford* clarify several matters relating to the application and interpretation of the MCIA, including that obligations of a member under the statute are personal ones; that code of conduct matters are subject to the MCIA but that an exemption cannot be read in to s. 4; the standard of review on an appeal; and the test to be applied on a consideration of the application of the exemption under clause 4(k) of the MCIA.

On the other hand, the Divisional Court's judgment also raises a number of significant questions, including the proper statutory interpretation approach to be placed on the MCIA; the application of the doctrine of collateral attack; the enervation of the principle of presumption of validity as it relates to municipal decisions; the imposition of a requirement that "any matter" under section 5 must be "legally valid" before a member of council has a pecuniary interest; whether a pecuniary interest is "real"; and the potential retroactive application of remedies arising from invalid municipal decisions. Unfortunately, the questions outnumber the clarifications and serve to create a great degree of uncertainty respecting the application and interpretation of the MCIA.

The general public has grown weary of the legal wrangling and maneuvering in this case. The matter, however, stays alive by virtue of Magder's application for leave to appeal to the Supreme Court of Canada. The Divisional Court's decision has generated a number of issues, some of which are undoubtedly of public importance. However, the Supreme Court of Canada typically hears only a small percentage of the applications for leave which are filed with it each year[79] and whether some or all of the issues in the leave application are deserving of its attention remains to be seen.

In the interim, the law respecting the interpretation and application of the MCIA has been thrown into a state of confusion and disarray with little prospect of any certainty of prediction for both members obligated to comply with their statutory duties and for electors who may seek to challenge potentially unlawful actions of members.

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Ford's costs request was, once again, scuppered by Mayor Ford." Megan O'Toole, "Rob Ford denied legal costs from accuser in conflict-of-interest case he won", *National Post* (April 2, 2013).

[77] *Supra*, note 7 at paragraphs 7, 8 and 9.

[78] The Divisional Court's choice of words is very interesting in view of Magder's application for leave to appeal to the Supreme Court of Canada where one of the grounds for obtaining leave under s. 40(1) of the *Supreme Court Act* is the "public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question."

[79] "'Getting leave to appeal is a huge long shot,' said Clayton Ruby, the Toronto lawyer masterminding the legal strategy to unseat Mayor Ford on behalf of a citizen, Paul Magder", Kirk Makin, *The Globe and Mail* (February 24, 2013). Mr. Ruby's comment was given prior to the release of the Divisional Court's judgment where the media were intent on ascertaining Rob Ford's chances of getting to the Supreme Court of Canada if he did not succeed on his appeal. Mr. Ruby has remained consistent in his view and stated that *his client's* chances of getting leave from the Supreme Court of Canada remains a "long shot": Sunny Dhillon, *The Globe and Mail* (March 15, 2013).