

Legal: Condo Cases

Straight From The Source ***An Interview with Benjamin J. Rutherford***

Gordon v. York Region Condominium Corporation No. 818, et al. –

<http://www.ontariocourts.ca/decisions/2014/2014ONCA0549.pdf>

1. What was this case about?

This case was about the validity of a by-law which empowers a condominium board of directors to hold an ethics review of a board member and disqualify that member where the board finds he/she breached the code of ethics on at least three (3) occasions.

The by-law is the first of its kind in condominiums. A condominium by-law like this had never been before the court. The condominium was ultimately successful.

In this case, it was alleged that a board member, Stanley Gordon, had breached the directors' code of ethics by: assaulting the president of the board; making disparaging remarks about members of the board and property management in public at the ACMO/CCI conference, and two other instances where it was alleged he tried to usurp the powers of the board, misused his position on the board, and instigated conflict. The board of directors held an ethics review under the by-law and disqualified Gordon.

2. What required this case to go to Court?

Both the Superior Court and the Court Appeal acknowledged that the by-law was democratically passed by owners and empowered the board to deal with unethical directors. The decision in the Court of Appeal notes that Gordon voted for the by-law.

Gordon commenced the court proceedings. The condominium (and the directors whom Gordon named personally) had to defend the by-law.

3. What were the main issues before the Court?

In the Superior Court the issues were as follows: (i) whether the by-law was consistent with the Condominium Act and, therefore valid; (ii) whether the decision of the board to disqualify Gordon should be reversed; (iii) in any event of the foregoing whether Gordon should be disqualified a member of the board, and; (iv) whether any members of the board of directors breached their standard of care.

The Superior Court judge: upheld the by-law, finding that it was consistent with the Condominium Act and, in particular, that a unit owner meeting to vote on the removal of a condominium director is not the only way to remove a condominium director before the end of his or her term. The Superior Court judge set aside the decision of the board of directors disqualifying Gordon because the judge did not approve of the manner in which the review was conducted, but he declined to re-instate Gordon and afforded the board of directors an opportunity to hold another ethics review.

It is important, in my view, to note the ultimate deference which the judge afforded to the condominium board. Also, there is an interesting acknowledgement in the judge's reasons which bears mentioning: the Superior Court judge acknowledged that a condominium board, though created by statute, is not a statutory tribunal whose decisions are subject to judicial review. This acknowledgement has the important effect of maintaining the level of deference given to condominium boards, and does not escalate their position to that of a tribunal whose decisions are always subject to judicial scrutiny.

At the Court of Appeal, the issues were as follows: (i) is the by-law unreasonable and therefore invalid?; (ii) is the by-law invalid as being inconsistent with the democratic principles of the Condominium Act, and; (iii) did the Superior Court judge make an error in not re-instating Gordon after setting aside the first decision of the board of directors.

The Court of Appeal found that it is reasonable for a by-law to empower a condominium board to hold an ethics review to enforce the Directors' Code of Ethics. The Court of Appeal found the by-law was consistent with the *Condominium Act* and had been democratically enacted. The Court of Appeal upheld the Superior Court judge's decision where he declined to reinstate Gordon and where he provided the board an opportunity to hold another ethics review: the Court of Appeal found that this part of the judge's order was discretionary (and the Court of Appeal does not lightly interfere in discretionary orders) and that, in any event, the Superior Court judge's decision was "eminently fair and reasonable".

4. What were the unique challenges of this case?

The case dealt with a unique by-law which had never been considered by the court. This case makes new law. Cases that result in new law are, by their nature, challenging.

5. What can condominiums learn from this case?

Condominiums, directors and owners do not have to put up with unethical directors; owners can empower their boards to deal with such directors.

Directors' code of ethics can have teeth and can be enforced with the proper by-law.

6. What was the outcome of this case?

The condominium was successful: It upheld its by-law, it exercised its right to hold an ethics review, and it was entitled to its costs of the appeal.

Benjamin Rutherford is a condominium lawyer and litigator with Fine & Deo. Ben is counsel on numerous reported condominium decisions.

THE VIEWS PRESENTED IN THE ABOVE ARE THE PERSONAL VIEWS OF THE INDIVIDUAL INTERVIEWED AND ARE NOT THOSE OF THE TORONTO & AREA CHAPTER OF THE CANADIAN CONDOMINIUM INSTITUTE. THE INFORMATION PRESENTED IS NOT A BINDING LEGAL OPINION AND READERS SHOULD SEPARATELY REVIEW THE CASE CITED TO ASCERTAIN ANY PRECEDENTIAL VALUE BASED UPON THE JUDGE OR HEARING OFFICER'S PRECISE AND COMPLETE REASONS FOR THE DECISION.