Court of King's Bench of Alberta

Citation: Spicer v Condominium Corp. 041156, 2023 ABKB 611

Date: 20231031
Docket: 2201 05241
Registry: Calgary

Between:

Lawrence Spicer and Thomas Kiley

Applicants

- and -

Katherine Joy Matear and Condominium Corporation No. 0411156 Operating as the Pinnacle Canmore

Respondents

Reasons for Judgment
of the
Honourable Justice R.W. Armstrong

Introduction

[1] Condominium living offers a unique blend of individual home ownership and shared responsibility. While sharing common spaces and living in close quarters may evoke a sense of community among residents, it can also result in conflict. In this case, conflict has arisen over the use of a barbeque on an outdoor patio.

[2] The Applicants, Lawrence Spicer and Thomas Kiley own a condominium on the top floor of the Respondent, Condominium Corporation No. 0411156, operating as the Pinnacle Canmore (the "Pinnacle"). The Respondent, Katherine Joy Matear, owns the unit directly below Mr. Spicer and Mr. Kiley.

[3] Ms. Matear's unit has multiple balconies. One of the balconies is off her kitchen area and another is off her dining room and living room areas. Directly above Ms. Matear's kitchen balcony is a pergola structure and above that is Mr. Kiley's and Mr. Spicer's kitchen window. Mr. Kiley and Mr. Spicer do not have a kitchen balcony. Their balcony is directly above Ms. Matear's living room and dining room balcony.

[4] The Pinnacle permits barbeques on balconies. There are no restrictions regarding the type (i.e., propane, natural gas, or charcoal) or location of barbeques on resident balconies. Ms. Matear's natural gas barbeque is on the balcony outside her kitchen. She finds this location most convenient when she is preparing meals.

[5] Mr. Spicer and Mr. Kiley take issue with the placement of Ms. Matear's barbeque. They claim its use creates excessive smoke in their unit and they bring this application for an order under s 67 of the *Condominium Property Act* (the "*CPA*") prohibiting Ms. Matear from utilizing her gas barbeque on her kitchen patio.

Issues

[6] This application raises three issues:

1. Does the placement of Ms. Matear's barbeque violate the Pinnacle's Bylaws?
2. Is the Pinnacle acting in a manner that contravenes the protections afforded by the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (the "*AHRA*")
3. Is the Pinnacle acting in a manner that is oppressive, unfairly prejudicial and that unfairly disregards the interests of Mr. Spicer and Mr. Kiley?

1. Does the placement of Ms. Matear's barbeque violate the Pinnacle's Bylaws?

[7] The Pinnacle and its residents are governed by Bylaws that include a set of Rules and Regulations. Neither the By-Laws nor the Rules and Regulations are the subject of challenge in this litigation, nor is the general right of residents to have and use barbeques on their patios.

[8] Section 111 of the Bylaws requires all condominium owners to use Common Property in such a manner as not to unreasonably interfere with the use and enjoyment thereof by other owners or occupants. The relevant section of the Rules and Regulations, which form part of the Bylaws, says:

1. An Owner shall not use his Unit, nor permit his Unit to be used, in a manner or for a purpose that is unlawful or may cause a nuisance or hazard.

[9] Common Property and Unit are defined terms in the Bylaws. Balconies are Common Property; however, s 46 of the Bylaws grants unit owners exclusive use of patios, decks, terraces, and balconies. Pursuant to the Rules and Regulations, the term Unit includes any Exclusive Use area. Accordingly, the Rules and Regulations prohibit an owner from using a balcony or patio in a manner or for a purpose that is unlawful or may cause a nuisance or hazard.

[10] Mr. Spicer and Mr. Kiley claim that Ms. Matear's barbeque causes a nuisance when it is used on her kitchen patio. Their evidence is that smoke from the barbeque rises from Ms. Matear's balcony and enters their unit through the kitchen window.

[11] Nuisance is not a defined term in the Bylaws or Rules and Regulations. In the absence of a definition, we may look to the common law which defines nuisance as "a substantial and unreasonable interference with the use and enjoyment of lands": A Linden, *Canadian Tort Law*, 11th ed (Toronto: LexisNexis, 2018) at 528; see also: ***Lupuliak v Condominium Plan No 8211689***, 2022 ABQB 65 at para 82.

[12] The substantial and unreasonable interference test was also applied in the context of a dispute among condominium owners in ***Carleton Condominium Corporation No. 132 v Evans***, 2022 ONCAT 97 at para 28. In that case the court found that "unpleasant and obnoxious behaviours" may negatively affect an owner's enjoyment of certain common areas but that does not necessarily mean that behaviour amounts to a nuisance. Nuisance requires a finding that the conduct complained of "has substantially or unreasonably obstructed or interfered with the 'rights of other owners to their comfort and quiet enjoyment of the common elements'."

[13] According to the affidavit of Mr. Kiley sworn on April 21, 2022, over the 8-month period between August 2021 and March 2022, Ms. Matear used her barbeque a total of 9 times. On some occasions, Mr. Kiley reported smelling smoke while on other occasions he referred to the smell of gas, fumes, and cooking food. On one occasion he reported no smoke or fumes or other smells. Mr. Kiley's own, recorded observations confirm that Ms. Matear is using her barbeque periodically and only for normal meal preparation purposes.

[14] Mr. Kiley swore a supplemental affidavit on August 25, 2022. In that affidavit he noted that Ms. Matear used her barbeque three times between July 8 and 15, 2022 and that there were 11 instances in July and August 2022 when Ms. Matear used her barbeque. Again, there is nothing unusual, excessive, or unreasonable about Ms. Matear's use of the barbeque. However, according to Mr. Kiley, when Ms. Matear barbeques, the air quality in his residence declines. He bases his assertion on a device he purchased called an "Airthings."

[15] According to Mr. Kiley, when Ms. Matear uses her barbeque, the Airthings device shows a decline in air quality. He states that particulate matter readings increased from an average of 2 to 4 parts per million to 31 to 68 parts per million. The screen shots he provided from the Airthings device do not support his theory that the barbeque causes an increase in particulate matter which renders the air quality poor. The particulate matter shown on July 9 is 1, yet the air quality is shown as "poor". On July 10, the particulate matter is 69 and again the air quality is shown as poor. Something other than the particulate matter must be accounting for the poor air quality. If there was a correlation between increased particulate matter, barbeque use and poor air quality, I would expect the particulate count to be high on both occasions.

[16] The Airthings device readings do not assist the court for several additional reasons. First, there are no readings from when the barbeque is not in use that may provide a baseline air quality reading for comparison.

[17] Second, no evidence was provided as to what normal readings are or how the other factors such as Radon, CO2 or VOC may affect the air quality readings.

[18] Third, on the evidence before me, there is no way to rule out other factors in the unit that may be contributing to the air quality readings. Mr. Kiley's evidence is that he and Mr. Spicer

often light incense and scented candles in their residence, particularly when Ms. Matear is barbequing. One might reasonably expect burning candles and incense, which produces smoke, to affect air quality.

[19] Fourth, as Ms. Matear states in her affidavit, the air quality in Canmore is, from time to time, quite smoky. Mr. Kiley and Mr. Spicer have left their windows open on days where the air quality in Canmore was rated as poor. On the evidence before me, there is no way of knowing what impact Canmore's general air quality would have on the readings taken in Mr. Kiley's and Mr. Spicer's residence.

[20] Mr. Kiley and Mr. Spicer have a barbeque on their own balcony which they admittedly use to prepare meals. Neither of them reports any adverse effects from the use of their own barbeque on their own balcony.

[21] Mr. Kiley makes a claim in his affidavit that defies common sense to the point where I simply do not find the assertion credible. He states that closing their kitchen window, the window directly above where Ms. Matear's barbeque is situated, has little or no effect on the smoke and odors coming into their unit from outside. While I accept that some cooking orders and smoke may permeate a closed window, I do not accept that closing the window makes no difference. A physical barrier such as a window will have the effect of deflecting smoke or other particulate from entering a premises. I am left with the impression that Mr. Kiley is exaggerating the effect of Ms. Matear's barbeque use for the purposes of this application.

[22] In making this finding I am cognizant of the email dated August 26, 2021 from Pinnacle Board member Rhonda Basson wherein she notes that it was "really really smoky" in Mr. Kiley and Mr. Spicer's unit when she attended at their invitation. I place very little weight on this email. It is hearsay. By attaching the email to the affidavit rather than having Ms. Basson swear an affidavit as to what she observed, the Applicants are shielding her from cross examination and eliminating the ability of the Respondents to test her statement in any meaningful way. Furthermore, there is no information in her email as to what the source of the smoke was or whether the unit's windows were opened or closed either when she attended or immediately before she attended.

[23] While the presence of cooking odors or some occasional barbeque smoke may be annoying or unpleasant, both are a normal part of living in high density housing such as a condominium that permits barbeque use on the balconies. I am unable to find on the evidence before me that the occasional use of a barbeque for meal preparation substantially or unreasonably obstructs or interferes with the right of Mr. Kiley and Mr. Spicer to the comfort and enjoyment of their own unit and its associated common areas. I therefore find Ms. Matear's barbeque use does not constitute a nuisance.

[24] Even if Mr. Spicer and Mr. Kiley have a subjective belief that Ms. Matear's barbeque interferes with their right to the comfort and enjoyment of their premises, that is not the applicable legal test in these circumstances. The test for substantial interference is an objective one: would the conduct complained of be intolerable to an ordinary person? The barbeque is used only occasionally, and it is not used for any purpose other than normal meal preparation. Food odors and smoke from the occasional use of a barbeque is a normal and expected event when living in a condominium or other high density setting where barbeque use is permitted. Occasional use of a barbeque for meal preparation does not rise to the level of conduct that would be intolerable to the ordinary person.

[25] Ms. Matear's use of her barbeque is lawful and there is no evidence it is hazardous. Furthermore, Mr. Spicer and Mr. Kiley have failed to establish that the barbeque is a nuisance in that it unreasonably interferes with the use and enjoyment of their premises. It does not substantially or unreasonably obstruct or interfere with the rights of Mr. Spicer and Mr. Kiley as owners in the Pinnacle. Ms. Matear's use of her barbeque does not, therefore, violate the Pinnacle's By-Laws.

The claim for discrimination pursuant to the *Alberta Human Rights Act*.

[26] Mr. Kiley asserts that the Pinnacle is discriminating against him in violation of s 4 of the *AHRA*. According to Mr. Kiley, breaching the *AHRA* constitutes improper conduct under s 67 of the *CPA* and entitles him to an injunction preventing Ms. Matear from using her barbeque on her kitchen patio.

[27] Mr. Kiley relies on the decision of ***Condominium Corporation No 052 0580 v Alberta (Human Rights Commission),*** 2016 ABQB 183 (***Condo Corp 052 0580***) as authority for the proposition that human rights legislation is applicable to a condominium corporation. I agree with this proposition. Condominium Corporations are subject to Alberta's human rights legislation, and they cannot engage in unlawful discrimination of any protected group. Furthermore, any decision of a condominium board that is discriminatory, will not be given any deference by the courts: ***Condo Corp 052 0580*** at para 86.

[28] The Pinnacle takes no issue with the assertion that the decisions of its Board are subject to Alberta human rights legislation; however, it argues that Mr. Kiley and Mr. Spicer cannot bring a complaint under that human rights legislation at the same time as pursuing a claim for discrimination under s 67 of the *CPA*. According to the Pinnacle, this court should decline to determine any issues regarding the human rights complaint and should let the Human Rights Commission adjudicate the human rights complaint initiated by Mr. Kiley.

[29] The Human Rights Commission has specialized expertise relating to human rights complaints and there is some merit to the argument that determination of the claim of discrimination should be left to the specialized tribunal. However, Mr. Kiley and Mr. Spicer have alleged that the decision of the Pinnacle's Board to permit Ms. Matear to leave her barbeque on her kitchen balcony is discriminatory and therefore a violation of s 67 of the *CPA*. The Human Rights Commission does not have jurisdiction to make an order under s 67 of the *CPA*. If I were to decline to determine the issue and the Human Rights Commission determined there was a violation of the *AHRA* then Mr. Spicer and Mr. Kiley may have to re-litigate their claim for a remedy under s 67 of the *CPA* in light of that finding. That would not be an efficient or effective manner of resolving this dispute.

[30] The claim for a remedy under s 67 of the *CPA* and the complaint pursuant to s 4 of the *AHRA* do arise out of the same set of facts. They are therefore parallel claims. The existence of parallel claims does not necessarily require one of the claims to be stayed or terminated and the jurisdiction of this court to determine whether there is discrimination which amounts to improper conduct under s 67 of the *CPA* is not ousted by the existence of Alberta's human rights administrative regime.

[31] A similar situation arose in the case of ***Melnyk v RBC Dominion Securities Inc.,*** 2022 AHRC 48. In that case, Mr. Melnyk commenced a claim for wrongful dismissal, and, at the same time, he made a complaint of discrimination pursuant to the *AHRA*. The employer sought a stay

of the human rights complaint pending determination of the civil action. The Human Rights Tribunal declined to grant the stay.

[32] While the decision of the Human Rights Tribunal is not binding on this court, the reasons given in the ***Melnyk*** decision are instructive. It may be appropriate for parallel claims to proceed where: 1) the civil action will not necessarily answer all the issues raised in the complaint or *vice versa*; 2) neither forum has yet made any findings such that the risk of inconsistent findings has not yet materialized; and 3) either the court or the tribunal could adjust its proceedings depending on the factual findings made in the other forum: ***Melnyk*** at paras 12-16.

[33] In this case, the civil action is focused on whether the Pinnacle has discriminated against Mr. Kiley in a manner that constitutes improper conduct under the *CPA*. Determination of the human rights complaint will not determine that issue. There have been no findings made in relation to the human rights complaint and there is no evidence before me as to when that might happen. As such, there is currently no risk that any findings made in this civil action will conflict with any findings made by a human rights tribunal.

[34] To the extent that findings of fact are made in this civil action, there is a mechanism within the human rights complaint procedure to avoid the possibility of conflicting findings or inconsistent results. Section 20.4(t) of the Bylaws of the Alberta Human Rights Commission permits the Human Rights Tribunal to "dismiss part or all of a complaint where the Tribunal determines that another proceeding has appropriately dealt with the substance of those allegations." For these reasons, I see no barrier to determining Mr. Kiley's claim that the Pinnacle is engaged in discriminatory behavior that amounts to improper conduct pursuant to s 67 of the *CPA*.

[35] I am further of the view that principles of judicial economy and the benefit of determining claims in an efficient manner weigh in favor of determining the discrimination claim notwithstanding the parallel human rights complaint. If the claim is not determined at this time, the parties will have to proceed through the human rights process and then, if there is a finding of discrimination, come back to this court for a determination of whether that amounts to improper conduct pursuant to s 67 of the *CPA*. That is not a desirable outcome in terms of judicial economy and the efficient determination of claims.

[36] Turning to the merits of Mr. Kiley's discrimination claim, to successfully demonstrate *prima facie* discrimination he must show that he has a characteristic protected from discrimination under the *AHRA*, that he has experienced an adverse impact as a result of the decision of the Pinnacle's Board regarding Ms. Matear's barbeque and that the protected characteristic was a factor in the adverse impact: ***Moore v British Columbia (Education)***, 2012 SCC 61 at para 33; ***Telecommunications Workers Union v Telus Communications Inc.***, 2014 ABCA 154 at para 28.

[37] Mr. Kiley asserts that he has a physical disability that is adversely impacted by the placement of Ms. Matear's barbeque. The medical evidence relating to Mr. Kiley's physical disability is contained in the affidavits of Dr. Janet Paul, sworn January 26, 2023, and Dr. Marcus Povitz, sworn January 12, 2023. Dr. Paul's evidence is that Mr. Kiley meets the criteria for a diagnosis of mild COPD. The only symptom that Dr. Paul refers to in her letter is a reported shortness of breath by Mr. Kiley when exercising. She refers to potential causes being irritant exposure or asthma without specifying which was the cause or even the probable cause in Mr.

Kiley's case. No recommendations for treatment or required accommodations are mentioned in Dr. Paul's evidence.

[38] Dr. Povitz's affidavit sets out general information about COPD. There is no indication that he has ever met Mr. Kiley or examined him. According to his affidavit, the only records he reviewed in preparing his own affidavit were the affidavits sworn by Mr. Kiley on April 21, 2022 and August 25, 2022 and the affidavit of Ms. Matear sworn September 15, 2022. There is no indication that he reviewed any of Mr. Kiley's medical records or even the affidavit of Dr. Paul prior to swearing his affidavit. Dr. Povitz's affidavit is therefore of very limited use when it comes to Mr. Kiley's personal circumstances. It does, however, provide some general information about COPD including a description of common events that can trigger shortness of breath or otherwise exacerbate COPD. Those events include physical exertion such as exercise, infection, emotional stress, smoke, cleaning products, any small particulate in the air or gas.

[39] With respect to air quality, the only recommendation that Dr. Povitz makes is that patients with significant COPD avoid being outdoors at times with poor air quality. Mr. Kiley has been diagnosed with mild COPD. Dr. Povitz did not make any recommendations or suggest the need for any accommodations for individuals suffering from mild COPD.

[40] Given Mr. Kiley's own description of his symptoms in his affidavit and the diagnosis made by Dr. Paul, I am satisfied that Mr. Kiley suffers from mild COPD and that is a physical disability that is protected by the *AHRA*. However, Mr. Kiley has failed to establish that he has experienced an adverse impact because of the decision of the Pinnacle Board regarding Ms. Matear's barbeque. I make that finding for the following reasons.

[41] First, there is no medical information that Mr. Kiley's mild COPD is in any way exacerbated or affected by Ms. Matear's occasional barbeque use. While Dr. Paul opined that in the absence of a smoking history, Mr. Kiley's mild COPD could be caused by irritant exposures or asthma, there is no indication whether that is the case for Mr. Kiley or, if it is, which cause is more likely in this case.

[42] Second, Mr. Kiley and Mr. Spicer have a barbeque on their own balcony which they admittedly use to prepare meals from time to time. If barbeque smoke truly exacerbated Mr. Kiley's mild COPD, he would not likely use a barbeque on his own balcony, in much closer proximity to his unit than Ms. Matear's barbeque. Mr. Kiley appears willing and able to tolerate the smoke from his own barbeque, directly adjacent to his unit.

[43] Third, there is clear and undisputed evidence that Mr. Kiley and Mr. Spicer burn incense and scented candles in their unit. Incense is designed to produce scented smoke in the area where it is burned. I do not accept they would do that if Mr. Kiley had a medical condition that was truly exacerbated by the presence of smoke.

[44] Finally, the evidence before me, supported by photographs, is that even when the air quality in Canmore is rated as poor, Mr. Kiley and Mr. Spicer leave their windows open. Again, this is inconsistent with a claim that smoky conditions exacerbate Mr. Kiley's mild COPD.

[45] While Mr. Kiley claims that Ms. Matear's occasional barbeque use exacerbates his COPD, his behaviour and that of Mr. Spicer is inconsistent with this claim. Accordingly, I am unable to find that the Pinnacle Board has engaged in any form of discrimination against Mr. Kiley in relation to his diagnosis of mild COPD. Mr. Kiley has failed to establish that the

Pinnacle Board has breached s 4 of the *AHRA*. The claim of improper conduct pursuant to s 67 of the *CPA* based on a violation of the *AHRA* is therefore dismissed.

Is the conduct of the Pinnacle's Board oppressive, unfairly prejudicial or does it unfairly disregard Mr. Kiley and Mr. Spicer?

[46] Mr. Kiley and Mr. Spicer argue that the Pinnacle has engaged in improper conduct as defined in s 67(1) of the *CPA*. Specifically, they allege that the Pinnacle's Board is exercising its powers in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards their interests. They further allege that the conduct of Ms. Matear is oppressive or unfairly prejudicial to them as owners in the building.

[47] Oppressive or unfairly prejudicial conduct in the context of an allegation of improper conduct under the *CPA* is defined as conduct that is "burdensome, harsh, wrongful or which lacks probity or fair dealing." Conduct that is unfairly prejudicial is conduct that is unjust or inequitably detrimental: ***Ryan v Condominium Corporation No 0610078***, 2021 ABCA 96 at paras 10-11.

[48] Mr. Kiley and Mr. Spicer allege that the improper conduct takes three forms. First, Ms. Matear's violation of the Pinnacle's By-Laws and the Pinnacle's refusal to enforce the By-Laws amounts to improper conduct. Second, the Pinnacle's violation of s 4 of the *AHRA* amounts to improper conduct. Third, the Pinnacle engaged in improper conduct when it permitted Ms. Matear to move her natural gas line to provide service to her kitchen balcony and then refused to investigate the allegations of excessive smoke.

[49] Non-compliance with condominium by-laws is a form of improper conduct: s 67(1)(a)(i) of the *CPA*. For the reasons stated above, I have already concluded that Ms. Matear is not violating the Pinnacle's By-Laws when she barbeques. Her use of the barbeque is therefore not improper conduct pursuant to s 67(1)(a)(i) of the *CPA*. Furthermore, as there is no breach of the By-Laws occurring, there is no improper conduct on the part of the Pinnacle for refusing or failing to enforce a By-Law.

[50] With respect to Mr. Kiley's and Mr. Spicer's second grounds for claiming improper conduct, I have concluded, for the reasons set out above, that the Pinnacle is not violating s 4 of the *AHRA* and discriminating against Mr. Kiley based on his COPD. Therefore, there is no improper conduct on the part of the Pinnacle based on an alleged human rights violation.

[51] In relation to the claim that the Pinnacle has failed to investigate and ameliorate the issue of smoke emanating from Ms. Matear's barbeque, Mr. Kiley and Mr. Spicer rely on the case of ***Hnatiuk v Condominium Corporation No. 032 2411***, 2014 ABQB 22. In that case, a condominium board was found to be engaged in improper conduct for failing to investigate the migration of cigarette smoke from the interior of one unit to an adjacent unit.

[52] The circumstances giving rise to the ***Hnatiuk*** decision are fundamentally different than the circumstances of this case. In ***Hnatiuk,*** the concern was a faulty bulkhead between the units. The migration of cigarette smoke posed a health hazard and, more importantly, if the bulkhead did not meet code, the risk of fire spreading from one unit to the next was significantly higher. With the possibility of such serious consequences, the Applications Judge in ***Hnatiuk*** held that the condominium corporation had a duty to investigate and find out if the bulkhead met code.

[53] There are no analogous health and safety considerations in the present case. The evidence in this case falls far short of establishing there are any health risks associated with the occasional, outdoor use of a barbeque for the purpose of meal preparation. Similarly, there is no evidence that the barbeque use poses any other risk that a condominium board would have a duty to investigate.

[54] To determine whether there is conduct in this case that is oppressive or unfairly prejudicial to Mr. Spicer and Mr. Kiley, the two-part test set out in ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 68 is applicable. In ***Dollan v The Owners, Strata Plan BCS 1589***, 2012 BCCA 44 at para 30, the BC Court of Appeal articulated the two-part test as follows:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

[55] Examined objectively, the evidence does not support Mr. Kiley's and Mr. Spicer's assertions regarding Ms. Matear's barbeque.

[56] Mr. Spicer and Mr. Kiley purchased a condominium unit on the top floor of a multi unit building that allows barbeques on its balconies. The placement of a natural gas line on some balconies is irrelevant to the question of barbeque placement or use. Any resident of the Pinnacle is permitted to place a barbeque on any balcony, independent of the location of the natural gas line. This was always the case and was not something that changed after Mr. Kiley and Mr. Spicer purchased their unit. Any expectation on the part of Mr. Kiley or Mr. Spicer that a neighbour would be prohibited from normal barbeque use on their patio is not objectively reasonable given Pinnacle's By-Laws.

[57] Furthermore, even if Mr. Spicer and Mr. Kiley did have a reasonable expectation that Ms. Matear would not be permitted to use her barbeque on her kitchen balcony, the Pinnacle has not acted in a manner that was significantly unfair. In other words, the Pinnacle has not engaged in conduct that is "burdensome, harsh or wrongful or which lacks probity or fair dealing." ***Lauder v The Owners: Condominium Plan No 932 1565***, 2021 ABQB 145 at para 224.

[58] Mr. Spicer and Mr. Kiley complained to the Pinnacle Board about Ms. Matear's barbeque use on August 19, 2021. In response to the complaint, the Pinnacle Board agreed to send a director to Mr. Spicer's and Mr. Kiley's suite to observe the effect of Ms. Matear's barbeque. Board member Rhonda Basson attended the suite on August 26, 2021, and noted that it was smoky.

[59] The Pinnacle Board had an informal discussion about the complaint. Ms. Basson provided her account of her visit as part of that discussion. As the President of the Pinnacle Board of Directors advised Mr. Spicer, Ms. Basson "worked diligently to represent your concerns."

[60] I find it reasonable for the Pinnacle Board to rely on the observations and report of one of its members who attended Mr. Spicer's and Mr. Kiley's unit while Ms. Matear was barbequing. Investigation does not require the attendance of every member of the Board of Directors. There is no evidence that Ms. Basson did not fully and fairly represent to the Pinnacle Board what she witnessed when she attended the unit.

[61] The Pinnacle Board put the issue of Ms. Matear's barbeque on their October 27, 2021 agenda. The Pinnacle Board had the benefit of Ms. Basson's observations and the complaint of Mr. Spicer and Mr. Kiley. They considered the matter and ultimately determined that Ms. Matear's use of her barbeque was not "an unreasonable nuisance."

[62] Mr. Spicer and Mr. Kiley argue that the Pinnacle Board acted improperly when they decided Ms. Matear's barbeque was not an "unreasonable nuisance" because the By-Laws only refer to nuisance and not an unreasonable nuisance. While the language used by the Pinnacle Board was imprecise, I am of the view that they turned their minds to the correct question when they considered whether Ms. Matear's barbeque was an unreasonable nuisance. As set out above, the term nuisance is not defined in the By-Laws. The meaning of the term has been well settled in the common law and it is a substantial and unreasonable interference with the use and enjoyment of lands. When considering whether Ms. Matear's barbeque was a nuisance, the Pinnacle Board had to consider whether the barbeque was substantially or unreasonably interfering with Mr. Spicer's and Mr. Kiley's use and enjoyment of their unit. The Pinnacle Board did not act improperly or make an error when considering what was reasonable when they decided that the complaint of Mr. Spicer and Mr. Kiley was without merit.

[63] Mr. Spicer and Mr. Kiley refused to accept the decision of the Pinnacle Board regarding Ms. Matear's barbeque, and the matter came before the Pinnacle Board for a second time on March 24, 2022. A motion was made to require Ms. Matear to move her barbeque off her kitchen balcony. The motion was seconded and discussed by the Pinnacle Board at length, but it was defeated. Following this meeting, the Pinnacle's property manager wrote to Mr. Kiley and Mr. Spicer offering a further inspection of their unit while Ms. Matear's barbeque was in use, but Mr. Spicer and Mr. Kiley did not respond to that offer.

[64] In April 2022, Mr. Kiley advised the Pinnacle Board of his health concerns given his diagnoses of COPD. Based on this added information, the Pinnacle Board agreed to revisit the issue and it was brought before the Pinnacle Board on May 2, 2022. The Pinnacle Board members had the opportunity to voice their respective opinions and to weigh the competing interests of Mr. Kiley and Mr. Spicer on one side and Ms. Matear on the other. After having this discussion, a motion requiring Ms. Matear to discontinue use of any barbeque on her kitchen balcony came to a vote. The motion was again defeated.

[65] Based on the evidence before me in this application, I am satisfied that the Pinnacle Board acted reasonably in the circumstances. The fact that Mr. Spicer and Mr. Kiley disagree with the decision of the Pinnacle Board regarding Ms. Matear's barbeque does not mean the Pinnacle Board acted in a manner that is unfair, unjust, inequitably detrimental, burdensome, lacking probity or harsh. To the contrary, the evidence establishes that the Pinnacle Board proceeded fairly, putting the matter to a vote following a report from board member Ms. Basson and following considerable discussion. When faced with additional information, the Pinnacle Board was open to reconsideration.

[66] Given that I have not found that the Pinnacle Board acted improperly when considering the complaints raised by Mr. Spicer and Mr. Kiley, there is no basis for me to intervene with the decisions of the Pinnacle Board.

[67] In ***934859 Alberta Ltd. v Condominium Corp. No. 0312180***, 2007 ABQB 640 at paras 54-55, the court reviewed a line of cases supporting the proposition that a court should defer to elected boards as a matter of general application unless the board's conduct is clearly oppressive,

unreasonable or contrary to legislation. The Court concluded that "as a matter of general application, Courts do defer to duly elected condominium boards. However, if improper conduct is alleged and a Court is satisfied that improper conduct has taken place, the Court, pursuant to Section 67(2) of the Condominium Act, may then direct and/or grant any of the remedies set out therein."

[68] Similarly, the BC Court of Appeal said in ***Dollan*** at para 38:

> I agree with the appellant that courts should be most reluctant to interfere in the affairs of a strata corporation where the process adopted to arrive at a decision is one that is fair and democratic. But where an owner invokes s. 164 to remedy alleged unfairness, a court is mandated to consider if the action rises to the threshold of "significant unfairness", in which case the court is required to intervene.

[69] In this case, the evidence does not establish that the Pinnacle Board acted improperly. The conduct of the Pinnacle Board was not oppressive, unreasonable, or contrary to legislation and neither did the Pinnacle Board act in a manner that was significantly unfair to Mr. Kiley and Mr. Spicer. As I have found that the Pinnacle did not engage in improper conduct, the remedies set out in s 67(2) of the *CPA* are not available. The action of Mr. Spicer and Mr. Kiley is dismissed.

Summary and conclusion

[70] The placement of Ms. Matear's barbeque does not violate the Pinnacle's By-Laws. The placement of the barbecue is not unlawful or hazardous and Ms. Matear's occasional use of the barbeque for meal preparation does not constitute a nuisance: it does not substantially or unreasonably obstruct or interfere with the rights of Mr. Kiley and Mr. Spicer to the comfort and quiet enjoyment of their premises.

[71] Mr. Kiley has failed to establish that the Pinnacle has breached the *AHRA* by discriminating against him based on his physical disability. The evidence is insufficient to support a finding that the placement of Ms. Matear's barbeque has any adverse impact on Mr. Kiley's mild COPD.

[72] No improper conduct pursuant to s 67 of the *CPA* has been established. The placement of Ms. Matear's barbeque does not violate the Pinnacle's By-Laws. The Pinnacle has not violated s 4 of the *AHRA.* There has been no conduct that is oppressive, unfairly prejudicial, or that otherwise unfairly disregards the interests of Mr. Spicer or Mr. Kiley.

[73] Mr. Kiley's and Mr. Spicer's Originating Application against Ms. Matear and the Pinnacle is dismissed.

[74] If the parties are unable to agree on costs, they may apply to me for a determination of costs and the following process shall apply.

[75] Within 30 days of this decision, each party shall file and serve on all the other parties their written submissions with respect to costs. The submissions shall not exceed five pages and shall include: (a) their position with respect to the factors set out in rule 10.33; (b) any formal offers of settlement or other settlement proposals they wish to have considered; (c) a proposed bill of costs pursuant to Schedule C of the Rules of Court; and (d) a summary of the reasonable

and proper costs that party actually incurred in respect of this action. The five-page limit does not include the proposed bill of costs pursuant to Schedule C or the summary of reasonable and proper costs.

[76] Within 15 days of receiving another party's submissions on costs, any party may file and serve a brief reply, not to exceed 2 pages, responding to matters raised in any other party's submissions.

[77] All submissions and reply submissions should be sent to me via email through my judicial assistant in addition to being filed.

[78] If submissions are not received pursuant to this direction, there shall be no order as to costs and Rule 10.29(1) of the *Rules of Court* shall apply.

Heard on the 14th day of June, 2023.
Dated at the City of Calgary, Alberta this 31st day of October, 2023.

R.W. Armstrong
J.C.K.B.A.

Appearances:

Richard E. Harrison
Wilson Laycraft
for the Applicants

Erin M. Berney
Field LLP
for the Respondent Katherine Joy Matear

David Cumming
McLeod Law
Respondent Condominium Corporation No. 0411156
operating as The Pinnacle Canmore