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ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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STANLEY GORDON

Applicant

- and -

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YORK REGION CONDOMINIUM CORPORATION NO. 818, ED ROTMAN,  
AHSAN ZAIYOUNA, HAROLD DAVIS, EUGENE KATZ and MANFRED KAPP

Respondents

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Court File No.: CV 12 110220

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APPLICATION ON NOTICE

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BEFORE THE HONOURABLE MR. JUSTICE J.R. MCCARTHY  
on Wednesday, AUGUST 21, 2013 at NEWMARKET, Ontario

APPEARANCES:

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B. NAM/M. CAMPBELL

Counsel for the  
Plaintiff/Respondent

B. RUTHERFORD

Counsel for the  
Respondent/Applicant

WEDNESDAY, AUGUST 21, 2013

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## RULING ON APPLICATION

McCARTHY, J. (Orally)

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The Applicant applies under Rules 14.05(2) and 14.05(3)(g) of the *Rules of Civil Procedure* and section 134 of the *Condominium Act*, 1998 S.O., C. 19 as amended, hereinafter referred to as "The Act".

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The Applicant seeks an order declaring the disqualification of the Applicant as Director of the Respondent condominium corporation ("The Corporation") by the Respondent on November 21<sup>st</sup>, 2011 to be invalid together with a declaration that Article 6.03(c)(x) of By-Law No. 9, hereinafter referred to as ("the Article") of the corporation is invalid as it is contrary to section 33 of the Act.

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As well, the Applicant seeks an order that the Applicant be re-instated as a Director of the corporation and the Applicant also seeks other ancillary relief.

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The Respondent brings a counter-application seeking: (a) a declaration that the Article is valid, (b) a declaration that the Applicant resigned as Director of the corporation following the ethics review on November 21<sup>st</sup>, 2011, (c) an order upholding the determination of the ethics review, and (d) in the alternative certain

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declarations or findings on the evidentiary record before the court that the Applicant breached the standard of care of a corporate Director, failed to act honestly and for other findings of fact.

5           The Applicant was a Director of the Defendant corporation from May of 2006 to November 2011. He was removed as a Director as the result of an ethics review held by the Board pursuant to the Article on November 21<sup>st</sup>, 2011.

10           The Article sets out that a Director shall cease to be qualified to be a Director and shall be deemed to have resigned from the Board of Directors upon the happening of certain events. Subsection (x) of subparagraph (c) identifies one of those events to be if the Director violates the  
15           Director's code of ethics on three occasions over the course of the Director's term unless determined otherwise by a court. A procedure for an ethics review is outlined in subparagraphs (a) and (b) of  
20           subsection (x).

          Section 33(1) of the Act reads as follows:

          "Subject to subsection 51(8) a Director, other than a Director on the first Board may be removed before the expiration of  
25           the Director's term of office by a vote of the owners at a meeting duly called for the purpose where the owners of more than 50% of all of the units in the corporation vote in favour of the removal."

30           Subsection 56(1) (a) of the Act reads as follows:

          "The Board may, by resolution make, amend or repeal by-laws, not contrary to this

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Act or to the declaration to: govern the number, qualification, nomination, election, resignation, removal, term of office and remuneration of the Directors subject to subsection (2)."

Audrey Loeb comments on the scope of subsection 56(1) (a) of the Act in her text, *The Condominium Act: A User's Manual, Carswell 3<sup>rd</sup>, ON 2012* at page 175 as follows:

"By-laws may be passed under the Act with respect to virtually all aspects of selecting and removing members of the Board of Directors including fixing the number, election, resignation, term of office for up to three years, remuneration not to exceed three years."

I find that the article of By-Law No. 9 of the Corporation is entirely consistent with subsection 56(1) of the Act. It deals directly with qualification, resignation or removal of a Board member. It is not inconsistent with any other section of the *Condominium Act*.

I agree with counsel for the Respondents that subsections 33(1) and 51(a) of the Act are merely permissive; they indicate how a Director may be removed in the absence of a by-law dealing with removal before a term. These subsections of the Act do not foreclose the possibility of a by-law dealing with some other grounds upon which, or means by which, a Director may be removed.

I am of the view that the By-Law No. 9, which was passed by a majority of the unit owners in compliance with the *Condominium Act*, expresses the

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desire of the majority of the unit owners that a  
Director should be disqualified from holding office  
upon the happening of any number of events. One of  
those events would be a conclusion by the Board of  
a violation of the Director's code of ethics on  
three occasions. This is set out at Article  
6.03(c) (x).

10  
The code of ethics was adopted by and agreed  
to by the members of the corporation, including Mr.  
Gordon, by means that were not contrary to the  
provisions of the Act. Three violations of the  
code of ethics would have the same effect of  
disqualifying a Director as if the Director became  
an undischarged bankrupt, was convicted of a  
15  
criminal offence, or ceased to own a condominium  
unit.

The owners of the corporation lawfully and  
clearly empowered their elected Board of Directors  
to deal appropriately with ethical violations.  
20  
They did so in a democratic fashion. The by-law  
was clearly authorized under the Act. In passing  
By-Law No. 9, the owners agreed to the ethical  
review.

I would distinguish the case of *York*  
25  
*Condominium Corporation No. 137 v Hayes*, 2012  
(Carswell), ON 9986 on the basis that neither  
sections 56(1)(a) of the Act nor a by-law passed  
pursuant to that subsection were at issue in that  
case.

30  
The ethics review is distinct, however, from  
the mere occurrence of an event such as a person  
ceasing to be a unit owner, becoming an  
undischarged bankrupt, or being convicted of a

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criminal offence. The ethics review calls for a procedure to be followed.

5 That procedure calls for an ethics review preceded by certain preliminary steps of notification. The procedure is to be the same as that used by the Board to decide all corporate matters, except to ensure fairness, it permits the subject Director to be present at the Board meeting and to be heard. The Board is then  
10 expected to determine the matter and render a decision.

In my view, principals of procedural fairness and natural justice cannot be ousted from such an ethics review. I was referred to the Court of Appeal's decision *York Condominium Corporation No. 382 v Dvorchik*, (1997) ON, No. 378, which  
15 is authority for the proposition that, when making rules, a Board is not performing a judicial role and no judicialization should be attributed to either its function or its process. In the absence  
20 of unreasonableness, deference should be paid to rules of a Board charged with the responsibility for balancing the private and communal interests of the unit owners.

25 I was also referred to the case of *Muskoka Condominium Corporation No. 39 v Kreutzweiser*, (2010) ONSC 2463 and *Chan v Toronto Standard Condominium Corporation No. 1834*, (2011) ONSC 108, both of which stand for the proposition that the  
30 role of the court hearing the application is not to substitute its own opinion for that of the Board of Directors, but to ensure that the Board has acted in good faith and in compliance with the Act, the

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corporation declaration, by-laws and rules. The court should accept the Board's decision unless it has acted capriciously or unreasonably.

5 I would distinguish the above cases on the basis that what is in question in the case at bar is not the enactment or even the imposition of a rule; rather it is a procedure set out in an Article to a By-Law which was accepted and passed by the corporation.

10 The members of the corporation clearly wanted an ethics review. This ethics review calls for notice, addresses and submissions, determinations and decisions. While the review may not require findings, it must certainly involve considerations  
15 of some modicum of evidence. Indeed, in the present case, the Board sought to rely upon witness statements. That being the case, the Board was, in my view, required to adhere to some minimal standard of procedural fairness and the basic  
20 principles of natural justice. Not to do so would be unreasonable and capricious.

In this case, it is clear that the Applicant was provided with notice of the hearing of November the 18<sup>th</sup>, 2011 through his solicitors. The notice  
25 itself with full particulars was dated on November the 21<sup>st</sup>, 2011, the very day of the hearing. I find that procedural fairness requires that reasonable notice of such an ethical review should have been given to the Applicant in advance of that date.  
30 One business day prior to the review date is simply not sufficient, fair or necessary.

As well it is unclear whether the Applicant received the witness statements that the Board

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intended to rely upon. Both the Applicant himself and one of the other Directors, Morris Dadoun, says he did not. Director Zaiyouna could not confirm that these statements were disclosed prior to the review. Certainly no evidence was tendered to show that an email, memo or letter was provided to the Applicant attaching the statements or summarizing their content.

It is a fundamental principle of natural justice and procedural fairness that a person facing the termination of his standing or office, should be made aware in a fulsome manner of the case which he has to meet. Moreover, the fact that this was a review of alleged ethical violations which would impact not only on the Applicant's standing as a Director but also on the Applicant's reputation in the community, required that the Applicant be provided with some assurance that he would receive a fair hearing.

In this case, it was plain and obvious that Director Rotman was looking to have the Applicant removed from the Board and was seeking to unite the other Board members to effect this removal. Rotman admitted this in cross-examination and it is made plainly obvious in his emails to the other Directors, dated November the 16<sup>th</sup>, 2011. The email dated November the 18<sup>th</sup>, 2011 from Rotman to the other Directors in advance of the ethics review contains the following statements:

"I would ask you to limit your questions to the decision at hand, to act on this information for the **purpose of voting that Stan Gordon be removed from his position**



**as a Director of the corporation** (emphasis added)."

And this is followed by:

**"We must arrive at a decision quickly so that our decision for the removal of Mr. Gordon can be given to him as quickly as possible when he returns to the meeting** (emphasis added)."

That one of the Directors resigned in protest over the manner in which the review was conducted provides an indication that a person close to the situation was concerned about the procedure being followed. Any reasonable person would be. It is one of the principles of natural justice and a key element of procedural fairness that a person who is to be making the decision should not have predetermined the matter before a review. At the very least, Director Rotman should have recused himself from the review and desisted from attempting to influence other Directors who would be participating in the review.

This may not ultimately have affected the outcome of the review, but it is clear from the letter from counsel for the corporation to the Applicant dated November 11<sup>th</sup>, 2011 that a determination of ethical violations had already been made by the Board in advance of the hearing. The relevant excerpt from that letter reads as follows:

"Your actions clearly establish that you do not act ethically."

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I find, therefore, that the ethics review conducted by the Respondent condominium corporation violated principles of fundamental justice, natural justice and procedural fairness. The Respondent argues that the court should afford deference to the determination made at the ethics review since the review was conducted according to the Article which forms part of the by-law adopted by of the corporation in accordance with the Act.

Alternatively and regardless of any procedural irregularities, violations of principles of natural justice or procedural fairness, there exists an ample evidentiary record for this court to conclude that the Applicant is guilty of at least three ethical violations and is therefore disqualified as a Director by virtue of the plain wording of the Article.

I am unable to agree with the Respondent that deference is in order regardless of my findings of violations of procedural fairness and natural justice. Nor am I prepared to substitute my findings for those made at the review level. First, this is not a judicial review of a statutorily created and defined administrative tribunal charged with adjudication under a statute. The standard of review for correctness and errors in law are not at play in this Application and may not be applicable. Second, there are no findings, conclusions or otherwise made by the Board to even review.

Third, I do not believe that this court should usurp the powers of the Board entrusted to it by the members of the corporation to conduct a proper

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ethics review of its own. Fourth, it would not be an economical use of the courts resources to embark on such a exercise. Fifth, even if such an exercise were to be undertaken, a trial of an issue would be required since the weighing of evidence and assessment of credibility might be the only proper context in which to carry out such an exercise.

I emphasize that deference to a decision arrived at by a Board in good faith is one thing; however, deference to violations of principles of natural justice and procedural fairness is quite another. On the basis of violations of principles of natural justice and procedural fairness alone, the decision of the Board of Directors given following the ethics review and dated November the 21<sup>st</sup>, 2011 is set aside. The disqualification of the Applicant as a Director is set aside. I am not prepared to order re-instatement of the Applicant as a Director as part of the remedy of this court at this time, however, given that the vacancy left by the disqualification has been filled.

The Board shall be at liberty to conduct a fresh ethics review of the Applicant within 90 days, the results of which shall be minuted by the Board. In the event that the Board of Directors does not conduct a fresh ethics review after 90 days, the Applicant may move for re-instatement as a Director or such other remedy as he may request. Director Rotman shall not form part of the Board for the purpose of any further ethics reviews of the Applicant.

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5 I will remain seized of the matter in the event that either party seeks further directions from the court following the ethics review or following the expiration of the time period set out for the ethics review.

10 That is the substantive part of the order. I am not going to revisit it. I simply ask the parties if there is any glaring errors that you have noted in terms of dates or spellings of person's names, or if I've said Applicant when it should be Respondent? I appreciate that it was read out quickly and you may have to go to the transcript in order to gain a full appreciate of what I have said.

15 I think the substance of it is clear. My decision is that the Article in question is not in violation of the *Condominium Act* and is therefore valid but that procedural fairness was not followed and principles of fundamental justice and natural justice were not followed in an ethics review so they will be afforded another opportunity for an ethics review.

20 Subject to what I hear, the parties may make written submission on costs limited to three pages each with one page each in reply within 30 days of today's date, the reply being 14 days after the 30 days initially for the submissions. I note that there has been divided success on this motion as well. The parties may agree to sever issue of costs until the final adjudication of the issue of remedy before me if that becomes necessary.

30 So you are free to make cost submissions now. You have divided success here so I am not going to

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tip my hat to say who is successful other than to say you both make submissions within 30 days and that you would have 14 days from then to make your reply limited to one page, the initial submission to be limited to three pages each.

My hope is that you can agree on costs or defer it until this matter is finally adjudicated. I would not do the disservice to another judge of foisting this matter on him or her while I remain seized of it unless you want to make submissions on why I should not remain seized of it because I have displayed some sort of bias on the issues. I am not going to take any offence of that if you do.

MR. RUTHERFORD: No, I'm - I'm quite content with what you suggested. Thank you, Your Honour.

THE COURT: I am not going to take any offence if you appeal this matter on the substantive issues of law or findings. I just think it is the best use of the court's resources that I remain seized of it for the tail of it, so to speak, that has to take place.

MS. NAM: I have no issues with that as well, Your Honour.

THE COURT: Alright, thank you. So again that is a complex endorsement. Maybe it is not so complex but the Court Reporter will have access to my notes if the Court Reporter requires it. And I always say this on the record, those notes are not to be released to the parties because they don't really form part of any part of the record. They're my notes for my use. The transcript is what it is. If it needs to be corrected the Court Reporter or I confirm the Court Reporter will give me a copy of

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the transcript. That is what happens. If you require an expedited copy of that you will have to pay for it. You may want to share the costs, I am not sure.

5 MS. NAM: Your Honour, may I just get clarification on one of your findings...

THE COURT: Yes.

MS. NAM: ...that you made?

THE COURT: Yes.

10 MS. NAM: Just why you decided not to re-instate the - re-instate the Applicant.

THE COURT: Because there was a full quorum on the Board right now.

15 MS. NAM: Right, but I mean arguably then that the - the appointment was not a valid appointment of the - of the Director that replaced...

THE COURT: That could be true.

MS. NAM: Yes.

20 THE COURT: But because I don't see how the Applicant is so severely prejudiced if he's going to either get another ethics review in 90 days or the chance to come back before the court to argue why he should be re-instated...

MS. NAM: Okay.

25 THE COURT: ...because he the ethics review didn't take place. Essentially what I am saying is the ethics review was irregular and it has to be done again and if the ethics review does not happen then you have got full rights to come back and say well,  
30 it didn't happen therefore I wasn't disqualified because the other one's been set aside and then we will make the remedy that is appropriate and it may mean substitution of Directors. I don't know, I

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would have to hear submission on that and law on that and that is not before me today.

You both look equally confused and disappointed but hopefully you can work things out.

5 MR. RUTHERFORD: No, I...

10 THE COURT: If not there will have to be another ethics review or not. Maybe the Board decides not to go ahead with one in which case you would probably want to bring the matter back first I would think and seek the remedy that you think you are entitled to. Whether or not there is case law on it, I don't know. There may be case law on it and if not then we have to make some precedent.

15 MR. RUTHERFORD: Thank you, Your Honour.

THE COURT: Just one endorsement on the record.

MR. RUTHERFORD: If we could ask for a copy of that as well.

20 THE COURT: Thank you and hopefully see will see you at some other date on this matter, if not good luck with working it out.

MR. RUTHERFORD: Thank you, Your Honour.

...

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Form 2

Certificate of Transcript  
*Evidence Act, Subsection 5(2)*

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I, Marion Hunt certify that this document is a true and accurate transcript of the recording of Gordon v York Region Condominium Corporation No. 818 held at 50 Eagle Street West, Newmarket, Ontario, taken from recording 4911 403 30130821 092421 which has been certified in Form 1.

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ORIGINAL SIGNED BY  
COURT REPORTER, MARION HUNT

15

September 30, 2013

\_\_\_\_\_  
Marion Hunt, CVR  
Court Reporter

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Photostatic copies of this transcript are not certified and have not been paid for unless they bear the original signature of Marion Hunt (in blue ink) and accordingly are in direct violation of Ontario Regulation 487/91 *Courts of Justice Act*, January 1, 1990.

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Transcript Completed.....August 29, 2013  
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