CITATION: Magder v. Ford, 2012 ONSC 5615
COURT FILE NO.: CV-12-448487
DATE: 20121126

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
PAUL MAGDER	Applicant	Clayton C. Ruby, Nader R. Hasan and Angela Chaisson, for the Applicant
– and –		
ROBERT FORD	Respondent	Alan J. Lenczner, Q.C. and Andrew Parley, for the Respondent
		HEARD: September 5-6, 2012 (Toronto)

HACKLAND R.S.J.

REASONS FOR DECISION

INTRODUCTION

[1] This is an application brought by a municipal voter, Paul Magder, under s. 9 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 [*MCIA*] against the respondent, Robert Ford, the current Mayor of Toronto. At a meeting of Toronto City Council on February 7, 2012, the respondent spoke to and voted on a matter in which he allegedly had a pecuniary interest. By so doing, it is alleged that he contravened s. 5(1) of the *MCIA* and, accordingly, an order is sought under s. 10(1) of the *MCIA* declaring his seat on Toronto City Council vacant.

[2] The respondent defends this application on the basis that (1) the *MCIA* does not apply to violations of Toronto's *Code of Conduct for Members of Council* [*Code of Conduct*] and (2) the

initial City Council Resolution requiring him to reimburse $3,150.00 to donors who had contributed to his charitable foundation was *ultra vires* Council's powers granted by the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, and was, therefore, a nullity. In the alternative, the respondent submits that s. 5 of the *MCIA* does not apply because the amount involved is so insignificant that it cannot be regarded as likely to influence his actions (*MCIA*, s. 4(k)) and, in the further alternative, his contravention of the *MCIA* was committed through inadvertence or by reason of an error in judgment so that his seat on Council should not be declared vacant (*MCIA*, s. 10(2)).

BACKGROUND

[3] On August 12, 2010, the City of Toronto Integrity Commissioner issued a report to Toronto City Council ("Council"), concluding that the respondent, Robert Ford (then a member of Council), breached Articles IV (Gifts and Benefits), VI (Use of City Property, Services and Other Resources), and VIII (Improper Use of Influence) of the *Code of Conduct*.

[4] The Integrity Commissioner found that the respondent used the City of Toronto logo, his status as a City Councillor, and City of Toronto resources to solicit funds for a private football foundation he created in his name. The Integrity Commissioner recommended that Council take steps to require that Councillor Ford reimburse $3,150.00 in donations made by lobbyist and corporate donors, and provide confirmation of such reimbursement to the Integrity Commissioner. The Integrity Commissioner's report, including her recommendations, were adopted by Council on August 25, 2010.

[5] I quote from the Resolution before Council on August 25, 2010:

> Councillor Rob Ford used the City of Toronto logo, his status as a City Councillor, and City of Toronto resources to solicit funds for a private football foundation he created in his name. Donors to the Councillor's foundation included lobbyists, clients of lobbyists and a corporation which does business with the City of Toronto. I concluded that there had been a breach of Articles IV (Gifts and Benefits), VI (Use of City Property, Services and Other Resources) and VIII (Improper Use of Influence) of the *Code of Conduct for Members of Council* (*"The Code of Conduct"*).

I recommend that Council impose a sanction that will appropriately address the breaches of the *Code of Conduct.*

RECOMMENDATIONS

The Integrity Commissioner recommends that:

1. City Council adopt the finding that Councillor Rob Ford violated Articles IV, VI and VIII of the *Code of Conduct.*

2. City Council adopt the recommendation that the following sanction permitted by Article XVIII of the *Code of Conduct* be imposed:

    1. Councillor Ford will reimburse the lobbyist and corporate donors in the amounts listed in the attachment to this report and provide confirmation of such reimbursement to the Integrity Commissioner.

[6] At the City Council meeting on August 25, 2010, the Integrity Commissioner's report and recommendations were initially approved without debate. Later in the meeting, a Councillor moved for reconsideration of that approval. A vote was held and the motion for reconsideration was defeated. The respondent voted on that motion. Just before this vote, Council Speaker Sandra Bussin alerted the respondent to a conflict of interest. She described what occurred in her affidavit in this proceeding, as follows:

> Because the matter involved Councillor Ford's conduct and made him personally liable for $3,150.00, it was my opinion that Councillor Ford had a direct and personal interest in Item CC52.1 which amounted to a conflict of interest that prohibited him from speaking on or voting on the motion.
>
> As a Councillor bound by the City's *Code of Conduct*, it was Councillor Ford's responsibility to declare that he had a conflict of interest because of his pecuniary interest in the motion. Nevertheless, as Speaker, when I realized that Councillor Ford intended to vote on the motion, I alerted him directly to his conflict of interest. I said to him in a clear voice:
>
> > "Councillor Ford. This matter deals with an issue regarding your conduct. Do you intend to declare a conflict? You are voting? Okay."
>
> I have attached a transcript of the exchange to this affidavit as Exhibit "A".
>
> I alerted Councillor Ford to his conflict of interest in the hope and expectation that he would declare his conflict and not vote on the motion. Having ignored my warning, there was nothing more that I could do.

> Councillor Ford did not seem surprised when I told him that he had a conflict of interest. Instead, he just nodded to me, indicating that he understood what I had said but that he was voting on the item. He then proceeded to do so.

[7] Notwithstanding the adoption of the Integrity Commissioner's report and recommendation that the respondent reimburse $3,150.00, the respondent did not comply. In the Integrity Commissioner's Annual Report to Council for 2011, she reported on her attempts to obtain the respondent's compliance with Council's resolution of August 25, 2010. The Integrity Commissioner stated:

> Council's decision required the Councillor to reimburse lobbyists and corporate donors from whom he had improperly solicited and taken donations. A copy of the decision was provided to the Councillor and follow-up letters were sent on August 31, 2010, September 15, 2010, May 10, 2011, June 7, 2011 and July 4, 2011. Confirmation of compliance remains outstanding.

[8] In view of the respondent's continuing refusal to comply with Council's resolution, the Integrity Commissioner issued a report to Council, dated January 30, 2012. This report disclosed that the respondent had written to the Integrity Commissioner on October 24, 2011, advising that he had corresponded with the donors, and attached letters from three of the donors who had written in response to him, to say that they did not wish to receive reimbursement for their donations. The Integrity Commissioner advised that she had written to the respondent confirming his obligation to obey Council's decision and advising him that asking lobbyists-donors for the additional favour of forgiving repayment could amount to a breach of the Lobbyists' Code of Conduct. In her compliance report, the Integrity Commissioner made the following recommendation:

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.

[9] The resolution quoted in the previous paragraph came before City Council for action on February 7, 2012. The respondent was present. He spoke to the matter, explaining the workings of his football foundation and, 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." About five minutes later, in response to a question from a Councillor regarding the use of his letterhead, the respondent spoke a second time saying, "I made a mistake before a few years ago, for the last I don't know how many years, that is exactly what I send out. No city logo, no titles. I don't know what else I can say."

[10] Councillor Ainslie then made a motion to rescind Council's August 25, 2010, decision. His motion was as follows: "That City Council rescinds the previous decision made under item CC 52.1 and directs that no further action be taken on this matter." The respondent did not speak to this motion. The respondent did, however, vote on the motion, which carried by a vote of 22-12. The effect of this motion was that Council rescinded its adoption of the Integrity Commissioner's findings as to the respondent's violations of the *Code of Conduct*, as well as the repayment obligation.

[11] The applicant subsequently brought this application, pursuant to s. 9(1) of the *MCIA*, for determination of whether the respondent contravened s. 5(1) of the *MCIA* by speaking or voting on the motions before Council on February 7, 2012.

ANALYSIS

(a) Does s. 5 (1) of the *MCIA* apply to a City of Toronto *Code of Conduct* Violation?

[12] The applicant's position is that s. 5 of the *MCIA* required the respondent, at the City Council meeting of February 7, 2012, to refrain from taking part in the discussion of, and from voting on a matter in which he had a pecuniary interest. As previously noted, that matter (the original motion and the motion to rescind), involved the issue of whether Council would require the respondent to personally reimburse the sum of $3,150.00 to persons who had donated to his

charitable foundation. The Mayor spoke on the original motion and voted on the motion to rescind. Section 5(1) of the *MCIA* provides:

> 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.

[13] Council was being asked to approve the Integrity Commissioner's recommendation that the respondent furnish proof, within a short time frame, that he had personally repaid $3,150.00 to donors who had been asked by him to make donations to the Rob Ford Football Foundation. Obviously, as a result of the personal repayment requirement, the respondent had a pecuniary interest in that matter and, if applicable, s. 5(1) of the *MCIA* required that he neither take part in a discussion of nor vote on any question in respect of the matter. That would, of course, also apply to the motion to rescind Council's decision of August 25, 2010.

[14] Importantly, the matter in which the respondent had a pecuniary interest arose from the sanction recommended by the Integrity Commissioner; and adopted by Council on August 25, 2010 that is, personal reimbursement of $3,150.00. It is not suggested that the respondent's contraventions of the *Code of Conduct* involving his fundraising for the Rob Ford Foundation engaged his personal pecuniary interests. Rather, the issue arose from the recommended sanction.

[15] The significance of s. 5(1) of the *MCIA* applying to a *Code of Conduct* violation is that any member of council faced with a finding of a *Code of Conduct* violation is, when the matter is discussed at Council, disqualified from speaking or voting on the matter. This is because under

the *Code of Conduct*, Council has the power to levy a financial sanction, thereby engaging s. 5(1) of the *MCIA*. This is not necessarily dependent on what the Integrity Commissioner has recommended by way of penalty, or whether or not there is a penalty recommendation, because under the *Code of Conduct*, pecuniary sanctions are available and it is for City Council to decide what sanction, if any, to impose. The law is well settled that a potential pecuniary interest in a matter is sufficient to engage s. 5(1) of the *MCIA* (see *Tuchenhagen v. Mondoux*, 2011 ONSC 5398, 107 O.R. (3d) 675 (Div. Ct.)). The applicant's position is that the Integrity Commissioner's recommendation that the respondent personally reimburse the donations engaged s. 5(1) of the *MCIA*, but that even in the absence of a recommended pecuniary sanction, any consideration by Council of a *Code of Conduct* violation would have similar effect because of the potential pecuniary sanctions which Council could impose on the member.

[16] The respondent argues that the inability of a member of Council to speak to *Code of Conduct* matters, when a sanction for the member's own conduct is being considered, is draconian. He argues that a councillor who is named and targeted by a proposed sanctioning resolution must have an opportunity to speak to the matter before Council determines whether to accept the Integrity Commissioner's recommendations. Otherwise, it is argued, he is denied natural justice and fairness and has no opportunity to offer explanations, address mitigating circumstances or to provide other relevant information for Council's consideration.

[17] In his factum, the respondent's counsel referred to a recommendation made by Commissioner Cunningham, in October 2011, in the Mississauga Judicial Inquiry. Commissioner Cunningham recommended that the *MCIA* be amended to state explicitly that a councillor does not violate the *Act* by making submissions to Council concerning the imposition of a penalty under a municipal *Code of Conduct.* At p. 173 of his "Report of the Mississauga Judicial Inquiry: Updating the Ethical Infrastructure", the Commissioner recommended:

> I recommend that the *Municipal Conflict of Interest Act* be amended to include a provision stating explicitly that nothing in the Act prevents a member of council from making submissions regarding a finding in a report by the integrity commissioner or regarding the imposition of a penalty under a municipal code of conduct. It is important that members of council be afforded procedural fairness under municipal codes of conduct.

[18] Professor David Mullan testified at the Mississauga Inquiry in favour of the recommendation noted above. He observed, in his testimony before the Inquiry, in relation to his experience as Toronto's former Integrity Commissioner, that he had recommended that it was necessary to provide some form of procedural fairness on the floor of Council when Council is deciding whether or not to implement a recommendation for some form of sanction.

[19] Professor Mullan went on to observe that the notion of allowing a councillor to participate in a debate about proposed sanctions against himself or herself should not be viewed as a conflict of interest and that Council should not be absolved of the obligation to extend procedural fairness simply because the Integrity Commissioner might have given procedural fairness at the reporting stage.

[20] In his reference to "procedural fairness at the reporting stage", Professor Mullan was alluding to the entitlement councillors have to procedural fairness in the course of the Integrity Commissioner's investigation. Elsewhere in the materials before this court, Professor Mullan has explained that councillors also would have the opportunity, in appropriate circumstances, to seek judicial review of the Integrity Commissioner's recommendations for sanctions or in respect of City Council's imposition of sanctions. Nevertheless, his observations support the argument advanced by the respondent's counsel, Mr. Lenczner, that the principles of procedural fairness, *audi alteram partem,* should allow a member of council to speak to proposed sanctions against himself or herself under the municipal *Code of Conduct* and such submissions are properly made to City Council as the body making the decision.

[21] In addition to the policy arguments to which I have just referred, it is submitted on behalf of the respondent that, as a matter of statutory interpretation, the *MCIA* does not apply to *Code of Conduct* violations. They are said to be two separate regimes. The *MCIA* has as its objectives transparency and disclosure in relation to matters affecting the business and commercial interests (or financial interests) of the City. In contrast, the *Code of Conduct* is enacted pursuant to the *City of Toronto Act* and governs the ethical conduct of members of council. It is pointed out that the vast majority of decided cases deal with business and commercial matters concerning the municipality or board.

[22] In summary, it is the respondent's position that as a matter of policy and statutory interpretation, a Council member's pecuniary interest in a matter, sufficient to engage s. 5(1) of the *MCIA,* must mean a personal pecuniary benefit arising from a city commercial or business matter before council. It is submitted that s. 5(1) cannot be interpreted to apply, as in the present case, to a situation in which a member of council is simply speaking about a potential pecuniary sanction he or she may be facing.

[23] I am, however, of the opinion that the applicant's position is correct, 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. Section 5 of the *MCIA* clearly and broadly states that where a member, "has any pecuniary interest ... in any matter," and is present at a meeting of council, he or she is to disclose his or her interest and must neither take part in the discussion of nor vote on the matter. 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. I note parenthetically that reading down the operation of statutory provisions otherwise applicable is a constitutional remedy and no *Charter* issues have been raised by the parties in this proceeding. Furthermore, there is no authority for implying a right to be heard in the face of a statutory provision (such as s. 5(1) of the *MCIA*), which specifically denies such a right.

[24] As learned commentators have noted, there may be a procedural fairness deficiency if councillors are precluded, at council meetings, from discussing potential findings or pecuniary sanctions which may be levied against them. I would regard these considerations as requiring study and possibly law reform, but they cannot provide a basis for restricting clear statutory provisions. In any event, *audi alteram partem* does not have anything to do with and cannot provide a justification for voting (rather than speaking) on a matter, as the respondent chose to do in this case. As previously outlined, at the February 7, 2012 Council meeting, the respondent spoke on a motion to receive the Integrity Commissioner's Report, but that motion did not come to a vote. Later in that meeting, the respondent voted (but did not speak) on a motion to rescind

Council's original adoption of the Integrity Commissioner's Report. I find that both motions related to a matter engaging the respondent's pecuniary interests.

[25] Section 4 of the *MCIA* sets out eleven enumerated categories of pecuniary interests which are deemed to be exempt from the application of s. 5 of the *MCIA*. For example, pecuniary interests that are "common with electors generally" (*MCIA*, s. 4(j)) are exempt, as are interests "so remote or insignificant" (*MCIA*, s. 4(k)) as not to be reasonably regarded as likely to influence the member. Notably absent from these exemptions is any reference to a potential pecuniary penalty which may arise from a municipal *Code of Conduct* violation. In my opinion, the court should be reluctant to create another exemption when, to date, the Legislature has chosen not to do so.

[26] The applicant observes, correctly in my view, that there is no authority in the case law to support the proposition that the *MCIA* is restricted to business or commercial matters of the municipality or is inapplicable when there are no transparency concerns. The *MCIA* is cast in broad terms to protect the integrity of government decision-making at the municipal level. I respectfully adopt the observations of the Divisional Court in the recent case of *Tuchenhagen*, in which Lederer J. stated, at para. 25:

> The *MCIA* is important legislation. It seeks to uphold a fundamental premise of our governmental regime. Those who are elected and, as a result, take part in the decision-making processes of government, should act, and be seen to act, in the public interest. This is not about acting dishonestly or for personal gain; it concerns transparency and the certainty that decisions are made by people who will not be influenced by any personal pecuniary interest in the matter at hand. It invokes the issue of whether we can be confident in the actions and decisions of those we elect to govern. The suggestion of a conflict runs to the core of the process of governmental decision-making. It challenges the integrity of the process.

[27] I accept the applicant's submission that, whereas the *MCIA* usually deals with cases where the municipality has financial interests and, in contrast, the *Code of Conduct* is primarily aimed at councillor integrity, nevertheless, those criteria do not define the application of the two regimes. Both are aimed at ensuring integrity in the decision-making of municipal councillors.

[28] The *Code of Conduct* addresses the intended operating relationship between the *Code* and the *MCIA*. The two regimes are to operate together and the *Code of Conduct* is a "supplement" to the *MCIA*. Article II of the *Code of Conduct* addresses "Statutory Provisions Regulating Conduct", and provides:

> This *Code of Conduct* operates along with and as a supplement to the existing statutes governing the conduct of members. The following provincial legislation governs the conduct of members of Council:
>
> - the *City of Toronto Act, 2006,* and Chapter 27, Council Procedures, of the *Municipal Code* (the Council Procedures By-law) passed under section 189 of that Act;
> - the ***Municipal Conflict of Interest Act;***
> - the *Municipal Elections Act, 1996;* and
> - the *Municipal Freedom of Information and Protection of Privacy Act.*
>
> [Emphasis added.]

[29] Article VIII of the *Code of Conduct* concerns "Improper Use of Influence" and prohibits the use of the councillor's office to benefit "oneself, or one's parents, children or spouse, staff members, friends or associates, business or otherwise." It is evident that some types of inappropriate conduct can contravene both the *MCIA* and the *Code of Conduct*. Further, Article IX of the *Code of Conduct* is entitled "Business Relations". It provides that:

> No member shall act as a paid agent before Council, its committees, or an agency, board or commission of the City except in compliance with the terms of the *Municipal Conflict of Interest Act*.

[30] I also accept the applicant's submission that the record before this court supports the inference that the respondent appreciated or was at least aware that the *MCIA* prevented him from speaking or voting on *Code of Conduct* violations involving himself. In May 2010, City Council considered a report in which the Integrity Commissioner found, in a report entitled, "Report on Violation of Code of Conduct by Councillor Ford", that the respondent had improperly disclosed confidential information. At the relevant council meeting, the respondent recused himself, stating, "it's a conflict of interest so I have to remove myself from the Chamber." In his evidence at the present hearing, the respondent was unable to explain why he

disqualified himself on that occasion, while speaking and voting on the present matter before Council on February 7, 2012.

[31] In summary, I am satisfied that the *MCIA* does apply to *Code of Conduct* violations, with the result that the respondent violated s. 5(1) of the *MCIA* when he spoke and voted on a matter in which he had a pecuniary interest at the City Council meeting of February 7, 2012.

(b) **Did City Council have the Authority to Require the Respondent to Reimburse $3,150.00 to Donors?**

[32] The respondent submits that City Council exceeded its authority in August 2010 when it passed a resolution requiring him to personally repay the donors $3,150.00. While this sanction is provided for in the *Code of Conduct*, it is argued that, in this regard, the Code is *ultra vires* the *City of Toronto Act* which allows for only two penalties for *Code of Conduct* violations. Subsection 160(5) of the *City of Toronto Act* provides:

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

[33] The *Code of Conduct*, at Article XVIII, goes further and provides as follows:

> **XVIII. COMPLIANCE WITH THE CODE OF CONDUCT**
>
> Members of Council are accountable to the public through the four-year election process. Between elections they may, for example, become disqualified and lose their seat if convicted of an offence under the *Criminal Code* of Canada or for failing to declare a conflict of personal interest under the *Municipal Conflict of Interest Act.*
>
> In addition, subsection 160(5) of the *City of Toronto Act, 2006,* authorizes Council to impose either of two penalties on a member of Council following a report by the Integrity Commissioner that, in her or his opinion, there has been a violation of the *Code of Conduct*:

1. A reprimand; or
2. Suspension of the remuneration paid to the member in respect of his or her services as a member of Council or a local board, as the case may be, for a period of up to 90 days.

Other Actions

The Integrity Commissioner may also recommend that Council or a local board (restricted definition) take the following actions:

1. Removal from membership of a Committee or local board (restricted definition).
2. Removal as Chair of a Committee or local board (restricted definition).
3. Repayment or reimbursement of moneys received.
4. Return of property or reimbursement of its value.
5. A request for an apology to Council, the complainant, or both.

[34] The *ultra vires* argument is premised on the phrase "may impose either of the following penalties" in s. 160(5) of the *City of Toronto Act*, which is said to operate as a restriction. The respondent submits that only two penalties are allowed under Toronto's *Code of Conduct*; a reprimand or suspension of the member's remuneration for a period of up to 90 days. The "Other Actions" provided for in Article XVIII of the *Code of Conduct* are said to be unauthorized and *ultra vires* and that any Council resolution authorizing or seeking to enforce such other actions is a nullity.

[35] Materials filed in the record of this proceeding disclose that Mississauga's *Code of Conduct* (April, 2011), applicable to the mayor and all members of council in that municipality, is cast in virtually identical terms with respect to sanctions for violation of its *Code*; i.e., the same two "penalties" followed by a series of "other actions" which the Integrity Commissioner may recommend. The *Municipal Act, 2001*, S.O. 2001, c. 25, authorizes municipalities to establish a *Code of Conduct* for Members of Council and local boards and, like the *City of Toronto Act*, the same two penalties are permitted and the phrase "may impose either of" two penalties is used. Subsection 223.4(5) of the *Municipal Act* provides:

Penalties

The municipality **may impose either of** the following penalties on a member of council or of a local board if the Commissioner reports to the municipality that, in his or her opinion, the member has contravened the code of conduct:

1. A reprimand.
2. Suspension of the remuneration paid to the member in respect of his or her services as a member of council or of the local board, as the case may be, for a period of up to 90 days.

[Emphasis added.]

I mention this in order to illustrate that this particular interpretation issue is of broad application to *Codes of Conduct* in use in other cities in Ontario, which are enacted pursuant to the *Municipal Act.*

[36] Recognizing, as I do, that the words "either of" seem to suggest a restriction and that the *expressio unius est exclusio alterius* interpretive rule (to express one thing is to exclude another) may support such an interpretation, I am of the opinion that the "other actions" provided for in the *Code of Conduct* are not *ultra vires*. A reprimand or suspension of pay is clearly a penalty. But other actions, such as the specified removal from membership of a Committee or as Chair of a Committee; repayment or reimbursement of moneys or property received; or the request for an apology to Council and/or the complainant are, in essence, a range of proportionate and necessary remedial measures to address situations which may arise from or the consequences of a member engaging in a *Code of Conduct* violation. While the member may view the other actions as penalties, they are in fact necessary remedial measures to allow the *Code of Conduct* to operate effectively and to address the problems arising from *Code of Conduct* violations.

[37] The applicant submits that the repayment sanction in the *Code of Conduct* is consistent with s. 6(1) of the *City of Toronto Act* which provides for a broad interpretation of the City's powers:

> The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues.

In addition, s. 7 of the *City of Toronto Act* provides that, "[t]he City has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act." Further, s. 8(1) of the *City of Toronto Act* confers a broad welfare power, providing that, "[t]he City may provide any service or thing that the City considers necessary or desirable for the public."

[38] The controlling jurisprudence in the Supreme Court of Canada supports a broad application of municipal powers in order to carry out the objectives of municipalities. The court in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at para. 47, noted that to a large extent, the inclusion of the broad, "general welfare provisions" in municipal acts "was intended to circumvent, to some extent, the effect of the doctrine of *ultra vires* which puts the municipalities in the position of having to point to an express grant of authority to justify each corporate act."

[39] The Supreme Court of Canada has consistently adopted a generous approach to interpretation of those powers. In *Nanaimo (City) v. Rascal Trucking Ltd.,* 2000 SCC 13, [2000] 1 S.C.R. 342, the Supreme Court of Canada, at para. 36, quoted, with approval, the following statement by McLachlin J. in *Shell Canada Products Ltd.*, at para. 19:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

[40] I conclude 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. In my opinion, it would be a

significant and unwarranted impairment of the remedial powers under municipal *Codes of Conduct* to declare these other actions as *ultra vires*.

(c) **Was the Respondent's Pecuniary Interest in the Reimbursement of $3,150.00 Unlikely to Influence him?**

[41] The respondent submits that his pecuniary interest involved in the Council resolutions requiring him to reimburse $3,150.00 to donors is sufficiently insignificant in its nature that it did not influence him. He relies on one of the enumerated exemptions in s. 4 of the *MCIA*, s. 4(k), which states:

> 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.

[42] The respondent argues that the amount of money involved ($3,150.00) is very modest considering his salary as Mayor. It is stated at para. 59 of the Respondent's Factum that, "No 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 ..."

[43] The issue posed by s. 4(k) of the *MCIA* is whether the respondent's pecuniary interest in the matter before Council – whether he should be required to furnish proof of repayment of $3,150.00 to donors – involved such an insignificant amount that it was unlikely to influence him in his consideration of that matter. 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 stated, in his remarks at the Council meeting, "[A]nd if it wasn't for this foundation, these kids would not have had a chance. And then to ask for me to 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...."

[44] In view of the respondent's remarks to City Council, I find that his pecuniary interest in the recommended repayment of $3,150.00 was of significance to him. Therefore the exemption in s. 4(k) of the *MCIA* does not apply.

(d) Was s. 5 (1) of the *MCIA* Contravened through Inadvertence or an Error in Judgment?

[45] Under s. 10(1) of the *MCIA*, where the court determines that a member of Council has contravened s. 5 of the *MCIA*, by speaking or voting on a matter in which the member has a pecuniary interest, the *Act* requires that the judge:

> (a) Shall, in the case of a member, declare the seat of the member vacant.

There is, however, a saving provision at s. 10(2) of the *MCIA*, in which removal from office is not required; i.e., "if the judge finds that the contravention was committed through inadvertence or by reason of an error in judgment...."

[46] The mandatory removal from office for contravening s. 5(1) of the *MCIA* is a very blunt instrument and has attracted justified criticism and calls for legislative reform. Professor David Mullan, Toronto's former Integrity Commissioner, described this provision as a "sledgehammer" in the course of his observations in a report to City Council, dated September 21, 2006:

> Even more importantly, the City should make every endeavour to persuade the provincial government to either modernize the *Municipal Conflict of Interest Act* or confer on the City of Toronto authority to create its own conflict of interest regime in place of or supplementary to that Act. Aside from the fact that the existing Act places legal impediments in the way of the City extending the concept of conflict of interest beyond the formulation in that Act, it is simply Byzantine to have a regime under which the only way of dealing legally with conflict of interest in a municipal setting is by way of an elector making an application to a judge and where the principal and mandatory penalty (save in the case of inadvertence) is the sledgehammer of an order that the member's office is vacated.

[47] The problem presented by s. 5(1) of the *MCIA* is that it does not allow for appropriately broad consideration of the seriousness of the contravention or of the circumstances surrounding the contravention, unless the member's actions in speaking or voting on a matter occurred

through inadvertence or by reason of an error in judgment. These are narrow concepts as interpreted in the case law. Commissioner Cunningham in the Mississauga Inquiry made the following very helpful recommendation, at p. 172, of his Report:

> I recommend that the existing sanctions in the *Municipal Conflict of Interest Act* (MCIA) remain in place. However, none should be mandatory, and lesser sanctions should be made available. More specifically, I recommend that:
>
> (a) Subsection 10(3) be repealed, and the following lesser sanctions be made available where a judge finds contravention of the MCIA:
>
> * suspension of the member for a period of up to 120 days;
> * a form of probation of the member, with oversight by the integrity commissioner or auditor;
> * removal from membership of a committee of council;
> * removal as chair of a committee of council;
> * a reprimand publicly administered by the judge; and
> * a formal apology by the member.

[48] I recognize that the circumstances of this case demonstrate that there was absolutely no issue of corruption or pecuniary gain on the respondent's part. His contraventions of the municipal *Code of Conduct* involved a modest amount of money which he endeavoured to raise for a legitimate charity (his football foundation), which is administered at arm's length through the Community Foundation of Toronto. His remarks to City Council on February 7, 2012, focused at least in part on the proposed sanction against him, in circumstances where many informed commentators would contend that the principles of procedural fairness, *audi alteram partem,* should have allowed him to speak (although not to vote). The respondent's actions, as far as speaking against the proposed sanction is concerned, was an unfortunate but arguably technical breach of s. 5(1) of the *MCIA*. The only pecuniary interest the respondent had in the matter before Council was the financial sanction sought to be imposed upon him. Moreover, there were no transparency concerns here, in view of the Integrity Commissioner's initial and follow-up reports, which carefully and accurately explained both the *Code of Conduct* issues and the respondent's ongoing refusal to comply with Council's repayment resolution adopted at the meeting of August 25, 2010. In short, the relevant facts were fully available to Council at its meeting of February 7, 2012.

[49] In addition, the respondent submits that he has complied with s. 5(1) of the *MCIA* on numerous occasions by declaring his interest in various matters and refraining from speaking or voting. Further, he submits that he has followed the Integrity Commissioner's direction to not use councillor letterhead or city staff in fundraising activities for the Rob Ford Foundation. The latter point was somewhat undermined by the respondent's evidence in cross-examination that he often exchanges his city business card (Exhibit 2) with people he encounters in his work as Mayor and then often follows up with requests for donations from these people for his football foundation.

[50] In any event, while the respondent's conduct in speaking and voting at the February 7, 2012 City Council meeting was far from the most serious breach of s. 5(1) of the *MCIA*, removal from office is mandatory unless the respondent's contravention of the *MCIA* was committed through inadvertence or by reason of an error in judgment. The burden of proof is on the respondent to establish this.

[51] I find that the respondent's conduct in speaking and voting on the matter involving his repayment obligation did not occur through inadvertence. Inadvertence involves oversight, inattention or carelessness. On the contrary, the respondent's participation was a deliberate choice. He testified in this proceeding that he appreciated that the resolution before Council impacted him financially because it required him to repay funds he believed he did not owe. He received the Council agenda a week prior to the meeting, considered the matter, planned his comments, which were designed to "clear the air," and came to the meeting with the intention of speaking. He admitted that he sought no advice, legal or otherwise, as to whether he should be involved in the debate. The respondent gave the following evidence in the cross-examination on his affidavit:

376.	Q.	So your speaking and voting were deliberate acts, correct?
	A.	I'm voting because I know my foundation...it's a fantastic foundation.
377.	Q.	You deliberately chose to make the speech you did and vote the way you did?

A. Absolutely.

378. Q. And you don't regret for a moment having done that?

A. Absolutely not.

[52] The respondent submits that his conduct falls within the "error in judgment" saving provision. He submits that he had an honest belief that he was entitled to speak and vote on the *Code of Conduct* issues before Council. His decision to speak and vote on these matters involving his pecuniary interest was indeed an error in judgment in the broad sense that all contraventions of the law can be viewed as errors in judgment. However, the case law has necessarily given the concept of an error in judgment a much more restricted meaning. Rutherford J. addressed this issue in *Campbell v. Dowdall*, 1992 CarswellOnt 499, 12 M.P.L.R. (2d) 27 (Gen. Div.), at para. 36:

> In one sense, every contravention of a statute based on deliberate action can be said to involve an error in judgment. A criminal act, for example, involves a serious error in judgment. The purpose of this second branch of this saving provision in subs. 10 (2) of the Act must be to exonerate some errors in judgment which underlie contraventions of the Act, but obviously not all of them. The Legislature must have intended that contraventions of s. 5 which result from honest and frank conduct, done in good faith albeit involving erroneous judgment, should not lead to municipal council seats having to be vacated. Municipal councils require the dedicated efforts of good people who will give of their time and talent for the public good. What is expected and demanded of such public service is not perfection, but it is honesty, candour and complete good faith.

[53] 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.

[54] Several cases were cited in argument, in which the error in judgment saving provision was successfully relied on. These arise in situations involving reasonable mistakes of fact about

whether the matter at hand engaged the elected official's pecuniary interests and cases of novice elected officials relying on erroneous legal advice. In contrast, this respondent has served on City Council for 12 years, the last two years as Mayor. He acknowledged, in cross-examination, that prior to this proceeding, he had never read or familiarized himself with the *MCIA*. Moreover, the respondent admitted that he never sought out legal advice as to his entitlement to speak or vote on the *Code of Conduct* issues before Council on February 7, 2012, or indeed with respect to several previous conflicts with the Office of the Integrity Commissioner. He stated that he did not see the need to attend briefing sessions offered by the *MCIA* to newly elected councillors, or to read the councillor's handbook which addresses conflicts of interest.

[55] On my view of the evidence, the respondent gave little or no consideration to whether he was lawfully entitled to speak or vote on the motions before Council on February 7, 2012, that involved his financial interests. I also find that he was well aware that he may have been in a conflict situation because Speaker Bussin had specifically warned him that he was in a conflict when he voted on a motion concerning these same issues (i.e., the recommended repayment to donors) when the matter first came before Council on August 25, 2010. The respondent emphasized that the City solicitor did not speak up at the Council meeting of February 7, 2012, to warn him of a conflict, while acknowledging that identifying conflicts is not the responsibility of the City solicitor. He acknowledged that no member of his staff is tasked with screening matters for possible conflicts and no protocol exists within his office for that purpose.

[56] It is apparent that the respondent was and remains focused on the nature of his football foundation and the good work that it does. He stated in evidence that this was his own "personal issue" that did not involve the financial interests of the City. He, therefore, felt that he was entitled to "clear the air" as he said, by speaking against the Integrity Commissioner's report, or at least her recommendation that he personally reimburse the funds he had solicited from donors. The Integrity Commissioner's report, itself, details a confrontational relationship with the respondent and a stubborn reluctance on the respondent's part to accept that his activities concerning his football foundation are properly subject to the *Code of Conduct*. It would appear that the respondent's actions at the February 7, 2012 Council Meeting, in speaking and voting on

resolutions concerning the Integrity Commissioner's factual findings in her report and her recommended sanction, was one last protest against the Integrity Commissioner's position that he profoundly disagreed with.

[57] On my review of the record in this proceeding, the respondent has never acknowledged a key point addressed in the Integrity Commissioner's report; that is, that it was not appropriate for the respondent to use his status as Councillor (or Mayor) for private fundraising, notwithstanding that the purpose was to benefit a good cause. The rationale for this is explained by the Integrity Commissioner in the following excerpt, on p. 14, from her excellent report, dated January 30, 2012, which I respectfully endorse:

> In fairness to Councillor Ford, it is common for a person who has blurred their roles to have difficulty "seeing" the problem at the beginning. It often takes others to point out the problem, especially in a case where the goal (fundraising for football programs for youth) is laudable. The validity of the charitable cause is not the point. The more attractive the cause or charity, the greater the danger that other important questions will be overlooked, including who is being asked to donate, how are they being asked, who is doing the asking, and is it reasonable to conclude that a person being asked for money will take into account the position of the person asking for the donation. Where there is an element of personal advantage (in this case, the publication of the Councillor's good works, even beyond what they had actually achieved), it is important not to let the fact that it is "all for a good cause" justify using improper methods for financing that cause. People who are in positions of power and influence must make sure their private fundraising does not rely on the metaphorical "muscle" of perceived or actual influence in obtaining donations.

[58] In assessing errors in judgment, just as it may be relevant to consider the position of a novice elected councillor with limited experience with conflict of interest issues, it is also appropriate to consider the responsibilities of the respondent as a long-serving councillor and Mayor. In my opinion, a high standard must be expected from an elected official in a position of leadership and responsibility. Toronto's current *Code of Conduct* is modelled on the recommendations of The Honourable Denise Bellamy, who conducted the *Toronto Computer Leasing Inquiry*, in 2005, when the respondent was a member of City Council. At pp. 65-66 of her report, Commissioner Bellamy had this important observation as to the role of the Mayor:

71. For the Mayor, integrity in government should be a top priority.

> The Mayor of Toronto has many responsibilities, pressures, and functions, but perhaps the greatest is providing leadership for integrity in government. The Mayor is the face of City government, both internally and externally. Maintaining the integrity of government is the Mayor's most important job.

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.

[59] In summary, I find that the respondent has failed in his burden to show that his contraventions of the *MCIA* were the result of a good faith error in judgment.

Disposition

[60] For the reasons set out above, I have concluded that the respondent contravened s. 5 of the *MCIA* when he spoke and voted on a matter in which he had a pecuniary interest at the meeting of Toronto City Council on February 7, 2012, and that his actions were not done by reason of inadvertence or a good faith error in judgment. I am, therefore, required by s. 10(1)(a) of the *MCIA* to declare the respondent's seat vacant. 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.

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

[62] 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.

[63] The applicant is to provide the court with his written costs submissions within four weeks of the release of these reasons, with the respondent providing his written submissions within four weeks of receipt of the applicant's submissions. The applicant will then have a further two weeks to reply.

"Hackland R.S.J."

Mr. Justice Charles T. Hackland

Released: November 26, 2012