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EYES WIDE SHUT - WILFUL BLINDNESS & A CONFLICT OF FORDIAN PROPORTIONS

by John Mascarin

Introduction

"Accordingly, I declare the seat of the respondent, Robert Ford, on Toronto City Council, vacant."

With those words, rendered at the conclusion of his decision in *Magder v. Ford*[1] on an application brought pursuant to Ontario's *Municipal Conflict of Interest Act*,[2] Justice Charles Hackland ignited a maelstrom of controversy. Already front page and headline news in the Greater Toronto Area before the judgment was even issued on the morning of November 26, 2012, the decision exploded onto a frenzied media.

Writing in the *Law Times*, Jeffrey Lem noted, "This year has had its fair share of controversial, politicized and precedent-setting court decisions. No decision, however, has shaken the political landscape of the province as much as the recent ruling by Justice Charles Hackland of the Ontario Superior Court of Justice in *Magder v. Ford* that threatens to remove Toronto Mayor Rob Ford from office."[3]

Commentary on the judgment in the mainstream media, on local talk radio, on the internet, on the streets and at the water cooler has ranged from expressions of vitriolic indignation, shock and surprise to rueful acceptance and gleeful *schadenfreude*. Like Rob Ford himself who is a polarizing public figure, beloved by "Joe Public"[4] and his Ford Nation supporters as an uncomplicated straight-shooting politician[5] and bemoaned by his critics and many others as an embarrassment,[6] the responses to the judgment have been wildly divergent.

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[1] *Magder v. Ford* (November 26, 2012), 2012 CarswellOnt 14510, Doc. CV-12-448487 (Ont. S.C.J.). The parties in the case will be primarily referred to in this article as the applicant and the respondent (including references to them in the application for the stay of removal and the appeal).

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

[3] Jeffrey Lem, *Law Times*, "Magder teaches lesson about conflicts of interest" (December 3, 2012), 7.

[4] James Royson, *Toronto Star*, "Rob Ford proves popular at mayoral campaign launch" (March 29, 2010).

[5] Even the staid *Wall Street Journal* saw fit to write about Mr. Ford, in an article entitled "Outspoken Mayor Cuts a Big Figure" (April 6, 2012) leading with a quote that "he's the most interesting political figure in Canada by far" and noting that he often refers to himself as "300 pounds of fun."

[6] Christopher Hume of the *Toronto Star* (August 30, 2012) characterized Mr. Ford as "unco-operative, barely articulate and staggeringly incurious, his typical response is that he can't remember" and "petulant, arrogant, disrespectful, lazy, out of touch, indifferent, ignorant and makes no bones about it." Mr. Hume's fellow columnist Rosie DiManno likened Mr. Ford to a dimwitted lunkhead: *Toronto Star*, "Court case bad as bozo mayor" (September 9, 2012).

Magder v. Ford has engendered political accusations, calls for immediate legislative reform, discussions respecting the rule of law, an incredible amount of manoeuvering by and rhetoric from city councillors (both left and right wing), legal posturing and, unusual for a municipal law case, international media interest.[7]

Within Canada, the case has received coast-to-coast coverage, with a significant amount of reporting in national newspapers and television news programs, as well as regional coverage outside of Ontario, including dailies in Montreal,[8] Vancouver,[9] and Edmonton.[10]

This article reviews the decision in *Magder v. Ford*, the background to the case, the MCIA from both a historical and contextual perspective, the subsequent application for a stay and the decision, and concludes with the grounds for appeal. While this commentary may step outside the typical confines of what normally comprises a legal analysis of a court decision, it is hoped that this may be permitted given the intense media scrutiny and public interest the case has generated, the vast layers of agitprop that has been disseminated about it and some quite remarkable and unusual aspects about the legal proceedings and legislation.

Background

(a) Rob Ford – The Politician

Mr. Ford was elected the Mayor of Toronto on October, 2010 in a landslide victory.[11] He swept into office on a conservative agenda of fiscal responsibility calling for less government, lower taxes and an end to the "gravy train" at City Hall.[12] His mantra was and remains "Respect for taxpayers."[13]

The respondent's tenure as mayor has been tumultuous and his brash and unapologetic demeanour has only served to expand the political schism at Toronto City Hall. His mayoralty term has thus far been characterized by an astounding series of gaffes, blunders and plain outright mistakes that even the most politically-incorrect novice council member could not have committed. These include:

- Mr. Ford denied and then admitted during the 2010 mayoral race that he was arrested in Florida in 1999 for driving under the influence and for possession of marijuana.[14] "Go ahead, take me to jail," Mr. Ford is quoted in the police report.[15]
- Early in the 2010 mayoral campaign, Mr. Ford was caught on tape urging an ill man to score painkillers on the street.[16]

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[7] Ian Austen, *New York Times*, "Canada: Judge Orders Toronto Mayor to Leave Office" (November 27, 2012) at A14; Claire Sibonney, *Chicago Tribune*, "Toronto's combative mayor ordered to leave office"; *The Economist*, "Model-T Ford Breaks Down" (December 1, 2012), 41-42.

[8] The Canadian Press, *The Montreal Gazette*, "Toronto Mayor Rob Ford ordered removed from office" (November 26, 2012).

[9] Colin Perkel, *The Vancouver Sun*, "Rob Ford, Toronto mayor, removed from office; says he will fight court ruling" (November 26, 2012).

[10] Colin Perkel, *The Edmonton Journal*, "Ouster of Toronto Mayor Rob Ford on hold as parties agree on stay pending appeal" (December 3, 2012).

[11] Kathryn Blake Carlson, *National Post*, "Election Wrap-Up: Ford thanks Toronto for 'vote of confidence'" (October 26, 2010).

The City Clerk's Official Declaration demonstrated that Rob Ford won a significant victory receiving roughly 47% of the vote (383,501 votes), with George Smitherman receiving approximately 35.6% of the vote (289,832 votes) and Joe Pantalone receiving approximately 11.7% of the vote (95,482 votes) [City of Toronto, *Declaration of Results of Voting* (Toronto: City of Toronto, 28 October 2010)].

Rob Ford was previously Ward 2 Councillor for Etobicoke North, having first been elected to office in 2000 and then being re-elected in 2003 and 2006.

[12] *The Economist.* "Model-T Ford breaks down" (The Americas: The Economist Newspaper Limited, December 1, 2012).

Nicholas Köhler, *Maclean's*, "The political genius of Rob Ford" (Toronto: Maclean's Magazine, October 12, 2010):

> He will put an end to wasteful spending, eliminate government perks, cut taxes and reduce the size of city government-including halving the number of councillors from 44 to 22 and outsourcing garbage collection. He will do all this at the same time as he builds a new subway line. "People do not want streetcars in this city – they want subways," Ford likes to say, his expression that of a man who has just taken a sip of sour milk. "'If you get behind a streetcar-you're stuck! Enough with the streetcars!' Ford will, to sum up, 'stop the gravy train'– a phrase the allegedly buffoonish former city councillor allegedly vetted with focus groups for maximum effect."

[13] Paul Moloney, *Toronto Star*, "Mayor Rob Ford's conflict of interest case: The players" (September 2, 2012). Mr. Ford was often a lone wolf at council, railing at excessive spending. It was not unusual to find Mr. Ford to be the lone dissenting vote on matters before council. His mantra "respect for taxpayers" was reiterated when a relieved, rejuvenated and feisty Mr. Ford met with reporters immediately following the granting of his stay application allowing him to retain his seat at City Hall: *CityNews Toronto* (December 5, 2012).

[14] Pat Hewitt, *CP24*, "Toronto mayoral candidate Rob Ford talks about criminal charges he's faced" (Toronto: The Canadian Press, August 20, 2010).

[15] Kelly Grant, *The Globe and Mail,* "Ford's drunk driving conviction could steer his campaign into the ditch" (August 19, 2010).

[16] Ben Spurr of *NOW Magazine* compiled a list of Mr. Ford's more interesting quotations in "Say what?! Rob Ford in his own words and quotes from the mayor" and included an excerpt from a taped telephone conversation from June 4, 2010 when the mayor was asked if he can score some oxycontin: "I'll try, buddy, I'll try. I don't know this shit, but I'll fucking try to find it. Why don't you go on the street and score it? Fuck, you know, I don't know any drug dealers at all."

- Mr. Ford has been accused of committing a number of driving faux-pas:
  - he admitted that he was "probably" reading while driving on the city's busy Gardiner Expressway - the admission came in reaction to a photo that was circulating on Twitter that showed the mayor reading a document while sitting in the driver's seat of his new black Cadillac Escalade;
  - he admitted he drove past the rear doors of a stopped streetcar, and was then confronted by the operator of the streetcar;
  - he was accused of illegally dialing numbers on his cellphone and talking on it as he steered his previous gold minivan along Dundas Street West near Spadina Avenue;
  - in July 2011, he first denied accusations that he raised his middle finger to a mother and her six-year-old daughter after the mother accosted him for talking on his cellphone while driving (his press secretary later acknowledged to some media outlets that the mayor had been talking on his cellphone during that incident).
- Accosted in the driveway of his home by actress Mary Walsh (in character as Marg Delahunty in a mock ambush interview) and being filmed for CBC's satirical program, *This Hour Has 22 Minutes*, Mr. Ford fails to get the joke and calls 911.[17]
- The mayor attempted to single-handedly kill the "Transit City" (Toronto's public transit plan) and called city council "irrelevant" after he lost his subways-first plan.[18]
- Mr. Ford is not a big fan of the *Toronto Star* because "they are liars." The mayor's office has attempted to essentially boycott the largest daily newspaper in Canada from having any access to the mayor and does not provide the Toronto Star with any official notices, briefings and pronouncements.[19]
- The mayor said the city's taxpayers were to blame for an unexpected council vote to ban plastic bags.[20]
- Mr. Ford has steadfastly refused to participate in Pride Week, an annual 10-day celebration of diversity of the lesbian, gay, bisexual and transgender community held in Toronto since the early 1980s. In the two years he has been mayor, Mr. Ford has absented himself from the ceremonial kickoff to Pride Week and from participating in the Pride Parade.[21]
- Although he has not disclosed the amount of time that he has devoted to the management of high school football team he coaches, Mr. Ford gave a speech in the summer of 2012 where he said that coaching requires a major commitment: "Every day from 3 to 6 o'clock for September-October, and depending on how far the team goes in the playoffs, it could go to the end of November."[22] He has routinely skipped city council and other

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[17] Kelly MacFarland, *National Post*, "CBC plays unfunny joke on unamused mayor" (October 25, 2011). Mr. Ford was accused of verbally berating the 911 dispatchers who answered his emergency call. Toronto Police Chief Bill Blair issued a statement that confirmed Mr. Ford did not call the dispatchers "bitches" although Mr. Ford himself admitted to being agitated and have used obscene language with the dispatchers.

[18] Subsection 132(1) of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, enshrines a general principle of municipal law that the "power of the City shall be exercised by city council."

On December 1, 2010, the newly elected mayor purported to cancel Transit City by stating "the war on the car is over." He met that day with the chief general manager of the Toronto Transit Commission (TTC) and instructed him to redirect all resources away from the Transit City initiative (see Natalie Alcoba, *National Post*, "'The war on the car is over' . . . and so is Transit City" (December 1, 2010)). The mayor directed the TTC to develop a new transit plan and then signed a memorandum of understanding purportedly on behalf of the city with the Province of Ontario and Metrolinx, the province's transportation agency, to confirm the termination of Transit City, to make alternate public transit plans and to reimburse Metrolinx for non-recoverable sunk costs on the Transit City plan.

City councillor Joe Mihevc commissioned a legal opinion which was written by Freya Kristjanson and Amanda Darrach and posted by the councillor on his website. The comprehensive opinion concluded that the mayor acted without the approval and the authority of city council and that he had no independent authority to cancel Transit City. The mayor's unilateral and unauthorized cancellation of Transit City had originally been reported to cost the city approximately $65 million (Stephen Spencer Davies, *Toronto Life*, "Streetcar Named Disaster" (December 14, 2011) and Ben Spurr, *NOW Magazine*, "65 million reasons not to cancel Transit City" (December 13, 2011)).

Hit in the cross-fire was TTC chief general manager, Gary Webster, a 37-year employee of the TTC, who was fired when Mr. Ford's allies voted 5-4 vote to oust him for having the temerity to advise city council that above-ground light rail made good sense in some parts of Toronto, in defiance of the mayor's subway-only direction. See Megan O'Toole, *National Post*, "'Toadyism wins:' Councillors rage after TTC board sacks Toronto transit chief Gary Webster" (February 21, 2012).

[19] See John Honderich, *Toronto Star*, "Rob Ford boycotts the Star, but we'll fight it and here's why" (December 1, 2011). Mr. Ford also had an altercation with *Toronto Star* reporter, Daniel Dale, where the mayor called the police claiming that Mr. Dale had trespassed into his rear yard: CBC News, "Agitated Mayor Rob Ford confronts reporter outside home" (May 2, 2012).

[20] *CBC News*, "Toronto plastic bag ban is 'people's fault,' says Ford" (Toronto: CBC News, June 7, 2012).

[21] Natalie Alcoba, *National Post*, "Rob Ford skips Pride kickoff for second year" (June 25, 2012).

[22] Daniel Dale, *Toronto Star*, "Mayor Rob Ford took most afternoons off during football season, itineraries suggest" (November 29, 2012).

meetings to attend to his coaching duties for the Don Bosco Eagles.[23]

- Players on his high school football team were picked up by two TTC buses on active duty that were pulled from their routes and were required to abandon their paying passengers.[24] Apparently, two telephone calls were placed by the mayor to the TTC chief general manager immediately prior to the re-routing of the buses.
- Mr. Ford and his brother criticized the city's medical officer of health on their weekly radio show, referring to his report recommending lowering speed limits for drivers on residential streets as "nonsense" and the officer's salary as an "embarrassment."[25] He then claimed that the city's Integrity Commissioner was politically motivated in the wake of her finding that their comments had violated council's *Code of Conduct*.
- Mr. Ford and his allies lambasted the city's Ombudsman, Fiona Crean,[26] for her report that criticized the Mayor's office for interfering with the public appointments process.[27] After being grilled at city council, the Ombudsman actually turned up a list of preferred candidates that had been provided by the mayor's office to members of the mayor's executive committee who were on the civic appointments committee.[28]

And if being embroiled in the municipal conflict of interest proceedings was not enough of a legal battle, the respondent was also named in a $6 million defamation claim by Beach restaurant owner George Foulidis who took offence with Mr. Ford's suggestion that a leasing deal between Mr. Foulidis' company, Tuggs Inc., and the city was corrupt. During his 2010 mayoral campaign Mr. Ford had told the *Toronto Sun* that a sole-sourced, untendered, 20-year contract the city awarded Tuggs Inc. for a restaurant on public land "stinks to high heaven."[29] The trial took place in November, 2012.

Moreover, the respondent's campaign election finances have been questioned. The financial disclosure filings by Ford's mayoral campaign appear to show that the campaign effectively borrowed $69,722.31 from Doug Ford Holdings, a corporation whose directors include the respondent and his brother, Doug Ford.[30] On May 4, 2011, Adam Chaleff-Freudenthaler and Max Reed filed for a compliance audit of the respondent's campaign finances. Their brief identifies that the campaign may have exceeded its legal spending limits, and that it may have illegally borrowed $77,722 from Doug Ford Holdings, among other alleged violations of the *Municipal Elections Act, 1996*.[31] On May 13, 2011, the city's Compliance Audit Committee unanimously agreed that the mayor's election expenses should be audited. The city has appointed Froese Forensic Partners to conduct the audit.

All in all (and the foregoing only sets out a partial list of errors perpetuated by Mr. Ford), the respondent's term as mayor (viewed in the best light) has been marked by a series of missteps and (observed more critically) has been a shameful and reprehensible mockery of his office.

(b) Accountability and Transparency

Sometime after the Municipality of Metropolitan Toronto and its six lower-tier constituent municipalities were amalgamated by the Province of Ontario into the new City of Toronto, the municipality awarded a contract with respect to city computer equipment. It appeared that an initial three-year term contract worth approximately $43 million was awarded by the city to a computer supply and service company. Over that period the city paid approximately $85 million to the contractor. An investigation was undertaken and city council passed a resolution seeking a judicial inquiry into the matter. Madam Justice Denise Bellamy was appointed as inquiry commissioner and she delivered her final report on September 12, 2005.[32]

Commissioner Bellamy discovered much that was wrong with the way the City of Toronto operated and she proposed a very long list of recommendations for adoption relating to

[23] The Don Bosco Eagles reached the Metro Bowl, the high school championship game, but lost 28-14. Mr. Ford was gracious in defeat noting that he was proud of his players but that the Newmarket Huron Height were the better team that evening. Mr. Ford unequivocally stated that he would be back coaching the team next year: Natalie Alcoba, *National Post* (November 28, 2012).

[24] *CBC News*, "TTC buses pulled off routes to pick up Rob Ford's football team" (Toronto: CBC News, November 4, 2012).

[25] *CBC News*, "Rob Ford: Integrity commissioner politically driven" (Toronto: CBC News, October 25, 2012).

[26] Fiona Crean is the city's first Ombudsman, appointed by city council in November, 2008 pursuant to section 170 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A.

[27] Ombudsman Report, *An Investigation into the Administration of the Public Appointments Policy* (Toronto: City of Toronto, September 27, 2012). Steven Kupferman, "Toronto Ombudsman: Mayor's Office Compromised the Public Appointments Process", *Torontoist* (September 27, 2012).

[28] Ombudsman Addendum Report, *An Investigation into the Administration of the Public Appointments Policy* (Toronto: City of Toronto, October 25, 2012).

[29] Ben Spurr, *NOW Magazine*, "Rob Ford awaits verdict in libel case" (November 20, 2012).

[30] John Lorinc, *The Globe and Mail*, "Ford's unique approach to campaign financing: Borrow from family firm" (April 6, 2012).

[31] Steve Kupferman, *Torontoist*, "A History of Formal Complaints Against Rob Ford" (Toronto: Ink Truck Media, November 19, 2012). *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched.

[32] Justice Denise Bellamy, *Computer Leasing Inquiry/Toronto External Contracts Inquiry* (Toronto: City of Toronto, 2005).

ethics, governance, lobbying and other matters. Commissioner Bellamy advocated for an expanded code of conduct for municipal councillors, the hiring of a full-time integrity or ethics commissioner to report directly to council, a lobbyist code of conduct and registry, and many other enhancements to improve the transparency, accountability and operation of the city.

When the *City of Toronto Act, 2006*[33] was enacted, it included Part V - Accountability and Transparency, which provisions were primarily derived from the judicial inquiry report.[34] Part V requires that the City of Toronto appoint integrity officials, including an Integrity Commissioner, Ombudsman, Auditor General and a Lobbyist Registrar.[35] The city is also required to establish a code of conduct for members of city council.[36] City council amended the *Code of Conduct for Members of Council – City of Toronto* in 2006 to comply with the requirements of section 157 of the *City of Toronto Act, 2006*.[37] Toronto's current Integrity Commissioner is Janet Leiper.[38]

(c) Code of Conduct Complaint

On May 4, 2010, a member of the public filed a complaint pursuant to the *Code of Conduct Complaint Protocol for Members of Council* and section 160 of the *City of Toronto Act, 2006* that the respondent (then still Councillor for Ward 2) had violated the *Code of Conduct*. The complaint alleged that the respondent had sought donations to the Rob Ford Football Foundation via letter, which was printed on his city letterhead and enclosed within a City of Toronto envelope. The complainant became aware that the respondent had announced his candidacy for mayor on March 25, 2010 and wrote "This left me uncomfortable. While it was not stated in words, there was a clear sense of an implied suggestion that a donation to his charity might serve me well should he be elected Mayor."[39] An investigation was conducted by the Integrity Commissioner, who brought a report to city council in accordance with the *Complaint Protocol* and subsection 162(3) of the *City of Toronto Act, 2006* concluding that the respondent had violated the city's *Code of Conduct*.[40]

On August 27, 2010, city council adopted the following recommendations from the Integrity Commissioner's report on consent:

> 1. Councillor Rob Ford violated Articles IV, VI and VIII of the Code of Conduct;
>
> 2. Councillor Ford will reimburse the lobbyist and corporate donors in the amounts listed in the attachment to the report (August 12, 2010) from the Integrity Commissioner and provide confirmation of such reimbursement to the Integrity Commissioner.

More fully, the adoption of the report meant that:

> **Code of Conduct Article IV (Gifts and Benefits)**: City council found that the respondent had breached Article IV by soliciting and receiving donations from persons and organizations engaged in bidding on contracts from the City of Toronto. In some cases, the donations were made within several months of lobbying activity with the then councillor.
>
> **Code of Conduct Article VI (Use of City Property, Services and Other Resources)**: City council found that the respondent and his staff had improperly used city resources to work on the Rob Ford Football Foundation, which is not a City of Toronto-sponsored initiative.
>
> **Code of Conduct Article VIII (Improper Use of Influence)**: City council found that the respondent had improperly used his influence of office to seek and receive the donations in his official capacity.

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

[34] Leo F. Longo and John Mascarin, *A Comprehensive Guide to the City of Toronto Act, 2006* (Markham: LexisNexis Canada Inc., 2008), 199.

[35] Unlike the accountability and transparency provisions in the Part V.1 of the *Municipal Act, 2001*, S.O. 2001, c. 25, which are discretionary powers for all municipalities in Ontario, Part V in the *City of Toronto Act, 2006* is mandatory for the City of Toronto. Notwithstanding the statutory imperative, on October 25, 2012, Mr. Ford proposed eliminating the positions of Toronto Ombudsman Fiona Crean, Toronto Lobbyist Registrar Linda Gehrke and Integrity Commissioner Janet Leiper: Daniel Dale, *Toronto Star*, "Mayor Rob Ford wants to eliminate city watchdog offices" (October 27, 2012).

[36] Section 157 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A.

[37] See Leo F. Longo and John Mascarin, *A Comprehensive Guide to the City of Toronto Act, 2006* at 200-201 and footnote 7:

> The City adopted a *Code of Conduct for Members of Council Inclusive of Lobbyist Provisions* on September 28 and 29, 1999 (Clause 2 of Report 5 of Administration Committee). The *Code of Conduct* was amended to comply with the requirements of subsection 157(1) of the City of Toronto Act, 2006. *Amendments to Code of Conduct for Members of Council* was approved by city council on September 25, 26 and 27, 2006 (Clause 26 of Report 7 of the Policy and Finance Committee) and came into force on February 8, 2007 following city council's approval on February 5, 6, 7 and 8, 2007 of the appeal mechanisms and legal support program in CC2.5 *Amendments to the Code of Conduct Complaint Protocol under Members Code of Conduct.*

[38] Janet Leiper was appointed by city council to a 5-year term which commenced on September 8, 2009. She followed current Dean of Osgoode Hall Law School, Lorne Sossin, who acted as Interim Integrity Commissioner following the retirement of the city's first Integrity Commissioner, Professor David Mullan.

[39] Integrity Commissioner, *Report on Violation of Code of Conduct* (Toronto: City of Toronto, August 12, 2010) at 2.

[40] Ibid. at 1.

Subsequently, the respondent failed to provide the proof of repayment required by city council's resolution. Between August 31, 2010 and October 4, 2011, six written requests were sent by the Integrity Commissioner to the respondent requesting confirmation of repayment. The respondent's failure to repay donors was brought to city council's attention at its meeting on July 13, 14 and 15, 2011 during the Integrity Commissioner's annual report.[41] Eventually, the Integrity Commissioner submitted a Report on Compliance with Council Decision CC52.1 and, at its meeting on February 7, 2012, city council reviewed the Integrity Commissioner's recommendation 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.[42]

The respondent did not declare a pecuniary interest on the matter at this meeting. The respondent spoke directly to the issue ahead of the vote and pleaded against enforcing city council's previous resolution. Another member of city council moved to rescind the earlier decision and to not take any additional action with respect to the matter. The respondent did not speak to the motion directly, but subsequently cast a vote in favour of rescinding the previous decision.[43]

(d) Application under MCIA

Enforcement of the MCIA is by private application commenced by an elector pursuant to section 9 of the statute:

> 9 (1) Subject to subsection (3), an elector may, within six weeks after the fact comes to his or her knowledge that a member may have contravened subsection 5 (1), (2) or (3), apply to the judge for a determination of the question of whether the member has contravened subsection 5 (1), (2) or (3).

"Elector" is defined in section 1 of the MCIA to mean (with respect to a municipality) "a person entitled to vote at a municipal election in the municipality."

The applicant who filed the Notice of Application at the Ontario Superior Court of Justice is Toronto resident Paul Magder.[44] The applicant believed that the respondent should not have spoken at city council or voted upon the motion to rescind the report from the city's Integrity Commissioner.

However, the applicant was not the first person who considered filing the application under the MCIA. Adam Chaleff-Freudenthaler went to school with the applicant's children and was the one who first reviewed the issue and brought the potential conflict of interest to the applicant's attention.[45] As noted above, Mr. Chaleff-Freudenthaler persuaded the city's compliance audit committee to order an audit into the respondent's mayoralty campaign election finances. Furthermore, it was Mr. Chaleff-Freudenthaler who contacted Clayton Ruby (legal counsel for the applicant) to inquire if he would be interested in taking the case under the MCIA.[46]

Legislation

(a) General

The original *Municipal Conflict of Interest Act, 1972* was first enacted in Ontario in 1972.[47] Although various statutory shortcomings were identified, which led to the enactment of the *Municipal Conflict of Interest Act, 1983*,[48] the provisions of the statute have remained very much the same for the past 40 years with minimal modifications. The currently notorious automatic declaration of vacancy has existed since the *Municipal Conflict of Interest Act, 1972*.[49]

An overhaul of the MCIA was proposed by a new piece of conflict of interest legislation introduced in 1994 as part of the *Planning and Municipal Statute Law Amendment Act,*

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[41] Integrity Commissioner, *Report on Compliance with Council Decision CC52.1* (Toronto: City of Toronto, January 30, 2012) at 1.

[42] Ibid. at 2.

[43] As is well known, the respondent's vote was not required as the motion to rescind passed 22-12.

[44] Paul Moloney, *Toronto Star*, "Mayor Rob Ford's conflict of interest case: The players" (September 2, 2012). Mr. Magder is not the well-known furrier bearing the same name who challenged the provincial Sunday shopping by-laws in the 1970s.

[45] Christie Blatchford, *National Post*, "Behind the people who brought down Toronto Mayor Rob Ford" (November 29, 2012).

[46] Daniel Dale, *Toronto Star*, "Meet Adam Chaleff-Freudenthaler: The 27-year-old who triggered Rob Ford's downfall" (November 27, 2012).

[47] *Municipal Conflict of Interest Act, 1972*, S.O. 1972, c. 142. Royal Assent was given to Bill 214 on December 15, 1972.

[48] *Municipal Conflict of Interest Act, 1983*, S.O. 1983, c. 8. Royal Assent was given to Bill 14 on February 23, 1983 and the statute was proclaimed in force on March 1, 1983.

[49] Subsection 5(1) of the *Municipal Conflict of Interest Act, 1972*, S.O. 1972, c. 142, provided as follows:

> 5(1) Where the judge determines that a member of the council or of a local board has contravened subsection 1 or 2 of section 2, he shall, subject to subsection 2 of this section, declare the seat of the member vacant . . . (emphasis added)

Clause 10(1)(a) of the *Municipal Conflict of Interest Act, 1983*, S.O. 1983, c. 8, reads almost exactly the same as it does in the current MCIA:

> 10(1) Subject to subsection (2), where the judge determines that a member or a former member while he was a member has contravened subsection 5 (1), (2) or (3), he,
>
> (a) shall, in the case of a member, declare the seat of the member vacant . . . (emphasis added)

The mandatory penalty of the vacating of the council member's seat has remained in place for over 40 years.

1994.[50] The *Local Government Disclosure of Interest Act, 1994* actually received Royal Assent and was proclaimed to come into force on April 15, 1994 but a change in government revoked the proclamation a mere two days before its effective date.[51] This statute would have implemented a discretionary power to declare a member's seat vacant for contravention (while at the same time instituting a mandatory suspension of a member's pay and benefits for a period of up to 90 days).[52]

The origins of the MCIA are well-stated by M. Rick O'Connor and George H. Rust-D'Eye:

> The passage of this legislation constituted a fundamental change in the approach to handling conflicts of interest in the municipal arena. Its general intent was to preclude councillors and members of local boards from considering or voting on those specific matters in which they had a "pecuniary interest" — while not affecting their qualification to remain in public office. In essence, the 19th-century principle of disqualification had been replaced by the dual concepts of disclosure and abstention by members on an issue-by-issue basis.[53]

In *Lorello v. Meffe* it was noted as follows: "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."[54] The MCIA sets out a legislative framework for when local decision-makers must declare an interest and must recuse themselves from participation and from voting in the decision-making process. The statutory provisions are not dissimilar to municipal conflict of interest legislation in other jurisdictions in Canada.[55]

The MCIA is a statute of general application to all "members" (broadly defined and including former members) of a municipal council or a local board in Ontario. Traditionally, municipalities have governed and regulated matters relating to property, land use development and business licensing which can be areas of risk with respect to conflicts of interest.

In general, conflict of interest legislation is strict. The MCIA has recently been described as a "sledgehammer" and an "intrusion into the democratic process by the courts".[56] Justice Hackland refers to it as a "very blunt instrument." Commissioner Cunningham in his *Report of the Mississauga Judicial Inquiry - Updating the Ethical Infrastructure*, wrote that the sanctions available under the MCIA are "severe" and "draconian."[57]

However, the statute was meant to be strict and unforgiving. The severity of the MCIA was articulated by Justice Belleghem in *Halton Hills (Town) v. Equity Waste Management of Canada* in the following terms:

> The *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, provides for the automatic unseating of any council member who votes on any public matter in which he or she has any financial interest.
>
> The Act is crystal-clear. It is harsh. It must be. It controls the actions of council members. They are the re-

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[50] *Local Government Disclosure of Interest Act, 1994*, S.O. 1994, c. 23, Sched. B. The statute remained on the books as unproclaimed until it was finally and mercifully repealed by para. 484(2)9 of the *Municipal Act, 2001*, S.O. 2001, c. 25.

[51] See Patricia A. Foran and Andrea Skinner, "Is the *Municipal Conflict of Interest Act* Too Broad?", *The Six-Minute Municipal Lawyer 2011* (Law Society of Upper Canada: May 18, 2011) at 14-12-14-13 and Rick O'Connor, "Municipal Conflict of Interest: One More Time With Feeling", 3 D.M.P.L. (May 1995), No. 5, at 63, 78-81.

[52] *Local Government Disclosure of Interest Act, 1994*, S.O. 1994, c. 23, Sched. B:

> 9 (1) If the court determines that a member or a former member while he or she was a member has contravened section 4, 5 or 6, the court,
>
> (a) shall suspend the member without pay or benefits for a period of not more than 90 days;
>
> (b) may, in the case of a member, declare the seat of the member vacant . . . (emphasis added)

[53] M. Rick O'Connor and George H. Rust-D'Eye, Ontario's *Municipal Conflict of Interest Act - A Handbook* (St. Thomas: Municipal World Inc., 2007) at 2-3.

[54] *Lorello v. Meffe* (2010), 99 M.P.L.R. (4th) 107 (Ont. S.C.J.) at 113.

[55] Alberta - Part 5 of the *Municipal Government Act*, R.S.A. 2000, c. M-26; British Columbia - Part 4, Division 6 of the *Community Charter*, S.B.C. 2003, c. 26; Manitoba - *Municipal Council Conflict of Interest Act*, C.C.S.M. c. M255; Saskatchewan - *Municipalities Act*, S.S. 2005, c. M-36.1 and *The Cities Act*, S.S. 2002, c. C-11.1; Nova Scotia - *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c. 299; New Brunswick - section 207 of the *Municipalities Act*, R.S.N.B. 1973, c. M-22; Prince Edward Island - section 23 of the *Municipalities Act*, R.S.P.E.I. 1988, c. M-13; Newfoundland and Labrador - section 207 of the *Municipalities Act*, S.N.L. 1999, c. M-24.

[56] Professor David Mullan in a report to Toronto City Council, as quoted in the decision at para. 46, and current Mississauga Integrity Commissioner, Robert Swayze, was quoted in the *Toronto Star* (Sunday December 2, 2012). Mr. Swayze candidly commented that he had met with staff at the Ministry of Municipal Affairs and Housing and that "[t]here was talk with the government, but no action." In an editorial published on November 29, 2012, "Fix this Flawed Law", the *Toronto Star* noted that the MCIA is inadequate and that "[t]he existing law is too narrow and, as a result, its outcomes can be overly harsh."

[57] Justice J. Douglas Cunningham, *Report of the Mississauga Judicial Inquiry - Updating the Ethical Infrastructure* (City of Mississauga, 2011) at 158 and 171. He notes at 159: "Broadly speaking, the quasi-penal nature of the MCIA is outdated and out of step with the modern municipal accountability regime. The MCIA lacks more nuanced remedies."

> positories of the citizens' highest trust. They must at once be strong in their debate to put forward their electorates' concerns; they must always have an ear to the dissent in their voters. They must not only be unshirkingly honest - they must be seen to be so - by those who voted *for* them, and those who voted *against* them. Their role, though noble in its calling, is demanding in its execution. It is onerous in the extreme.[58]

It is curious that so many people have decried the statute and the mandatory vacating of office for contravention as undemocratic when it was enacted by elected provincial legislators who believed that strict conflict of interest requirements were needed to keep local government officials on the right side of the law. It must be noted again that the statute and the automatic removal from office for contravening its requirements has been in place for over 40 years (and that it is not the first time that the vacating of a member's office has been ordered).[59]

The MCIA may be "outdated" but it remains the law until the provincial legislators change it.

(b) Pecuniary Interest

The statute does not apply to conflicts of interest in the broad sense; instead it targets a "pecuniary interest" of a member of council. A pecuniary interest is not defined in the MCIA but has been held to be one that is "concerning or consisting of money . . . an interest that has a monetary or financial value."[60]

(c) Obligations of Member

The MCIA provides that if a member of council has a pecuniary interest in a matter that is to be considered by the council or a committee the member must declare the interest and then not participate or vote on the matter or attempt in any way to influence the voting on the matter. These obligations are set out in section 5 of the statute:

> 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

Section 5 sets out the general responsibilities of a member of council. The obligations are personal ones that the member of council is solely responsible to discharge.

Both the *Municipal Act, 2001* and the *City of Toronto Act, 2006* expressly provide that a person shall not take a seat on the council until the person takes a declaration of office.[61] The declaration of office is a standard form which is established by the Minister of Municipal Affairs and Housing and sets out four simple sentences which elected, acclaimed or appointed members solemnly promise and declare to abide by and fulfill. The third declaration states as follows:

> 3. I will disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*.

The declaration of office leaves no doubt that the obligation to comply with the requirements of the statute is a personal responsibility of the member of council. This means that a member of council cannot point to the municipal solicitor, the clerk, the chief administrative officer or any other member of council to caution, warn or discharge his or her responsibility under the MCIA.

(d) Exceptions

Section 4 recognizes that there are a number of instances where a member of council may have a pecuniary interest but that various interests shall not serve to trigger the obligations under section 5. There are eleven express exceptions: the first 9 refer to narrow and specific matters and the last two are general and have consequently generated the most

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[58] *Halton Hills (Town) v. Equity Waste Management of Canada* (1995), 30 M.P.L.R. (2d) 232 (Ont. Gen. Div.) at paras. 8-9.

[59] Removal from office is rare but it has happened. It likely would have been ordered in *Sims v. Fratesi* (1996), 36 M.P.L.R. (2d) 294, 141 D.L.R. (4th) 547, 19 O.T.C. 273 (Ont. Gen. Div.), where the former mayor of Sault Ste. Marie was found to have breached the MCIA, but for the fact that he had already resigned from office. Justice Poupore exercised the discretion afforded under clause 10(1)(b) of the MCIA to disqualify the former member from holding office for 6 years.

In 2009 a trustee and former chair of the Toronto Catholic District School Board had his seat vacated pursuant to clause 10(1)(a) of MCIA: *Baillargeon v. Carroll* (2009), 56 M.P.L.R. (4th) 161 (Ont. S.C.J.).

In their book *Alberta's Local Governments: Politics and Democracy - 1958-1968*, Jack K. Masson and Edward C. LeSage note that William Hawrelak, a multi-term mayor of the City of Edmonton, was twice removed from office for conflict of interest contraventions, first in 1959 and then again (after having gained re-election) in 1965.

Renata D'Aliesio, *The Globe and Mail*, "Other mayors have faced conflict of interest penalties" (November 26, 2012) wrote, "In an e-mail, a spokeswoman for the Ontario Ministry of Municipal Affairs said the department is not aware of any recent cases where a mayor has been found guilty of contravening the conflict-of-interest law and his or her seat has been declared vacant."

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

[61] *Municipal Act, 2001*, S.O. 2001, c. 25, s. 232(1); *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 186.

judicial consideration. At issue in *Magder v. Ford* was the final general exception which provides as follows:

> 4. Section 5 does not apply to a pecuniary interest in any matter that a member may have,
>
> . . .
>
> (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

There is no exception for permitting a member of council to make submissions regarding a finding or recommended penalty in an Integrity Commissioner's report.[62]

(e) Penalties

The penalty for contravening the statute is severe. Section 10 of the statute provides that if a judge of the Ontario Superior Court of Justice determines that a member has contravened the MCIA, the member's seat must be declared vacant. Unless one of the saving provisions is applicable, the judge has no discretion and the member's seat is automatically vacated.[63] The judge does have discretion to further disqualify the member from being elected for up to 7 years and also to order reimbursement of any financial gain.

Subsection 10(1) provides as follows:

> 10(1) Subject to subsection (2), where the judge determines that a member or a former member while he or she was a member has contravened subsection 5(1), (2) or (3), the judge,
>
> (a) shall, in the case of a member, declare the seat of the member vacant; and
>
> (b) may disqualify the member or former member from being a member during a period thereafter of not more than seven years; and
>
> (c) may, where the contravention has resulted in personal financial gain, require the member or former member to make restitution to the party suffering the loss, or, where such party is not readily ascertainable, to the municipality or local board of which he or she is a member or former member.

While the disqualification and reimbursement penalties are optional orders that a judge may impose if a contravention is found, the mandating of the member's seat is imperative under the statute and the judge has no discretion not to impose it.

(f) Saving Provisions

By virtue of the express language of section 10, a judge does retain the ability to excuse a member's contravention and not order his or her seat vacant if the judge determines that the member contravened the statute through inadvertence or an error in judgment. These are the two saving provisions set out in subsection 10(2):

> 10(2) Where the judge determines that a member or a former member while he or she was a member has contravened subsection 5(1), (2) or (3), if the judge finds that the contravention was committed through *inadvertence* or by reason of an *error in judgment*, the member is not subject to having his or her seat declared vacant and the member or former member is not subject to being disqualified as a member, as provided by subsection (1). (emphasis added)

Subsection 10(3) expressly provides that a member cannot be suspended.

The Decision

(a) Grounds for Defence

The respondent defended the application on four grounds:

1. the MCIA did not apply to violations of the City of Toronto's *Code of Conduct*;
2. the initial resolution of city council requiring the respondent to reimburse the $3,150 in donations was a nullity as it exceeded the statutory powers of the city under the *City of Toronto Act, 2006*;
3. the exception in clause 4(k) of the MCIA applied since the amount was so remote or insignificant as to not be regarded as likely to influence the respondent's actions; and

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[62] Justice J. Douglas Cunningham, *Report of the Mississauga Judicial Inquiry - Updating the Ethical Infrastructure* (City of Mississauga, 2011) recommends a greater cohesion between the MCIA and municipal codes of conduct. His recommendation 14 (at 173) advocates an amendment to the MCIA permitting a member to make submissions to council regarding an Integrity Commissioner's report finding or a recommended penalty under a code of conduct.

[63] Much of the publicity surrounding the judicial decision was directed at the draconian nature of the penalty under s. 10(1) which ordered the removal of Mr. Ford from office. However, such a provision is not usual in similar legislation in other jurisdictions throughout Canada.

In British Columbia, the *Community Charter*, S.B.C. 2003, c. 26, explicitly states that a council member who fails to comply with the restrictions on conflicts of interest is disqualified from office unless the contravention occurred due to inadvertence or an error in judgment made in good faith: ss. 101(3), 102(3), 103(2), 105(3), 106(3), 107(3), 108(2) and 110.

Manitoba's *Municipal Council Conflict of Interest Act*, C.C.S.M. c. M255, is as harsh as Ontario's statute:

> 21(2) Where the judge declares that the councillor has violated a provision of this Act, the judge
>
> (a) shall declare the seat of the councillor vacant; and
>
> (b) may, where the councillor has realized pecuniary gain in any transaction to which the violation relates, order the councillor to make restitution to any person, including the municipality, affected by the pecuniary gain.

4. the saving provisions in subsection 10(2) of the statute applied as the respondent's contravention of the MCIA was committed by inadvertence or an error in judgment.

(b) Application of the Municipal Conflict of Interest Act

The statute is one of general application and clearly provides in section 5 that if a council member has a pecuniary interest (or even a potential pecuniary interest[64]), he or she must first disclose the interest and the general nature thereof and thereafter not take part in any discussion or vote on the matter and not attempt to influence the vote. The MCIA recognizes that there may be instances in which a member of council may still be entitled to participate and vote on matters in which he or she has a pecuniary interest. A finite list of exceptions is set out in section 4 of the statute.

As noted above, at its meeting on February 7, 2012, city council had before it a report from its Integrity Commissioner setting out two recommendations: (1) that city council require the respondent to provide proof of reimbursement of the donated monies as required in its previous decision, and (2) that if proof has not been provided by March 6, 2012, the Integrity Commissioner would report back to city council.

It is irrefutable that when the matter came up at council the respondent failed to declare his pecuniary interest and that he addressed the issue as noted by Justice Hackland "with apparent reference to the proposed sanction, the respondent said, 'And then to ask that I pay it out of my own pocket personally, there is just, there is no sense to this. The money is gone; the money has been spent on football equipment'."

A motion to rescind city council's previous decision and not to take any further action on the matter was moved. The respondent did not speak on the motion but did cast a vote in favour of it. The motion carried by a vote of 22 to 12.

The respondent argued that he would be denied procedural fairness and natural justice if he was not afforded an opportunity to address the matter. The respondent noted one of the recommendations of Justice Cunningham in the Mississauga Judicial Inquiry which advocated for an explicit provision stating that the MCIA does not prevent a member from making submissions regarding a finding in an Integrity Commissioner's report or pertaining to the imposition of a penalty under a municipal code of conduct. This, as noted by Hackland R.S.J., is a policy argument. The recommendations of Justice Cunningham in the Mississauga Judicial Inquiry have not been acted upon. The statute presently sets out 11 enumerated exceptions to the engagement of section 5 - there is no express exception in section 4 that pertains to codes of conduct or to members being exempted from the requirements of the MCIA if a matter before their council relates to a code of conduct finding or penalty.

The respondent also contended that as a matter of statutory interpretation, the MCIA does not apply to violations under a municipal code of conduct because they are two separate regimes, the first dealing with transparency and disclosure of financial interest and the second concerning ethical conduct of council members. The respondent's position appeared to be that in order for subsection 5(1) to apply, a council member's pecuniary interest had to equate to a personal pecuniary benefit somehow arising from a municipal commercial or business matter before the council.

Justice Hackland concludes 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." The learned justice further notes that any argument relating to procedural fairness must end with speaking or making submissions on a matter and cannot possibly extend to a right to vote on a matter (which is expressly precluded by clause 5(1)(b) of the MCIA). Such determinations are unassailable.

Contrary to the allegations of the respondent that the MCIA and the city's *Code of Conduct* constituted two separate and distinct regimes, Hackland R.S.J. finds that "[b]oth are aimed at ensuring integrity in the decision-making of municipal councillors" and that they are intended to operate together.

(c) Council Authority to Order Reimbursement

The respondent essentially argued that city council had no authority to require him to personally reimburse $3,150 to the donors pursuant to the *City of Toronto Act, 2006* and that, therefore, the matter of the proposed sanction was *ultra vires* the city's jurisdiction. The respondent advanced what essentially amounted to a fruit-of-the-poisoned-tree argument. The respondent's submission was that the original decision requiring reimbursement constituted a nullity and that any subsequent consideration by city council could not engage the requirements of the MCIA.

This argument is a red herring. Instead of simply dismissing the line of reasoning as leading to an impractical and, indeed, absurd result, Hackland R.S.J. sought to address the question of whether the city council had the authority to impose the personal obligation to reimburse the donated funds upon the respondent.

Subsection 160(5) of the *City of Toronto Act, 2006* provides that one of two penalties may be imposed on a member of council for a contravention of the code of conduct: either a reprimand or a suspension of remuneration for a period of up to 90 days.[65] The city's *Code of Conduct* listed the two pen-

[64] See *Tuchenhagen v. Mondoux* (2011), 88 M.P.L.R. (4th) 234, 107 O.R. (3d) 675, 284 O.A.C. 324 (Ont. Div. Ct.) and *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371, 135 D.L.R. (4th) 298, 5 C.P.C. (4th) 128 (Ont. Gen. Div.).

[65] A virtually identical provision is contained in s. 223.4(5) of the *Municipal Act, 2001*, S.O. 2001, c. 25.

alties but also set out "Other Actions" that the Integrity Commissioner could recommend (and, presumably, that city council could implement and enforce).

Justice Hackland determines that the "other actions" provided for in the *Code of Conduct* are not *ultra vires*. He cites the broad interpretation provision in subsection 6(1) of the *City of Toronto Act, 2006* as well as the natural person and broad welfare powers accorded to the city under sections 7 and 8 of the statute. He notes the seminal jurisprudence advocating the adoption of a broad and generous approach to the interpretation of municipal powers. He concludes that "the reimbursement obligation in the section "Other Actions" in the *Code of Conduct* is properly and logically connected to the permissible objectives of the City of Toronto in establishing its *Code of Conduct*. As such, it is an action lawfully available to Council upon recommendation of the Integrity Commissioner."

This determination is incorrect in law because the restriction in subsection 160(5) of the *City of Toronto Act, 2006* is an express limitation on the powers of city council to impose penalties for violations of its code of conduct. Subsection 160(5) only authorizes a reprimand or a suspension of pay upon a member of council. There is no authority to expand the penalties to include any of the other actions as set out in the city's *Code of Conduct* by virtue of subsections 12(1) and (1.1) of the *City of Toronto Act, 2006*:

> 12(1) If the City has the power to pass a by-law under section 7 or 8 and also under a specific provision of this or any other Act, the power conferred by section 7 or 8 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision.
>
> (1.1) For the purpose of subsection (1) and, unless the context otherwise requires, the fact that a specific provision is silent on whether or not the City has a particular power shall not be interpreted as a limit on the power contained in the specific provision.

Section 12 is the so-called general claw-back provision that limits the broad applicability of the general municipal powers in the *City of Toronto Act, 2006*.[66] The broad general powers are restricted by any limitations contained in any specific provisions of the statute. Accordingly, it is not possible for the penalties for code of conduct violations to be expanded or enlarged because of the restrictive language used in subsection 160(5).

However, whether the penalty of reimbursement on the respondent could or could not have been validly imposed is immaterial to the application of the MCIA. There is nothing in the statute that gives any indication that the obligations of a member of council to declare a pecuniary interest and to not take certain actions are only predicated upon lawfully authorized actions.

To determine otherwise would lead to an uncertain and impractical application of the statute which would undermine its purpose. The respondent's submission that all actions following the city council's initial original resolution of August 25, 2010 which sought reimbursement of donated monies by the respondent are nullities is incorrect at law. In fact, taken to its logical extension, the respondent's argument would have to be that since the *Code of Conduct* exceeds the jurisdiction of the city, any determinations made by the Integrity Commissioner or city council pursuant to the *Code of Conduct* would be a nullity.

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[67] 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.

The absurdity of the result of the argument can be seen through an example. Toronto City Council recently enacted a by-law prohibiting the sale, consumption and possession of shark fin products. If a member of council had a financial interest in the matter (say he or she owned a Chinese restaurant that offered shark fin soup), that member of council would be required to declare his or her interest and not participate in the discussion or vote on the matter. However, the by-law was successfully challenged and was struck down in its entirety.[68]

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[66] Similar provisions are contained in ss. 15(1) and (1.1) of the *Municipal Act, 2001*, S.O. 2001, c. 25.

[67] *Re Greene and Borins* (1985), 28 M.P.L.R. 251 (Ont. Div. Ct.): "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."

[68] In fact, City of Toronto By-law 12347-2011 purporting to ban the possession, sale and consumption of shark fins or shark fin food products within Toronto was recently declared to be *ultra vires* and without any force or effect: *Eng. v. Toronto (City)* (November 30, 2012), 2012 CarswellOnt 15093, 2012 ONSC 6818 (Ont. S.C.J.).

Based on the argument of the respondent, the councillor restaurateur would have been able to participate in the council debate and vote on the by-law banning shark fin products. What if the councillor had done so in the belief that the by-law was illegal but the court had decided that it was a valid municipal by-law? What if the councillor had voted on the by-law and, before a challenge to the by-law was launched, an application had been filed to declare the councillor in contravention of the MCIA? Would the conflict of interest application be required to be held in abeyance if a by-law challenge were to be subsequently filed? What happens if the by-law ruling is later overturned on appeal? This would lead to complete chaos and absurd results.

In any event, the respondent never challenged the *vires* of city council's original approval of the Integrity Commissioner's report on August 25, 2010 (although he did vote on a motion to reconsider the approval). The respondent's statement at the council meeting on February 7, 2012 also did not articulate any challenge as to the jurisdiction to require reimbursement (his comment "there is no sense to this" appears to be more in reference to his next comment that "the money is gone; the money has been spent on football equipment"). Had the respondent seriously believed that the Integrity Commissioner's recommendation and council's resolution were legally invalid, it would have been expected that he would have at least raised the issue at some point.

Moreover, had the respondent truly been concerned about the legality of the reimbursement requirement, he was not left without a remedy as he could have commenced a judicial review application of city council's original decision or brought an application to quash the resolution.

Furthermore, on the issue of procedural fairness, the evidence at the hearing was clear that the Integrity Commissioner had given the respondent ample opportunity to discuss the complaint that he had improperly used city stationary to solicit donations with her and a full ability to respond to the complaint.[69] In fact, the Integrity Commissioner wrote to the respondent six separate times inquiring as to whether he had complied with city council's resolution. Not once did the respondent respond to her correspondence, even to indicate that city council was without legal authority to demand reimbursement from him.[70]

In conclusion, the decision incorrectly determines that city council had valid authority to order the respondent to reimburse donors for the funds solicited. However, this particular determination does not invalidate the decision because whether city council had the authority to demand reimbursement does not negate the respondent's obligations under the MCIA.

(d) Remote or Insignificant Exception

The respondent argued that "[n]o objectively reasonable person could conclude that the Respondent, a City Councillor for ten years and Mayor for two years would jeopardize his position for $3,150 . . .". The argument is based on the exception in clause 4(k) of the MCIA which exempts a pecuniary interest "which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member".

The applicable test in determining whether a member has an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member is set out in *Whiteley v. Schnurr* but note the words that follow that articulation of the "test":

> 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? 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

[69] Former City of Toronto Integrity Commissioner, David Mullan, provided testimony at the Mississauga Judicial Inquiry on December 15-16, 2011. Professor Mullan noted that he believed it was not appropriate to preclude a council member from participating in a debate at a council meeting if the matter involved sanctions under a code of conduct. He testified that it was a "bizarre sense of what conflict of interest is all about" but then stated as follows:

> Now how far — how much further down the procedural fairness route you want to go may well depend upon the nature of the report and the nature of the allegations and the nature of the sanction that is being recommended
>
> But I certainly do not want to be in the business of exempting council from a duty of procedural fairness, simply because the Integrity Commissioner might have given procedural fairness at the reporting stage.

It is clear that Professor Mullan believes that some procedural fairness should be afforded but he makes it explicit that it is not absolute and even he could not support the extension of the concept to include an entitlement to vote on the part of the council member.

[70] What the Integrity Commissioner did receive was a letter from the respondent indicating that he had written to the donors and attaching letters from three of them who noted that they did not wish to receive reimbursement for their donations. This led to the Integrity Commissioner advising the respondent that his request to lobbyist-donors to forgive repayment of their donations might potentially amount to a breach of the city's lobbyists' code of conduct.

> the scope and ambit of the analysis necessary for the review process.[71]

Justice Hackland determined that the recommended repayment of $3,150 by the respondent was of significance to him and that it did influence him:

> 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.

The respondent's emotional plea to city council, captured on video, made it patently obvious that while the amount may have been relatively modest,[72] it was of significance to him. The respondent's entire tenure at City Hall had been marked with a high degree of frugality and penny-pinching so that it made it difficult for him to sensibly argue that the monetary sum was insignificant.

(e) Saving Provisions

As noted above, a contravention of subsection 5(1) of the MCIA leads to an automatic declaration of vacancy under clause 10(1)(a) unless one of the saving provisions under subsection 10(2) are applicable. In *Ontario's Municipal Conflict of Interest Act - A Handbook*, the authors note that the two saving provisions are often pleaded together as defences but that they are distinct types and standards of conduct

> . . . 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.[73]

The onus is on the council member to establish that the saving provisions apply to excuse a contravention of the statute.

(i) Inadvertence

Justice Hackland found that the respondent's participation in the debate at the city council meeting and his vote on the motion were deliberate acts. Hackland R.S.J. noted that "[i]nadvertence involves oversight, inattention or carelessness. On the contrary, the respondent's participation was a deliberate choice".[74] Although not cited on the question of inadvertence, the decision notes that the respondent had been warned by Council Speaker Sandra Bussin that he may have had a pecuniary interest at the council meeting in 2010 when the Integrity Commissioner's report was approved and then reconsidered. The same subject matter arose again at the council meeting of February 7, 2012.[75]

The judgment quotes from evidence that the respondent provided during his cross-examination on his affidavit. When asked if his speaking and voting on the motion were deliberate acts, the respondent answered "Absolutely". Hackland R.S.J. also notes that the respondent testified that:

- "he appreciated that the resolution before Council impacted him financially because it required him to repay funds"
- "planned his comments, which were designed to 'clear the air', and came to the meeting with the intention of speaking"
- "he sought no advice, legal or otherwise, as to whether he should be involved in the debate"

Based on the foregoing, Hackland R.S.J. could not have come to any conclusion other than "the respondent's participation was a deliberate choice" and that the defence of inadvertence was not applicable.

(ii) Error in Judgment

In one of the first decisions on the new *Municipal Conflict of Interest Act, 1972*, Killeen Co. Ct. J. noted as follows in *Blake v. Watts*:

> I conclude on the basis of my review of the applicable authorities that the phrase "*bona fide* error in judgment"

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[71] *Whiteley v. Schnurr* (1999), 4 M.P.L.R. (3d) 309 (Ont. S.C.J.).

[72] In any event, it has been held that the fact that the value of a pecuniary interest is particularly small does not relieve a member from compliance with the MCIA: *Mino v. D'Arcey* (1991), 4 M.P.L.R. (2d) 26 (Ont. Gen. Div.).

[73] M. Rick O'Connor and George H. Rust-D'Eye, *Ontario's Municipal Conflict of Interest Act - A Handbook* (St. Thomas: Municipal World Inc., 2007) at 76.

[74] See *Benn v. Lozinski* (1982), 1982 Carswellont 772, 37 O.R. (2d) 607 (Ont. Co. Ct.):

> The *Shorter Oxford English Dictionary* defines inadvertence as failure to observe or pay attention, inattention, an oversight. It has been defined as the opposite of deliberate action. *The Canadian Law Dictionary* defines it as heedlessness, lack of attention, carelessness.

[75] The *Toronto Star* reported that Mr. Ford had actually been warned again prior to or at the council meeting of February 7, 2012 that he had a pecuniary interest in the matter and should refrain from voting on any motions. Royson James, *Toronto Star*, "The inside story on Rob Ford's self-inflicted destruction" (November 30, 2012):

> Meanwhile, Councillor Michael Thompson, a Ford ally, was in the mayor's ear.
>
> "I told him, 'Don't speak on the matter,'" Thompson recalled Wednesday. "And just before the vote, I said, 'Just step outside for a minute, don't vote.'"
>
> But Ford did speak, influencing his colleagues. Before the Perruzza motion was crafted the debate was cut short, and Ford voted with the majority in a 22-12 decision to rescind the previous council decision and free him from repaying the $3,150.
>
> "People now say, 'Why didn't you guys warn him?' Well, we did," said Thompson.

> adumbrates a more liberal standard of exemption than does the standard implicit in the phrase "through inadvertence". The standard obviously involves and requires a complete consideration of the factual background of the contravention by the respondents.[76] (emphasis in original)

Justice Hackland does consider the complete factual background and the respondent's contravention in making his determination as to whether the contravention was committed by an error in judgment. His determination is well set out at para. 53 of the decision:

> 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.

The respondent admitted that he had not read the MCIA, that he did not know what was in the statute, that he had not attended the legal department's orientation session for council members where the statute was addressed and that he had not read the councillor's handbook that was prepared by city staff. This is despite the fact that the respondent had been a three-term member of council prior to being elected mayor in 2010. This meant that the respondent had made four declarations of office prior to taking his seat at city council and each time he had solemnly promised and declared to "disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*."

Based on the foregoing, Hackland R.S.J. had no choice but to conclude that the respondent's contravention of the statute did not constitute an error in judgment. His words in the judgment are very critical of the respondent [at para. 58]:

> In view of the respondent's leadership role in ensuring integrity in municipal government, it is difficult to accept an error in judgment defence based essentially on a stubborn sense of entitlement (concerning his football foundation) and a dismissive and confrontational attitude to the Integrity Commissioner and the *Code of Conduct*. In my opinion, the respondent'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.

The respondent failed to discharge the burden upon him to demonstrate that his contravention of the statute should be excused as an error in judgment.

(f) Current Term - Disqualification

One matter that caused a great deal of legal debate related to the disposition of the order. Justice Hackland concluded that the respondent had contravened section 5 of the MCIA and that his actions were not inadvertent or as a result of a good faith error in judgment. He accordingly declared the respondent's seat vacant as required by clause 10(1)(a) of the statute. He then continued:

> In view of the significant mitigating circumstances surrounding the respondent's actions, as set out in paragraph 48 of these reasons, I decline to impose any further disqualification from holding office beyond the current term. (emphasis added)

The sentence was surprising because there was nothing in the decision that preceded it which indicated that the learned justice was seeking to utilize his discretionary authority to disqualify the respondent. A judge who finds that a council member has contravened the statute has a discretion under clause 10(1)(b) to disqualify the member from holding office for up to 7 years. No mention was made of this authority in the judgment so it was curious to find this seemingly contradictory statement at the conclusion of the disposition.

Immediately upon release of the decision, the media commenced asking what Justice Hackland intended by the last four words "beyond the current term" as noted above.

Questioned at the city council meeting the next day, Toronto's City Solicitor, Anna Kinastowski, correctly stated that her interpretation of the judgment was that the respondent was disqualified from holding office for the remainder of the term of council.[77]

The word "term" is not defined in the MCIA or in the *City of Toronto Act, 2006*. While the word "term" is not expressly

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[76] *Blake v. Watts* (1973), 1973 CarswellOnt 372, 2 O.R. (2d) 43, 41 D.L.R. (3d) 688 (Co. Ct.).

[77] Kelly Grant, Elizabeth Church and Jeff Gray, *The Globe and Mail*, "Toronto Mayor Ford says sorry, but intends to fight for job" (November 27, 2012):

> Anna Kinastowski, the city solicitor, told council Tuesday that an Ontario Superior Court decision ordering Mr. Ford out of office would also bar him from standing in a by-election if council decides to call one for 2013.
>
> Mr. Justice Charles Hackland, who ruled Monday that Mr. Ford violated a conflict-of-interest law, wrote that his decision did not disqualify the mayor beyond the end of the "current term."
>
> Legal experts interviewed Monday differed on the definition of the word. The mayor's own lawyer, Alan Lenczner, said it meant Mr. Ford would be free to run again almost immediately.
>
> But Ms. Kinastowski has a different view — one that carries special weight because of her role as head of the city's legal department.

defined in the *Municipal Elections Act, 1996*,[78] subsection 6(1) provides as follows:

> 6(1) The term of all offices to which this Act applies is four years, beginning on December 1 in the year of a regular election.

The City Solicitor's interpretation was that "current term" could only refer to the four year period commencing December 1, 2010 and concluding on November 30, 2014. This interpretation is correct in law and is supported by other provisions in the *City of Toronto Act, 2006*.[79]

Following a conference call with both legal counsel for the applicant and respondent, Justice Hackland issued a corrigenda on November 30, 2012 whereby he deleted the words "beyond the current term" and replaced them with "under s. 10(1)(b) of the MCIA".

The import of the change is that the respondent is not disqualified from holding office and could run in a by-election if ordered or conceivably also be re-appointed by city council pursuant to section 208 of the *City of Toronto Act, 2006*.

(g) Stay of Decision Pending Appeal

The penultimate paragraph of the decision included a suspension of the order:

> Recognizing that this decision will necessitate administrative changes in the City of Toronto, the operation of this declaration shall be suspended for a period of 14 days from the release of these reasons.

The stay is unusual and is likely not something that has been previously imposed in a conflict of interest ruling.

Justice Hackland may have been aware that a regularly-scheduled meeting of city council was to be held the day following the release of the decision. Pursuant to section 207 of the *City of Toronto Act, 2006*, where the seat of a member of council becomes vacant, the council is required to declare the seat vacant. Upon council declaring a seat vacant, there commences a 60-day period wherein the council must appoint a person to fill the vacancy or pass a by-law requiring a by-election to be held.

Ensuing Press Conferences and Statements

Immediately following the release of the judgment, the applicant and his solicitor, Clayton Ruby, held their press conference at 11:30 a.m. at City Hall whereby Mr. Ruby uttered the now-famous words, "Rob Ford did this to Rob Ford. It could so easily have been avoided. It could have been avoided if Rob Ford had used a bit of common sense. And if he had played by the rules."

A short time after, the respondent met with a throng of reporters at City Hall whereby he answered the first question put to him as to whether he was going to appeal with the following statement:

> Absolutely I'm appealing . . . I'm going to appeal it and carry on with my job and we'll take it from there. I'm a fighter and I've done a lot of great work for the city and sometimes you win, sometimes you lose.[80]

In typical fashion, the respondent vowed to fight "tooth and nail" to hold onto his mayoralty seat. The respondent also intimated that it was a left wing cabal that had orchestrated his ouster from office.

On November 27, 2012 the respondent, looking stressed and glassy-eyed, held a press conference where he read very slowly and very deliberately from a prepared statement:

> Good afternoon everyone.
>
> I was elected two years ago by the people of this great city to do a job. We have accomplished a lot in the past two years, but that job is not finished yet.
>
> I respect the court's decision that was released yesterday. My decision to appeal is not a criticism of the court, but I feel it is important to work through the appeals system so I can continue to do the work I was elected to do by the taxpayers of this city.
>
> This entire matter began because I love to help kids play football. When this came to council for a vote, I felt it was important to answer the accusations that had been made against me. I was focused on raising money to help underprivileged youth. I never believed it was a conflict of interest because I had nothing to gain and the City had nothing to lose. But, I respect the court's decision.
>
> Looking back, maybe I could have expressed myself in a different way. To everyone who believes I should have done this differently, I sincerely apologize. The people elected me to bring respect for the taxpayers back to City Hall. I will keep working to do exactly that for as long as I can, or until the people elect someone else to do the job.
>
> Thank you very much. Unfortunately, that's all I can say at this time.[81]

"It is my opinion that that word, term, means 2010 to 2014. That is our interpretation of that particular fact," she said. "If down the road there is a by-election and Mr. Ford does not agree with our interpretation, he can certainly take action to get a judicial interpretation at that time."

The city's most senior lawyer was asked to provide some clarification after a stunning court decision Monday ordered Mr. Ford out of his job for violating the *Municipal Conflict of Interest Act*, a provincial statute that carries a mandatory penalty of removal from office.

[78] *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched.

[79] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, ss. 135(6), 184 and 209.

[80] Natalie Alcoba and Megan O'Toole, *National Post*, "Rob Ford out as Toronto mayor over conflict of interest case" (November 26, 2012).

[81] Natalie Alcoba wrote as follows about Mr. Ford's apology in the *National Post* (November 28, 2012):

Stay Application & Decision

The respondent filed an application for a stay pending the appeal immediately and was able to secure an expedited hearing before a single judge of the Ontario Divisional Court on December 5, 2012. The applicant indicated that he would consent to the stay and accordingly the application proceeded unopposed before Justice Gladys Pardu at the Divisional Court.

The well-known and standard tripartite test from the Supreme Court of Canada's judgment in *RJR-Macdonald Inc. v. Canada (Attorney)*[82] was submitted:

> Is there a serious issue to be heard?
>
> Will there be irreparable harm if a stay is not granted?
>
> Does the balance of convenience and the public interest justify granting a stay?

Justice Pardu considered the motion and indicated that she would return shortly. After deliberating for less than one hour, Pardu J. returned and stated "this is an appropriate case for a stay," and said that "Mr. Ford would suffer irreparable harm" if the stay was not granted.[83] She endorsed the record by granting the stay and ordering the respondent to file all materials in support of the appeal by December 12, 2012 and the applicant to file his materials by December 24, 2012.[84] Justice Pardu then issued a short endorsement wherein she noted the following in determining that the test for the stay had been met:

- the appeal was neither frivolous or vexatious
- there are serious issues to be determined
- the respondent would suffer irreparable harm if he were removed from office
- significant uncertainty would result if a by-election was held or an appointment made and the respondent was restored to his position as mayor
- the appeal was scheduled to be heard shortly (a lengthy stay would not be in the public interest).[85]

The Appeal

(a) General

Subsection 11(1) of the MCIA provides an as-of-right appeal from any order made under section 10 of the statute to the Ontario Divisional Court.

The respondent (now appellant) was successful in obtaining an expedited hearing date for the appeal. A three-judge panel of the Divisional Court will convene on January 7, 2013 to consider the respondent's appeal.

The Notice of Appeal filed on November 28, 2012 alleges that six errors of law were committed by Hackland R.S.J. in his decision. The respondent will argue in the appeal that Justice Hackland erred in law:

- by determining that the respondent's personal liability to reimburse $3,150 to donors was lawfully within the jurisdiction of the city to impose under the *City of Toronto Act, 2006*;
- by concluding that the respondent could be required to make the reimbursement payment pursuant to the "other actions" in the city's *Code of Conduct*;
- in holding that penalties under the *City of Toronto Act, 2006* could be expanded pursuant to the city's broad authority powers in the statute;
- by finding that the words "pecuniary interest" from section 5 of the MCIA could be utilized in the City of Toronto Act, 2006 when each statute had different purposes and objectives;
- in determining that the respondent committed an error in judgment pursuant to subsection 10(2) of the MCIA; and
- in applying the wrong test under clause 4(k) of the MCIA to determine whether the amount of $3,150 could reasonably be regarded as likely to influence the respondent's decision.

(b) Standard of Review

There is an intriguing question in the appeal regarding the standard of review to be applied by the Ontario Divisional Court. In typical cases, an appellate court reviews questions

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> The mayor emerges, a grim expression on his face. He grasps the edges of the podium and begins his message of contrition. At times shaky, his voice hoarse, he says he "never believed there was a conflict of interest, because I had nothing to gain and the city had nothing to lose." He emphasizes the words "nothing," "gain," and "lose." You can still hear Councillor Janet Davis speaking on the floor of council, which is on the other side of the wall. "To everyone who believes I should have done this differently," Mr. Ford goes on, pursing his lips, "I sincerely apologize."

To many, Mr. Ford's apology was unexpected. His brother, Doug Ford, noted that Mr. Ford would henceforth conduct himself differently and commented as follows: "You get hit over the head with a sledgehammer - let's call facts facts - and you do things a little differently": Wendy Gillis, *Toronto Star* (December 5, 2012).

[82] *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 164 N.R. 1, 60 Q.A.C. 241.

[83] *Macleans*, "Toronto mayor granted stay to halt removal from office" (December 5, 2012).

[84] A visibly relieved Mr. Ford met with reporters outside his office at City Hall shortly after the stay was granted where he repeated three times in less than one minute that he "cannot wait for the appeal": *CityNews Toronto* (December 5, 2012).

[85] *Magder v. Ford* (December 5, 2012), Doc. 560/12 (Ont. Div. Ct.).

of errors of law from a lower court based solely on the record before it and by granting deference to the judge at first instance. With respect to an appeal under the MCIA, there is a question as to whether the appeal before the Divisional Court is a true appeal or a trial *de novo*.

Subsection 11(2) provides a seemingly broad discretion to the Divisional Court to review a judicial decision regarding conflicts of interest under the MCIA:

> 11(2) The Divisional Court may give any judgment that ought to have been pronounced, in which case its decision is final, or the Divisional Court may grant a new trial for the purpose of taking evidence or additional evidence and may remit the case to the trial judge or another judge and, subject to any directions of the Divisional Court, the case shall be proceeded with as if there had been no appeal.

In late 2011, the Divisional Court confirmed (in a 2-to-1 decision) in *Tuchenhagen v. Mondoux*[86] that the broad discretion built into the appeal provisions meant that the Divisional Court could deal with the appeal "as we would have as judges in the first instance." Without actually using the term *de novo*, the Divisional Court essentially applied a standard which conferred little or no deference to the lower court decision.[87]

A short time later in mid-2012, a differently constituted panel of the Divisional Court in *Amaral v. Kennedy* concluded that notwithstanding the language of subsection 11(2), appeal courts generally "refrain from hearing cases *de novo*."[88]

As such, the question is in a state of flux but that more correct determination appears to be that the Divisional Court is an appellate court and should accord deference to the applications judge.[89]

This is doubly so in this case where the application commenced with *viva voce* testimony from the respondent (which is very unusual for an application under the MCIA which would normally proceed solely on legal arguments based on a written record). It would be extraordinary for the Divisional Court to not grant deference to Hackland R.S.J.'s assessment of the live testimony and indeed to his determinations at first instance.

(c) Finality of Decision

When *Magder v. Ford* was first released and the respondent vowed to immediately appeal, many commentators and the press assumed that it would be years before all appeals were exhausted and that accordingly Mayor Ford would (if he obtained a stay pending appeal) be certain to remain in the mayor's seat for the likely remainder of the term of council. This is, of course, not at all the case as subsection 11(2) of the MCIA expressly provides that "[t]he Divisional Court may give any judgment that ought to have been pronounced, in which case its decision is final."

The Ontario Court of Appeal has now twice pronounced that "final" in subsection 11(2) actually does mean final.[90]

Consequences to the City of Toronto

In suspending the operation of the declaration of vacancy for 14 days, Justice Hackland recognized that "this decision will necessitate administrative changes in the City of Toronto."

If the respondent's appeal is allowed and the lower court decision is overturned, then the respondent remains in the mayor's seat and business will eventually get back to whatever now constitutes normal at Toronto City Hall.

Should the respondent be unsuccessful in his appeal, the judicial declaration of vacancy will take effect. Toronto city council must then declare the seat of mayor to be vacant at its next meeting.[91] City council's declaration of vacancy commences the clock running on the 60-day period within which it must make a decision: to hold a by-election to allow

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

[87] Wilson J., in dissent in *Tuchenhagen v. Mondoux*, noted [at para. 81] that the "caselaw on this issue is inconsistent."

[88] *Amaral v. Kennedy* (2012), 96 M.P.L.R. (4th) 49 (Ont. Div. Ct.) at para. 7. The determination was that "[t]he permissive order-making authority of s. 134(1) [of the Courts of Justice Act] does not justify a non-deferential approach to the original decision. Neither does s. 11(2) of the MCIA."

[89] 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. In fact, it is submitted that it would be inappropriate for the Divisional Court to hear an appeal on a *de novo* basis based on the specific language in the latter part of subsection 11(2) which expressly allows the Divisional Court to "grant a new trial for the purpose of taking evidence or additional evidence."

[90] *Ruffolo v. Jackson* (2010), 71 M.P.L.R. (4th) 43 (Ont. C.A.) and *Mondoux v. Tuchenhagen* (2012), 100 M.P.L.R. (4th) 179 (Ont. C.A.) at 181, "We are bound by the decisions of this court that 'final' in s. 11(2) means final, and that no appeal lies to this court from the Divisional Court under s. 11 of the MCIA. Indeed, we agree with that position. The legislature has chosen in s. 11(2) to permit a member only an appeal to the Divisional Court, but no further. Therefore, regardless of the possible merits of the appeal itself, we are prevented from hearing it by the legislation itself." Interestingly, the Court of Appeal had earlier granted leave to appeal in *Mondoux v. Tuchenhagen* and then heard the matter on an application to quash the appeal whereupon it determined that the statute precluded an appeal beyond the Divisional Court. See also *Amaral v. Kennedy* (2012), 2 M.P.L.R. (5th) 34 (Ont. C.A.).

[91] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 207.

voters to elect the mayor or to appoint a person to be the mayor until the next municipal election in 2014.[92]

Based upon early estimates, the city's budget chair, Mike Del Grande, has warned that the bill for a by-election to replace the mayor could climb to as much as $15 million.[93]

Conclusions

The respondent contravened his responsibilities under the MCIA and was ordered removed from office in accordance with the mandatory requirement in subsection 10(1)(a) of the statute. *Magder v. Ford* was correctly determined by Hackland R.S.J. His error as to the jurisdiction of the city to impose a reimbursement requirement upon the respondent does not impact the main holding of the decision.

Justice Hackland acknowledged that the matter did not involve corruption or a pecuniary gain on the part of the respondent; that the amount of money was modest but that it was of significance to the respondent; that the respondent's participation in the debate at council was arguably a technical breach of section 5 of the MCIA; that many excellent commentators had, perhaps justifiably, pointed to the harshness of the statute and of the specific penalty of a mandatory removal from office; and that principles of procedural fairness might possibly afford a member of council the opportunity to speak to a matter involving a penalty under a code of conduct. These are all set out in the decision.

However, a judge must interpret and apply the law as it stands; a judge is not a legislator and a judge cannot (or should not) create the law. Those who argue that the decision in *Magder v. Ford* is flawed are ignoring or simply refusing to accept that what the respondent did was directly contrary to the MCIA because he had a pecuniary interest in the repayment of $3,150,[94] that any reasonable person could clearly see that the pecuniary interest was of significance to the respondent and that his contravention was neither inadvertent nor an error in judgment committed in good faith.

Moreover, the judgment accords to established jurisprudence that conflict of interest legislation must be construed broadly and in a manner consistent with its purpose.

To this point, the article will conclude with the oft-quoted words of Robins J. in *Moll v. Fisher* which have been consistently adopted and applied by decisions on the MCIA for well over 30 years:

> The obvious purpose of the Act is to prohibit members of Councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest. There is no need to find corruption on his part or actual loss on the part of council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then regardless of his good faith or the propriety of his motive, he is in contravention of the statute.[95]

Every member of municipal council in Ontario must swear a declaration of office whereby they promise to disclose any pecuniary interest in accordance with the MCIA. Any member who then does not at the very least read and attempt to understand the extent of their statutory obligations is indeed wilfully blind and wholly deserving of the admittedly harsh penalty that is mandated to be imposed under the statute.

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[92] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 208. Any person can be appointed to the position as long as they consent to the appointment; the person does not have to be the deputy mayor or even a member of council. The appointment is not for an "interim" mayor; the appointment is to be the mayor for the remaining term of council.

[93] Elizabeth Church, *The Globe and Mail*, "Toronto mayoral by-election cost could rise to as much as $15 million" (December 6, 2012).

[94] This particular point has been re-stated by a number of commentators but none with the brevity and succinctness of Jeffrey Lem in his column "The Dirt" in the *Law Times* (December 3, 2012):

> The case had nothing to do with Ford's wrongful solicitation of the donations in the first place, all of which involved uncontested breaches of the code of conduct. Instead, the case had everything to do with whether or not Ford should have spoken in his own defence and then voted on the 2012 council motion to let himself off the hook for the refund of the donations.

[95] *Moll v. Fisher* (1979), 8 M.P.L.R. 266, 23 O.R. (2d) 609, 96 D.L.R. (3d) 506 (Div. Ct.) at M.P.L.R. 269.