

## **The Oppression Remedy – Section 135 of the *Condominium Act, 1998***

### **Case Comment on *Di Nardo et. al. v. Simcoe Condominium Corporation No. 92***

2009 CanLII 19932 (ON.S.C.)

***This decision provides guidance to condominium boards in making decisions that may have a disparate impact on certain owners within a condominium community.***

The owners of two condominium units (the “Applicants”) brought a court application against the condominium corporation for an order requiring the corporation to remove a walkway the corporation installed on the grassy common element area in front of the Applicants’ units. The result was that the grassy common element area in front of these units was now reduced.

The Board considered the original configuration of the common element area in question to be unsafe because it required other owners trying to reach their parking spaces to navigate, in rather tight circumstances, around the Applicants’ parked vehicles. Over the years, the Board implemented a number of measures to address the problem which largely entailed eliminating the Applicants’ parking space that blocked access to the parking lot when a car was parked in same, and reassigning new parking spaces to the Applicants. The Applicants objected to these arrangements. Ultimately, the Board decided to construct a walkway that crossed over the grassy common element area in front of the Applicants’ units leading safely to the parking lot.

The court application was brought pursuant to section 135 of the *Condominium Act, 1998* which is commonly referred to as the “oppression remedy”. Briefly, section 135 permits a court to make an order rectifying a matter if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive, or unfairly prejudicial to the applicant, or unfairly disregards the interests of the applicant.

The Applicants argued that the installation of the walkway was oppressive or unfairly prejudicial to the Applicants because:

1. The walkway interfered with their privacy;
2. The Applicants were now required to negotiate a step to get across the walkway; and
3. There was another option available to the Board which was to shift the parking lot a few feet away from the Applicants’ units which would allow the installation of a walkway without encroaching on the grassy common element areas in front of their units. Apparently, this was previously done by the Board in dealing with a similar problem in another area at the property.

In reaching its decision, the Court had to weigh the interests of the Applicants' right to privacy and to be treated fairly or equally by the Board, and the Corporation's interest in ensuring the safety of persons while on the common elements. The Court disagreed with the Applicants that the installation of the walkway was oppressive or unfairly prejudicial to the Applicants for the following main reasons:

1. There was no evidence that the walkway actually interfered with the Applicants' privacy or that the Applicants now had to negotiate a step. Accordingly, any prejudice resulting to the Applicants by the walkway was nominal;
2. The Board's decision to install the walkway was legitimately based on safety considerations; and
3. Perhaps most importantly, the Court found (as recorded in the minutes of a board meeting) that the Board did carefully consider the Applicants' proposal to shift the whole parking lot, and had even consulted with an engineer on possible solutions to the access problem.

The Court found that, "[i]n the end, the Board determined that construction of the walkway was the best option. Their decision was not in any way arbitrary, nor discriminatory. It took into account the interests of all affected unit owners". The Court further noted that while the construction of the walkway may not have been the only solution to the problem, the Board's decision was reasonable in the circumstances and was made in good faith in the discharge of its duty to manage the common elements of the Corporation for the benefit of all owners and residents.

Notably absent from the Court's decision is any consideration of the reasons for the Board's decision that the walkway was the best option. Had the Applicants been able to demonstrate that they were prejudiced by the installation of the walkway, this case may have been decided differently. In the very least, there would likely have been some consideration by the Court of the Board's underlying reasons for foregoing other options. For instance, given two equally viable options, one that could impact negatively on certain owners, and one that would not, a court could find that proceeding in the manner that impacts negatively on some owners does come within the ambit of section 135.

What is evident from this decision is that, in the context of section 135 of the Act, the manner in which a board of directors arrives at a decision may be just as important as the decision itself. In making decisions that may have a disparate impact on owners or some owners, condominium boards would be well advised to:

1. Consider all possible solutions to the issue;
2. Obtain professional advice where it may be of assistance;
3. Record the Board's consideration of the issue and decision in the minutes of board meetings; and
4. Consult with the owners whose use and enjoyment of the property may be affected by the decision.

From reading the decision, it appears that the Board may not have initially consulted with the Applicants in its previous decisions to solve the access problem by reallocating new parking spaces for these owners. This may have given rise to the Applicants' feeling that they were being treated unfairly by the Board resulting in this litigation. Even where a condominium corporation may not be required to give formal notice to owners under the *Condominium Act, 1998*, if it is foreseeable that the decision may affect the use or enjoyment of the property by certain owners, it may be prudent for the board to seek and consider the input from such owners in making the decision.