



# KEEPING CURRENT

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## NOT A TECHNICALITY: MAGDER v. FORD

### MAYOR FORD KEEPS JOB BASED ON SOUND LEGAL FINDING

#### By Stephen Thiele

Toronto Mayor, Rob Ford kept his job this month as a result of the Divisional Court's reversal of a decision which had found him in breach of the *Municipal Conflict of Interest Act*.

In *Magder v. Ford*, the Divisional Court held that even though Mayor Ford had voted on a matter which involved a personal pecuniary interest, the vote did not matter since the underlying by-law which gave rise to the pecuniary interest was a nullity. Rather than being a decision based on a technicality as argued by Mr. Magder's lawyers, the decision of the Divisional Court was based on a sound legal finding.

The by-law at issue was passed by Toronto's City Council in August 2010 in response to a report from the City's Integrity Commissioner which had determined that then Councillor Rob Ford had improperly used his position and public resources to solicit donations to a charitable football foundation administered at arm's length to Mr. Ford. Although Mr. Ford did not receive any money personally, the City's Integrity Commissioner recommended that City Council require him to pay back over \$3,000 in donations. This recommendation was made under the City's Code of Conduct for Members of Council which permitted a sanction requiring a member to pay money he or she received as a result of a breach of the Code. This recommendation was confirmed by a resolution of City Council.

As correctly determined by the Divisional Court, the recommendation and subsequent resolution were flawed. Since Mr. Ford never received the money, there was no jurisdiction in the City of Toronto to order him to pay back any money for his breach of the Code. The resolution passed by City Council was *ultra vires*.

The doctrine of *ultra vires* protects against the misuse of power by a municipal government. Unlike provincial and federal governments, municipal governments are creatures of statute. They derive their authority by statute and therefore do not have the status of natural persons or the Crown. Accordingly, municipalities must act within their strict powers when enacting resolutions or by-laws.

While municipal law recognizes a great deal of flexibility in the jurisdiction possessed by city governments, the Divisional Court rightly recognized that such authority cannot be used in a punitive manner.

This is logical. Otherwise elected politicians could easily abuse their power and pass by-laws which blatantly support "friends" of the majority of council, and correspondingly "punish" enemies.

This is essentially what the Divisional Court found when it stated that the by-law requiring Mr. Ford to pay back money he had not received was punitive.

With respect to the remainder of the decision, the Divisional Court also accurately analyzed the interpretation to be given to various sections of the *Municipal Conflict of Interest Act*. However, missing from the analysis was any discussion about the substantive rights of voters who would be disenfranchised by the removal of Mayor Ford from office.

At the time of writing, lawyers for Mr. Magder have indicated that they will be seeking leave to appeal the ruling of the Divisional Court to the Supreme Court of Canada. This may present some difficulties, however, since the *Municipal Conflict of Interest Act* clearly contemplates that the decision of the Divisional Court is final. This too makes sense since otherwise we will have endless court proceedings in matters that are best left to the electorate.

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Mr. Thiele was co-counsel in *Wrzesnewskyj v. Opitz* and *Foulidis v. Ford*.

He also prepared legal arguments in *Holyday v. Toronto (City)* and *The Toronto Party for a Better City v. Toronto (City)*.

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