THE GR COURT DOCKET

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GR LAWYERS OBTAIN DISMISSAL OF MUNICIPAL CONFLICT OF INTEREST CASE AGAINST FORD BROTHERS

By Stephen Thiele

Gardiner Roberts LLP was saddened to learn of the death of former Toronto Mayor and firm client Rob Ford following his 18-month battle with cancer.

We are satisfied, however, in having been able to secure the dismissal of the municipal conflicts of interest application that was brought against him and his brother, former councillor Douglas Ford Jr., by city resident Jude MacDonald. The order dismissing, without costs, the conflict of interest application was obtained on December 22, 2015.

Although the dismissal of the application resulted in the merits of Ms. MacDonald's allegations never being tested before Justice Perell, who was seised of the matter, as contended throughout the stages of the proceeding, the Fords had not breached the *Municipal Conflicts of Interests Act* (the "MCIA").

Indeed, the MCIA provides numerous defences to any elected municipal representative in a conflict of interest case and based on these defences the allegations against the Fords were defensible.

Municipal conflict of interest is serious

No one can or should argue against the proposition that electors deserve to be represented by elected officials who make decisions free from conflicts of interest.

In municipal law, the MCIA provides a process for an elector to unseat an elected representative in circumstances where the representative breaches his or her duties to declare a conflict of interest.

However, this is a serious remedy because its end result is to disenfranchise those who elected the representative to public office.

The operative provision

Section 5(1) prohibits elected members from acting in conflict of interest and requires disclosure of conflicts. The section states:

> 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 subject of consideration, the member,
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> (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof,
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> (b) shall not take part in the discussion of, or vote on any question in respect of the matter, and
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> (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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Application against the Fords

Ms. MacDonald's application alleged multiple conflicts of interest against the Fords. She contended that the Fords, their business and clients of their business had pecuniary interests with respect to the following matters that were considered at Toronto City Council or its committees between the years 2008 and 2014:

i. a ban on the sale of bottled water in civic centres;

ii. an initiative to reduce food packaging waste in Toronto;

iii. the adoption and implementation of healthy vending criteria for the sale of beverages in Parks, Forestry and Recreation vending machines;

iv. changes to the Tripartite Agreement to permit Porter Airlines to fly jets into and out of the Toronto Island airport, and to extend the airport's runway;

v. the appointment of Darius Mosun to the board of the Toronto Parking Authority;

vi. adjustments to the formula and rates for calculating fees under the city's industrial waste surcharge agreement program, paid by the Fords' business and the clients of their business, including Apollo Health and Beauty Care, Nestle, Coca Cola, Maple Leaf Foods, Loblaw, the subsidiaries of these purported clients and other clients that were known to the Fords but not to MacDonald; and

vii. an avenue study for St. Clair Avenue West from Keele Street/ Weston Road to Scarlett Road, and related amendments to the city's Official Plan and zoning by-laws.

In assessing MacDonald's application and based on submissions made by her lawyers during open court attendances and an interlocutory motion, there were potentially at least a dozen separate allegations of conflict of interest being made against the Fords.

Penalty for contravening the Act

The penalty for contravening the MCIA has been described by the courts as draconian.

Under s. 10(1), where a judge has determined that there has been a contravention of s. 5, he or she is required, in the case of a sitting member, to declare the member's seat vacant.

In addition, a judge can prohibit a member or former member from seeking elected municipal office for up to seven years, and, where the contravention results in personal financial gain, require that restitution be made to a party that has suffered loss or to the municipality or local board.

Ms. MacDonald's application sought to declare Rob Ford's seat on city council vacant and sought the maximum 7 year prohibition for either Rob Ford or Douglas Ford Jr. from being a member of Toronto City Council.

Defending a conflict of interest application

In general, defending an MCIA application requires an intimate knowledge of the defences available under the statute, a sound understanding of the principles of statutory interpretation, and a careful consideration of precedent. In addition, the subject-matter of the impugned conflicts must be carefully reviewed in order to determine whether indeed s. 5 of the MCIA has been breached.

The statutory defences available to a member or former member of council can be found in sections 4 and 10 of the MCIA.

Section 4 provides, in part, that the conflict of interest rules of s. 5 do not apply to a pecuniary interest in any matter that a member may have,

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> (a) as a user of any public utility service supplied to the member by the municipality or local board in like manner and subject to the like conditions as are applicable in the case of persons who are not members;
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> (b) by reason of the member being entitled to receive on terms common to other persons any service or commodity or any subsidy, loan or other such benefit offered by the municipality or local board;
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> (c) by reason of the member having a pecuniary interest which is an interest in common with electors generally; or
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> (d) 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.

Meanwhile, in the event that a breach of conflict of interest has occurred, s. 10(2) of the MCIA grants the court the ability to relieve a member or former member of any penalty where the contravention was committed through inadvertence or by reason of an error in judgment. This is a "good faith" defence.

As determined last year by the Ontario Court of Appeal in *Ferri v. Ontario (Attorney General)*[1] good faith and motive are relevant to the question of whether a pecuniary interest is likely to influence a councillor. Aside from the good faith defence available under s. 10(2) in respect to penalty, good faith and motive lie at the heart of whether a pecuniary interest is remote or insignificant under the defence found in s. 4(k) of the MCIA.[2]

With respect to the principles of statutory interpretation, it is well-established that the words of a statute must be read as a whole and must accord with the intent and purpose of the statute. The passage most often cited in Canadian jurisprudence to express this "golden rule" of statutory interpretation is as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[3]

The "golden rule" of statutory interpretation is important to understanding how the MCIA ought to be applied to any conflict of interest application, and, in particular, is absolutely critical to the application of s. 5(1).

A careful reading of s. 5(1) of the MCIA requires that the member's pecuniary interest, direct or indirect, must be "in the matter" that is the subject of consideration by council. Thus when assessing if a member or former member is in a conflict of interest the content of the resolutions or motions voted upon must be microscopically reviewed.

Judicial authority has also held that the pecuniary interest of the member, direct or indirect, must be in existence at the time of the vote and that there must be something more than infrequent past dealings or the possibility of obtaining future business.[4]

A pecuniary interest must be definable and real, rather than hypothetical or so remote as to be illusory.[5]

There are numerous cases involving municipal conflicts of interest. However this newsletter is not intended to exhaustively review every defence to an MCIA application or to review every case.

Each case turns on its own unique circumstances and such would have been the case in the application against the Fords.

However at the end of the day, whether

the merits of the multiple allegations made against them would have proven to be a breach of the MCIA or not, a dismissal of the application was obtained.

Representation of the Fords

The Fords were represented by Gavin Tighe and Stephen Thiele. Jane Sirdevan provided representation on a motion to dismiss the application.

These lawyers were further assisted by student-at-law Chris Junior.

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1. 2015 ONCA 683 at para. 19
2. Section 4(k) of the MCIA is set out as subparagraph (d) found above in this newsletter.
3. *Bell ExpressVu Ltd. Partnership v. R.*, 2002 SCC 42 at para. 26
4. *Lorello v. Meffe*, 2010 ONSC 1976 (S.C.J.) at para. 59
5. *Bowers v. Delegarde*, 2005 CanLII 4439 (S.C.J.) at para. 100