



## STAFF REPORT ACTION REQUIRED

### Report on Decision of Divisional Court in *Magder v. Ford*

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| <b>Date:</b>             | February 12, 2013                         |
| <b>To:</b>               | City Council                              |
| <b>From:</b>             | City Solicitor and Integrity Commissioner |
| <b>Wards:</b>            | All                                       |
| <b>Reference Number:</b> |   |

#### **SUMMARY**

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On January 25, 2013, the Divisional Court allowed an appeal brought by Mayor Ford under the *Municipal Conflict of Interest Act (MCIA)* in the matter of *Magder v. Ford*. This report provides Council with information about the ruling to assist Council with the application of the *Code of Conduct for Members of Council* (the "Code").

#### **RECOMMENDATIONS**

The City Solicitor and the Integrity Commissioner recommend that:

1. City Council receive this report for information.

#### **Financial Impact**

This report will have no financial impact on the City of Toronto.

#### **DECISION HISTORY**

On August 27, 2010 Council adopted Item CC 52.1 finding that Councillor Rob Ford had breached Articles IV, VI and VIII of the *Code* by soliciting donations to his private named foundation, including from lobbyists and corporate donors, using City resources.

On February 6 and 7, 2012, the Integrity Commissioner brought a report to City Council concerning compliance with Item CC 52.1. City Council voted to rescind

its previous decision made under Item CC 52.1 and directed that no further action be taken on the matter.

An application was taken by Toronto resident Paul Magder to the Superior Court of Justice, alleging that in speaking to the matter before Council on February 6 and 7, 2012, and in voting on the motion to rescind Item CC 52.1, Mayor Ford breached the *Municipal Conflict of Interest Act* ( the "MCIA"). On November 26, 2012, the Superior Court of Justice ruled that there had been a breach of the MCIA.

An appeal from the decision of the Superior Court of Justice was taken to the Divisional Court of Ontario by Mayor Ford. On January 25, 2013, the appeal was granted. The Divisional Court found that the sanction imposed under Item CC 52.1 by City Council on August 27, 2010, was beyond Council's jurisdiction under the *City of Toronto Act, 2006 (COTA)*. This meant that the later item on which Mayor Ford voted was a nullity and therefore could not attract the sanctions provided under the MCIA.

In making its ruling, the Divisional Court addressed a number of questions which have an impact on the application of the *Code* and procedures for Council when considering *Code* matters.

Although the MCIA does not provide for any further appeals, the question of whether any leave application is brought to the Supreme Court of Canada by the respondent is addressed in this report.

## **BACKGROUND**

### **The Ruling**

On January 25, 2013, the Divisional Court granted Mayor Ford's appeal from the Superior Court of Justice decision which had both concluded that he had contravened the MCIA and declared his seat on Council vacant. A link to the Divisional Court decision is found at:

<http://www.ontariocourts.ca/scj/decisions/2013ONSC0263.htm>

The Superior Court of Justice had concluded that Mayor Ford "contravened s. 5 of the MCIA when he spoke and voted on a matter in which he had a pecuniary interest." The "matter" was a motion to reverse a Council decision requiring him to repay donations from lobbyists and a corporation who did business with the City of Toronto which had been solicited for a football foundation in his name, using his Council staff, letterhead and status as an elected official. The use of these things for this purpose is prohibited by the *Code*.

## **The Reason the Appeal to the Divisional Court Succeeded**

The Court noted that "the application judge correctly found that Mr. Ford had a direct pecuniary interest when he voted on [a] motion" to reverse the financial sanction. As a result, "s. 5(1) of the *MCI*A was engaged"; however, it was ultimately not contravened because Council lacked the jurisdiction to require the Mayor to pay the money to the lobbyist-donors. It based its conclusion on an interpretation of s. 160 of the *COTA* which sets out the penalties Council may impose when the Integrity Commissioner finds that a member has contravened the *Code*. *COTA* provides for two potential penalties: a reprimand and/or a suspension of remuneration for up to 90 days. The *Code* recognizes Council's authority to impose the two *penalties* but it also provides for a number of "other actions" which the Integrity Commissioner may recommend to Council.

The Court said that the *COTA* does not preclude the use of other remedial measures, but that these cannot amount to *penalties*. It concluded that the requirement to "pay certain monies to donors when [the Mayor] had never received such monies personally" is a *penalty*. The Court found that the Council decision to impose the "*penalty*" was a "nullity". (This is a very technical point, but essentially means that, in law, it is as if the decision to impose the unauthorized penalty was never made.) On this basis, the Court concluded that Mayor Ford had no pecuniary interest when he voted to reverse it.

In making its ruling, the Court noted that on February 7, 2012, Mayor Ford did not attack the finding under CC 52.1 that he had breached the *Code* rather he objected to the financial sanction imposed by that decision. Given the nature of the issues, the fact that the finding stands and that Mayor Ford acknowledged at the meeting of February 6 and 7, 2012 that he was wrong to have solicited the donations in the way that he had, the Integrity Commissioner will not be recommending any further action, either by way of sanction or remedial action to Council.

## **The "Other Actions" under Council's Code of Conduct**

Although the Court noted that the requirement to pay money to the donors in this set of circumstances was not one of the "other actions" listed in the *Code*, it did not find fault with the "other actions" listed there. The Court noted that some of these actions, for example, a request for an apology, are appropriate. The Court declined to determine the full scope of Council's power to impose remedial measures beyond the two penalties set out in the *COTA*.

## **The Ability of Members of Council to Address Council for Code of Conduct Matters**

The Court also considered whether a pecuniary interest under the *MCI*A is engaged whenever a report of a violation of the *Code* is dealt with by City Council. This is because of the potential for a financial penalty under s. 160 of the *COTA*. The Court found that unless the Integrity Commissioner is recommending that Council impose a financial sanction, such as the suspension of remuneration, or where there is some “real likelihood” that such a penalty is being contemplated, that a member may speak to a report on his or her conduct, as a matter of procedural fairness. The Court specifically noted, “There is no reason to preclude a member from speaking to a report recommending a reprimand or requesting an apology.”

## **The Impact of a Further Appeal**

The decision of the Divisional Court in *MCI*A proceedings is final, by virtue of s. 11(2) of the *MCI*A. This was confirmed most recently by the Court of Appeal for Ontario in *Tuchenhagen v. Mondoux*, 2012 ONCA 567. The potential for a leave application under the *Supreme Court of Canada Act* need not prevent Council from resuming its responsibilities under the *Code* and the *Code of Conduct Complaint Protocol for Members of Council* given the findings, summarized above, in *Magder v. Ford*. In the event the law in the area changes, that can be dealt with at the time of a future ruling.

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## **SIGNATURE**

*(Original Signed)*

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Janet Leiper

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*(Original Signed)*

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