

Magder v. Ford: A Call to Reform the Ontario Municipal Conflict of Interest Act

By Eric M. Davis

Introduction

Ontario's *Municipal Conflict of Interest Act* (MCIA)[1] needs to be reformed in a number of ways, but the most urgent reform relates to the mandatory penalty that must be imposed for contravening the MCIA, namely declaring a seat vacant.

The MCIA should be amended to provide for a variety of different penalties and, more critically, none of those penalties should be mandatory.

The recent decision in *Magder v. Ford*[2] delivered by His Honour Justice Hackland on November 26, 2012, highlights the need for reform. As many will be aware, in that case, Toronto Mayor Rob Ford's seat was declared vacant after he was found to have contravened the MCIA.

At a City Council Meeting on February 7, 2012, Mayor Ford spoke to and voted on a matter in which he had a direct pecuniary interest, contrary to section 5 of the MCIA. Specifically, Mayor Ford spoke in relation to a resolution which sought to have him reimburse $3,150.00 in donations made by "lobbyist and corporate donors" to his private football foundation.[3] He also voted on a motion to rescind a previous City Council decision which included a repayment obligation for the Mayor, though he did not speak on that motion.

Though it is currently being appealed, Justice Hackland found that Mayor Rob Ford had contravened the MCIA and, as none of the saving provisions applied, he had no choice but to declare Mayor Rob Ford's seat vacant pursuant to section 10(1) of the MCIA.

Mayor Ford became a victim of mandatory minimum sentencing in relation to municipal conflicts of interest. As will be discussed below, Justice Hackland was required to impose a penalty under the MCIA that was arguably too harsh, given the broader circumstances of the case.

The current MCIA needs, at a minimum, to provide more flexibility in imposing penalties. The *Magder v. Ford* decision highlights the need for that reform.

Pecuniary Interests

According to the MCIA there are two (2) types of conflicts: (1) a direct pecuniary interest; and, (2) an indirect pecuniary interest.

The term "pecuniary" is not defined in the MCIA, though the term generally means "consisting of or pertaining to money." As well, the terms "direct" and "indirect" are not defined.

Direct Pecuniary Interest

A direct pecuniary interest arises where a member of Council stands to gain (or lose) monetarily.

In the *Magder v. Ford* case, Justice Hackland found that Mayor Ford had a direct pecuniary interest in relation to the resolution that he repay the $3,150.00 in donations he received for his football foundation. His Honour wrote:

> Obviously, as a result of the personal repayment requirement, the respondent had a pecuniary interest in that matter and...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.[4]

Mayor Ford should not have spoken in relation to the personal repayment resolution. Had the resolution been defeated by Council, Mayor Ford stood to gain monetarily. There was a direct pecuniary interest.

Similarly, Justice Hackland found that Mayor Ford should not have voted on a motion to rescind a previous City Council decision which included a repayment obligation. As that motion passed, Mayor Ford was no longer required to reimburse the $3,150.00 in donations. Again, that is a direct pecuniary interest, as the Mayor gained monetarily.

Indirect Pecuniary Interest

Section 2 of the MCIA states that a member of Council has an indirect pecuniary interest if the member:

(a) is "a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public" that has a pecuniary interest in a matter;

(b) has "a controlling interest in, or is a director or senior officer of, a corporation that offers its securities to the public" that has a pecuniary interest in a matter;

(c) is a "member of a body" that has a pecuniary interest in a matter; or,

(d) is a "partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter".

For example, if a City Councillor's employer has a direct pecuniary interest in a matter, that Councillor would have an indirect pecuniary interest and should declare a conflict of interest pursuant to section 2.

If A Pecuniary Interest Exists

According to section 5 of the MCIA, if a member of Council has a pecuniary interest in a matter, either direct or indirect, and is present at a Council Meeting at which the matter is being considered, the member:

(a) shall, prior to any consideration of

Continued on page 37

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.

Justice Hackland found that Mayor Ford contravened section 5 of the MCIA as he both discussed and voted on matters in which he had a direct pecuniary interest at the City Council meeting of February 7, 2012.

Penalties

The most problematic part of the MCIA is the mandatory penalty.

Where a Judge determines that a member of Council has contravened the MCIA, the Judge, according to section 10(1) of the MCIA:

(a) shall declare the member of Council's seat vacant; and,

(b) may disqualify the member of Council from being a member of Council for seven (7) years thereafter; and,

(c) may, where the contravention has resulted in personal financial gain, require the member of Council to make restitution to the party suffering the loss, or, where such party is not readily ascertainable, to the municipality.

Therefore, if a member of Council fails to declare a conflict, beyond the public humiliation of being found to have contravened the MCIA, they *automatically* lose their seat. They could also be disqualified from seeking elected office for the next seven years.

In the *Magder v. Ford* decision, Justice Hackland stated:

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.

[...]

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.

[...]

I recognize that the circumstances of this case demonstrate that there was absolutely no issue of corruption or pecuniary gain on the [Mayor's] part.[5]

Justice Hackland's comments speak to the unnecessarily harsh, mandatory penalty under the MCIA. Arguably, publically sanctioning the Mayor, or some other, lesser penalty, would have sufficiently protected the interests of the citizens of Toronto without having to declare the Mayor's seat vacant.

Allowing for lesser sanctions, such as suspensions, probations with oversight, removal from committee membership, a reprimand or requiring a formal apology, would give Judges much more discretion to determine the appropriate penalty. Of course, the ability to declare a seat vacant should remain available to Judges as a possible sanction, depending upon the nature of the contravention, but it should definitely not be mandatory.

By removing from the Court the power to weigh the seriousness of the offence, the circumstances of the case and the need to uphold the principles of the MCIA, the MCIA fails to protect the democratic purpose of its enactment.

Exceptions

Section 4 of the MCIA provides for limited exceptions to the requirements of section 5, permitting members of Council to take part in discussing and voting on certain matters in which they have a pecuniary interest.

For example, it states that the MCIA does not apply to a pecuniary interest in any matter that a member of Council may have:

(a) by reason of the member of Council having a pecuniary interest which is an interest in common with electors generally; or,

(b) by reason only of an interest of the member of Council which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

In the *Magder v. Ford* case, Mayor Ford attempted to argue the amount of money involved ($3,150.00) was so insignificant, especially considering his salary as Mayor, that it could not reasonably be regarded as likely to influence him in considering of the matter (one of the exceptions under the MCIA). Justice Hackland, however, found that in light of the Mayor's own remarks to City Council on the matter that the repayment of $3,150.00 was of significance to him, the exception did not apply in the circumstances of this case.

Inadvertence or Error in Judgment

As mentioned by Justice Hackland, under the MCIA a member of Council can be saved by s. 10(2), which states:

> Where a 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.]

This section has been used often by members of Council who have violated the provisions of the MCIA, yet do not want to have their seats be declared vacant.

In *Magder v. Ford*, Justice Hackland found that the Mayor's conduct did not occur through inadvertence. He stated: "Inadvertence involves oversight, inattention or carelessness. On the contrary, the [Mayor's] participation was a deliberate choice."[6] Of course, this finding is fact-specific.

Similarly, Justice Hackland found that though there was "indeed an error in judgment in the broad sense that all contraventions of the law can be viewed as errors in judgment," he did not find the Mayor's actions compatible with an error in judgement as intended by section 10(2) of the MCIA.[7] He found the Mayor's actions to be "characterized by

Continued on page 38

ignorance of the law and a lack of diligence in securing professional advice, amounting to wilful blindness."[8]

Potential Reforms

A recent call to reform the MCIA came when the City of Mississauga went through a Judicial Inquiry involving conflicts of interest. The report of the Judicial Inquiry dated October 3, 2011 (the "Report") found that the MCIA had several shortcomings.

The Commissioner of the Mississauga Judicial Inquiry found that the "municipal accountability regime, which includes the [MCIA], has not kept pace with the evolution of the Municipal Act, 2001." He suggested several ways to improve the MCIA, including:

Creating a preamble to the MCIA which would set out broad overarching principles that would assist members of Council to understand their role in promoting public confidence in municipal government;

Adding a statement within the MCIA to the effect that the interests of spouses, parents, children, siblings and other relatives are deemed to also be the interest of the member;

1. Extending the scope of the MCIA to include private interests more broadly – from "pecuniary interest" to "private interest" – which would likely also require a "materiality threshold";
2. Amending the MCIA so that it clearly applies to all meetings attended by members of Council in their official capacities;
3. Making no sanction mandatory and allowing lesser sanctions (e.g. suspension, probation with oversight, removal from committee membership, a reprimand or requiring a formal apology);
4. Allowing individuals or organizations "demonstrably acting in the public interest" to bring applications under the MCIA; and,
5. Allowing the Integrity Commissioner to investigate and to report on matters covered by the MCIA.

Though not all of these recommendations may be feasible, allowing some flexibility in relation to potential sanctions and ensuring that no one sanction is mandatory, as noted in point number five above, is a wise reform which would ensure that unnecessarily harsh penalties do not have to be meted out by Judges.

Conclusion

The *Magder v. Ford* decision illustrates the need to reform the MCIA in order to provide for a variety of potential penalties for any contraventions of the MCIA.

Based on his findings of fact, Justice Hackland had no option but to declare Mayor Ford's seat vacant. As outlined in his decision, he did not want to impose such a harsh penalty, but after reviewing the statute and the relevant case law before him, His Honour did what was required by law.

The MCIA serves a useful purpose in trying to remove conflicts of interest from municipal decision-making. However, there are several aspects of the MCIA that could benefit from some serious reconsideration. Allowing for a variety of potential penalties and providing the Courts with flexibility to determine the appropriate penalty in a particular circumstance allows the MCIA to fulfill its purpose while ensuring a degree of proportionality.

The McGuinty Liberal government recently advised that it has been reviewing the MCIA for about a year, and such a review could not come at a more opportune time.

Addendum

On January 25, 2013, following the submission of this article, Toronto Mayor Rob Ford's appeal to the Ontario Divisional Court was granted and he was permitted to remain in office. A three-judge panel agreed that Toronto City Council never had the authority to compel the Mayor to pay back donations made to his private football foundation, which meant that he did not have a pecuniary interest in discussing or voting upon matters involving the reimbursement of those donations at Council.

Notes

1. R.S.O. 1990, c. M.50
2. *Magder v. Ford* [2012] ONSC 5615; http://files.slaw.ca/ford_decision.pdf (last accessed: January 17, 2013)
3. *Id.* para. 4
4. *Id.* para. 13
5. *Id.* paras. *46 to 48*
6. *Id.* para. *51*
7. *Id.* para. *52*
8. *Id.* para. *58*
9. The Honourable J. Douglas Cunningham, "Report of the Mississauga Judicial Inquiry: Updating the Ethical Infrastructure," 2011.
10. *Id.* at 158
11. *Id.* at 167
12. *Id.* at. 169
13. *Id.* at 170
14. *Id.* at 171
15. *Id.* at 172
16. *Id.*
17. *Id.* at 173

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