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## CLIENT BULLETIN

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### **Toronto Mayor Remains in Office: Could It Happen Here?**

The Ontario Divisional Court's decision in the matter of the disqualification of Mayor Rob Ford for violating the Ontario *Municipal Conflict of Interest Act* (*Magder v. Ford*) raises an important question: Would a B.C. mayor, councillor or regional board member be disqualified if they voted on a matter in which they had a pecuniary interest valued at \$3150?

To recap: the Toronto mayor's office was declared vacant by the Ontario Superior Court of Justice last December as a result of Mayor Ford having participated in and voted on certain matters in respect of which he had a personal financial interest, contrary to Ontario's *Municipal Conflict of Interest Act*. The Mayor appealed that decision and the Ontario court granted a stay of its decision, allowing the Mayor to remain in office until the appeal court issued its decision. The Ontario Divisional Court pronounced judgment allowing the appeal on January 25. Mayor Ford may continue to serve his term as Mayor of Toronto. (Under the Ontario legislation, if the appeal had been dismissed, Mr. Ford could have run in a by-election to fill the mayor's chair, or the Council could have chosen to simply appoint someone, including Mr. Ford, to complete the term.)

The matters on which Mayor Ford voted in February of 2012 arose under Toronto's Code of Conduct, a bylaw passed pursuant to the *City of Toronto Act*. The Code of Conduct requires the City to appoint an Integrity Commissioner, who has authority to inquire into alleged contraventions of the Code of Conduct, which among many other things prohibits council members from using their office to benefit themselves, their parents, children or spouse, their staff members, their friends or "associates, business or otherwise", even where the benefit is not a personal financial benefit. (This is a significantly broader prohibition than that contained in s. 103 of our *Community Charter*, which deals only with outside influence in respect of matters in which the council member has a pecuniary interest.) The Integrity Commissioner inquired into Mayor Ford's fundraising activities on behalf of a football team in which he was personally involved, found that he had violated the Code of Conduct outside influence rule, and recommended that the Council pass a resolution requiring him to reimburse the donors, out of his own pocket, the sum of \$3150. The Council accepted that recommendation in a vote on August 25, 2010 (in respect of which Mayor Ford participated). However Mayor Ford did not make the reimbursement and in January 2012 the Integrity Commissioner followed up with a report to Council recommending that Mayor Ford provide proof of reimbursement by March 6, 2012. Mayor Ford addressed the Council on that recommendation at its meeting on February 7, 2012, explaining why it was in his view inappropriate that he should have to reimburse the donors. A motion was then made in Council to

rescind the August 25, 2010 resolution requiring the reimbursement. Mayor Ford voted on this resolution, which passed. The successful application to the Ontario Superior Court of Justice to have Mayor Ford disqualified, brought by an elector of the City, was based on the Mayor's participation in these two motions. The propriety of the Mayor's original August 25, 2010 vote was not addressed in the proceedings.

The point on which Mayor Ford's appeal succeeded was this: the *City of Toronto Act* did not authorize the Council to impose a reimbursement penalty for a breach of its Code of Conduct. As a result, the Council's original August 25, 2010 resolution requiring reimbursement was a nullity, and Mayor Ford therefore could have no pecuniary interest in the matters on which he voted on February 7, 2012 which pertained solely to that original resolution. The *City of Toronto Act* permits the Council to impose two types of penalties on a member of council in respect to a Code of Conduct contravention: a reprimand, and suspension of councillor remuneration for up to 90 days. Reimbursement is not mentioned. The City's own Code of Conduct bylaw allowed the Integrity Commissioner to recommend other consequences, including removal of a councillor from committee memberships; repayment or reimbursement of moneys received; return of property or reimbursement of its value; and a request for an apology to the council or the person who complained to the Integrity Commissioner. The Divisional Court's conclusion is simply another application of the rule that local governments have only those powers that have been conferred on them by a provincial statute. The Court did not accept that the council could properly impose any consequences constituting a "penalty" on one of its members if the consequences did not come within the scope of the section of the *City of Toronto Act* that specified the two penalties that could be used for a Code of Conduct violation: a reprimand or a suspension of compensation. The Court specifically rejected the proposition that the case law on "broad interpretation" of municipal powers, the City's "natural person" powers, or its powers to provide any service "necessary or desirable for the public", could support a broadening of the range of permissible penalties for Code of Conduct violations, in view of the specific wording of the *City of Toronto Act*. In any event, to the extent that the Integrity Commissioner's recommendation had been based on the authority in relation to "reimbursement of moneys received", the Divisional Court noted that Mayor Ford had never received any money; the funds he had raised had gone directly to his football team.

There is no equivalent in British Columbia to the provisions in the *City of Toronto Act* (or the similar provisions applicable to other Ontario municipalities in that province's *Municipal Act*) that enabled the Toronto City Council to establish a Code of Conduct. Thus it is not possible for a situation to arise in B.C. in which a municipal council is imposing a financial sanction on one of its members pursuant to one of the council's own bylaws, in relation to which a pecuniary conflict of interest (and possible disqualification consequences) could arise for a council member. The Ontario Divisional Court decision does not suggest in any way that it is proper for a council member to vote on a matter in respect of which they have a significant financial interest; rather, it finds to be invalid the bylaw scheme that created the financial interest in relation to which Mayor Ford ultimately voted (several times) in this particular case, and in relation to which he had been disqualified. (At no time had Mayor Ford ever attempted to justify his participation in these matters on the basis that the sanction that the Council was imposing was beyond its powers; this was a point that appears to have been first raised in the legal proceedings.)

Some aspects of the *Ford* decision should nonetheless be a heads-up for councillors and electoral area directors in B.C., and staff advising them. In attempting to make out an “error in judgment” defence, which is also available under the B.C. *Community Charter*, Mayor Ford admitted that despite having been on the City Council for 12 years he had never read the *Municipal Conflict of Interest Act* or sought legal advice on his entitlement to speak or vote on Code of Conduct issues involving himself; that the Council’s Speaker had cautioned him on the conflict of interest issue when the Inquiry Commissioner’s report on the outside influence allegations first came before the Council for decision in 2010; and that no procedure existed in his office for identifying potential conflicts of interest on matters that were about to come before the Council for decision. He claimed to have an honest belief that conflict of interest rules applied only to situations in which the City had a financial interest (which it clearly did not in the matter of the football team donations). The Divisional Court declared that a council member’s subjective belief about the meaning and application of conflict of interest law is not sufficient to ground an “error in judgment” defence; rather, they must have made some inquiry about the meaning and application of the law. This reinforces the importance not only of general familiarization training on conflict of interest matters for newly-elected officials, but of specific advice on factual situations that may arise during the term of office, whether obtained from corporate officers who are generally familiar with the *Community Charter* ethical conduct rules, or from qualified legal counsel.

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