

# Court of King's Bench of Alberta

**Citation: Owners: Condominium Plan No. 932 3066 v Way, 2026 ABKB 260**

**Date:** 20260402  
**Docket:** 2303 16460  
**Registry:** Edmonton

Between:

**The Owners: Condominium Plan No. 932 3066**

Applicant

- and -

**Randall Wade Way**

Respondent

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**Reasons for Judgment  
of the  
Honourable Justice A.K. Akgungor**

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## **I. Introduction**

[1] This dispute concerns a decision made by the board of the Applicant, The Owners: Condominium Plan No. 932 3066, (the “Condo Board”) to remove two trees and a lilac bush from the property of the Respondent, Mr. Randall Way (“Mr. Way”). The Condo Board seeks a mandatory injunction requiring Mr. Way to take all reasonable steps to facilitate the removal of the trees and the lilac bush.

[2] For the reasons that follow, the application for a mandatory injunction is dismissed. The Condo Board has the authority to remove the trees and the lilac bush, however in exercising that authority, the Condo Board has engaged in improper conduct as contemplated by section 67 of the *Condominium Property Act*, R.S.A. 2000, c. C-22 (“CPA”).

## II. Background

[3] The Applicant is constituted under the *CPA* as a bare land condominium corporation and complex known as the Village at Terra Losa. The complex consists of 18 residential structures, each being a side-by-side duplex, for a total of 36 residential units. Mr. Way owns a unit in the condominium complex and became the owner of that unit on April 9, 2014. Mr. Way's mother was the original owner of the home. Mr. Way began living in the unit in September 2013.

[4] This case involves the consideration of provisions of the *CPA*, the bylaws of the condominium corporation as well as an Easement, Restrictive Covenant and Party Wall Agreement registered at the Land Titles Office as instrument number 932 368 292 on November 25, 1993 (the "Agreement"). There is no dispute that Mr. Way's unit is subject to the Agreement.

### A. The Bylaws

[5] The current bylaws of the Condominium Corporation were registered at the Land Titles Office as instrument number 072 355 913 on June 16, 2007 (the "Bylaws"). The Bylaws provide as follows in relevant part:

#### Preamble

It is the intention of the members of the Corporation that this project be treated like a conventional condominium with the Corporation being responsible for any building envelopes constructed on a Unit (and collateral components) and the Owners being responsible for the interior of the buildings.

#### 65. Obstruction

(a) Owners are allowed to maintain shrubs and trees on their Unit, however, Owners are responsible to remove them if they cause damage to the Residence, Unit, or Common Property;

(b) Owners who wish to create flower beds must obtain the prior written approval of the Board for their location and size. Owners must also ensure no damage is done to the common sprinkler system that is maintained by the Corporation. Owners are responsible for any costs the Corporation may face as a result of any flower beds that are installed by the Owner.

(c) Owners who wish to establish flower beds or plant shrubs or trees adjacent to their Residence, are responsible for the care and maintenance of this landscaping.

[6] Section 101 of the Bylaws requires that each Owner and the Corporation will abide by the terms of the Agreement.

### B. The Agreement

[7] The Agreement contains the following relevant provisions:

#### 2.1 Exterior Maintenance or Alterations

The Condominium Corporation has the exclusive right and obligation to maintain all areas in the project, other than the interiors of individual Condominium

Homes. Accordingly, except with the consent of the Board, an occupant shall not, in relevant part:

- (a) Plant trees, build a fence, erect a barrier, install a satellite dish, create flower beds, or otherwise alter any areas which the Condominium Corporation is required to maintain;
- (b) Paint, decorate, remodel or otherwise affect the exterior of a Condominium Home;
- (c) Make structural, mechanical or electrical changes to a Condominium Home unless the changes do not affect the areas which the Corporation is required to maintain, or any other Condominium Home;
- (d) Interfere in any way with the areas which the Condominium Corporation is required to maintain.

### C. Bare Land Condominiums

[8] Part of the complexity underlying this dispute is the fact that the Village at Terra Losa is a bare land condominium. The legal structure of a bare land condominium provides that the condominium corporation owns the surrounding land as common property, and the individual owners are responsible for anything within their unit boundaries. In a bare land condominium, by reducing the amount of common property, and restricting the board's mandated obligations to only common property, condominium fees are substantially lower since funds do not need to be collected and earmarked for the repair and preservation of common property, because there is little, or none, of it: *Maciejko v Condominium Plan No. 9821495*, 2012 ABQB 607 at para. 9.

[9] The condominium plan for a bare land condominium shows each bare land unit but there are no demarcations as to the residence that is placed on the lot. Normally, the owner owns the building and land within the boundaries of their unit and would retain the responsibility for the areas within the bare land unit. In a bare land condominium, common property consists of all areas outside the defined unit boundaries. This typically includes private roads, sidewalks, visitor parking, landscaped areas, recreational facilities, and underground utility services.

[10] This arrangement can be contrasted to a conventional condominium unit that is located within a building. Unit boundaries are identified by referring to floors, walls and ceilings as opposed to markings on a plot of land. Owners of conventional condominiums have full ownership of everything inside their unit based on the boundaries set out in the condominium plan. Generally speaking, everything outside the unit such as hallways, lobbies, elevators, fitness centres, and exterior spaces like gardens, would form the common property. The condominium corporation would retain the responsibility for the control, management and administration of the common property.

[11] If the Village at Terra Losa had retained the traditional bare land condominium structure, there is little question that Mr. Way would have retained control and management over his trees and lilac bush, given that the trees and lilac bush are located within his unit. Similarly, had the Village at Terra Losa been a conventional condominium complex, the trees and lilac bush would have surely formed part of the common property, with the result that the condominium corporation would have retained responsibility for the control and management of the trees and lilac bush.

[12] The challenge in the present case arises from the Agreement. The objective of the Agreement was to effectively transform the bare land condominium complex into a conventional condominium complex in that the condominium corporation would have the exclusive right and obligation to maintain all areas of the condominium complex other than the interiors of the individual condominium homes.

[13] A restrictive covenant with wording very similar to the Agreement was registered on all titles to a bare land condominium in *Maciejko*. Germaine J noted at para 8 that “when the developers elected to proceed with a bare land condominium in 1998, they anticipated, from a legal point of view, that with a restrictive covenant and a burden created by bylaw they could provide for traditional “common property like” maintenance, even though in a bare land condominium, the exterior structure of individual homes is not common property.

#### **D. Condo Board Involvement with Tree Removal**

[14] Affidavit evidence provided by Mr. Len Goryniuk, president of the Condo Board, confirms that the Condo Board does not have a formal policy on how to deal with trees. Rather, a common sense approach is taken and if an existing tree is felt to be diseased or a danger to property, a decision is made by the Condo Board as to next steps. According to the Condo Board, the trees removed to date have generally been old pine or spruce trees as these trees create problems with cones, disease and root systems. No more of these types of trees will be planted. Further concerns with the spruce trees included a danger to people from tripping over exposed roots and comprising the integrity of nearby structures.

[15] Mr. Goryniuk’s evidence outlines various decisions with respect to tree removal taken by the Condo Board from 2016-2023. The reasons for the tree removals included leaning trees, age, disease, safety concerns, trees leaking sap on property and fixtures, exposed roots, and potential damage to courtyards or underground pipes. Reasons for tree removal are not articulated in the Condo Board minutes in every case. It also appears that, except for Mr. Way, the owners affected by the tree removals were in agreement with the Condo Board’s decision to remove the tree.

#### **E. Prior Removal of Trees from Mr. Way’s Property**

[16] Five trees were planted on Mr. Way’s property by the developer when it was originally built in the mid-1990s. Four were evergreen trees (planted in a row along the south side of the property) and one was a Manchurian cherry tree. Mr. Way attested that the Condo Board removed the Manchurian cherry tree in 2013 on the basis that it was dead.

[17] With respect to the four evergreen trees, Mr. Way stated that they provided shade and protection to his property from wind, sun, rain, heat and cold during the various seasons. In March 2016, the Condo Board advised Mr. Way that two of the evergreen trees would be cut down because, in the opinion of the Condo Board, there was a danger that these trees could fall down on the adjacent drive land or onto someone’s car and that the roots of these trees might damage the foundation of his residence or his underground drainage pipes. Mr. Way stated that these trees were strong and healthy and of similar size to the remaining two trees. No professional opinions were provided by the Condo Board to confirm the risks posed by the trees. The trees were ultimately cut down. The Condo Board did not plant any replacement trees.

## F. Current Tree Removal Issues

[18] On March 14, 2023, the Condo Board passed a motion (the “Motion”) that read as follows:

Three spruce trees will be removed this year. The trees in particular are leaking sap on our property and fixtures. Also the roots of these trees are becoming a cause for concern. Untended lilac bushes will also be removed which will give our Village a more pleasant appearance.

[19] While not clear from the Motion itself, it is common ground that the Motion includes two trees and the lilac bush on Mr. Way’s property.

[20] On May 11, 2023, Mr. Way wrote to Mr. Goryniuk, expressing his objection to the Motion and asking the Board to rescind its decision. Mr. Way asked to attend the next meeting of the Condo Board so that he could learn about the rationale underlying the Condo Board’s decision and present his concerns about the decision. Mr. Way’s concerns as set out in the May 11, 2023 letter can be summarized as follows:

- Two evergreens were previously removed from his property. Subsequent to their removal, the lack of shade provided by the large spruce trees meant that his home was hotter in the summer and colder in the winter due to the lack of the insulating effect of the tree. The removal of the trees meant that Mr. Way’s home did not benefit from the windbreak effect of the trees. These effects will be exacerbated if additional trees are removed.
- His courtyard patio will be less liveable and enjoyable without the shade and windbreak from the current trees.
- A realtor estimated the loss of value to his property if the trees are removed at a minimum of \$10,000. An American Real Estate Association study determined that home that are landscaped sell at 7%-10% higher than identical homes without landscaping. These figures would amount to a loss to Mr. Way of \$21,000 if the trees and bush are removed.

[21] Mr. Goryniuk replied to Mr. Way by letter dated May 12, 2023. In his response, Mr. Goryniuk described other instances where the Condo Board determined that trees needed to be removed:

- Unit #24: the tree in the front yard took over the whole front lawn and all that was visible was large bumps and dips from the tree roots. The tree had also started to lift the stone wall around the flower bed.
- Unit #21: the spruce tree had roots so large that it started to lift up the pony wall and patio.
- Unit #27: a large spruce tree had to be removed because the roots had invaded the storm drain and had to be cleaned out with an auger. The auger could not break through the roots so the drain was re-routed to the lawn.

[22] Mr. Goryniuk explained that the Condo Board takes into consideration all factors and any liabilities that might arise from the damage that trees could cause in the near future. He noted

that such damage could cause thousands of dollars in repairs to lawns, sidewalks, driveways, patios and pony walls as well as damages to the underground drainage system. Mr. Goryniuk also confirmed to Mr. Way that the Condo Board had a responsibility to all owners in the Village.

[23] Mr. Goryniuk further referenced the Agreement as giving the Condo Board control of all the landscaping for all units in the Village. He advised that once the trees had been removed, they would be replaced with a species with a less invasive root system.

[24] A further letter was provided to Mr. Way from the Condo Board on June 4, 2023. It indicated that the Condo Board had often discussed its concern with the spruce trees being so close to Mr. Way's residence and that they had also shared their concerns with the state of the lilac bush next to his unit. The Condo Board indicated that the Board Maintenance Officer had previously advised Mr. Way of the Condo Board's concerns and what the Condo Board's plans were with respect to the removal of the trees. The Condo Board advised that it was obligated to follow through with the Motion once the Motion was passed and accordingly, the trees would be removed that summer.

[25] Mr. Way replied to the Condo Board on June 5, 2023. He reiterated his earlier concerns and pointed out that Bylaw 65 of the Condominium Bylaws (the "Bylaws") provided that owners are allowed to maintain shrubs and trees on their unit. Mr. Way proposed a path forward as follows:

- The Condo Board would provide to him in writing the reasons and evidence that the two evergreen trees needed to be removed, including an outline of the damage that the trees were causing;
- On receipt of this information, Mr. Way would have a reasonable amount of time to consider the evidence and to respond, including by consulting professionals; and
- The Condo Board would fully and fairly consider Mr. Way's response and they would work together to reach a reasonable resolution.

[26] On June 9, 2023, the Condo Board advised Mr. Way that it had confirmed at the Annual General Meeting on June 5, 2023 that it would be following through with the Motion. The Condo Board noted at follows:

- The lilac bush could easily be an impediment should there be an emergency situation that required evacuation of the basement area;
- The Condo Board had been monitoring the growth of the trees and bush on Mr. Way's property and had removed trees previously.
- The Condo Board was unanimous in "removing two large spruce trees that, with time, can seriously damage both the structure of your unit and courtyard walls. As well, underground damage to service lines can also be adversely affected by the roots of these trees."

[27] This letter was followed up by a letter dated June 13, 2023 to Mr. Way from legal counsel to the Condo Board confirming the Motion and advising Mr. Way to cease and desist from taking any steps to prevent the timely removal of the trees. Mr. Way replied on June 15,

2023 restating his concerns with the Motion and advising that he had not, to date, been provided with any written evidence from the Condo Board of any damage being caused by the trees and shrubs. He explained his position that the Condo Board's actions were oppressive, unfairly prejudicial and unfairly disregarded his interests.

[28] On June 16, 2023, at the direction of the Condo Board, an arborist attended at Mr. Way's property to carry out the Motion. Mr. Way came out of his house to stop the removal of the trees. The police were called. Ultimately, the arborist was instructed to leave and not perform the work to remove the trees and bush. This litigation then ensued.

[29] As of the date of the hearing, Mr. Way was not aware of any damage to his residence, foundation or drainage pipes caused by or being caused by the evergreen trees or lilac bushes. He had not experienced any drainage issues or concerns with the basement since moving into the unit in 2013.

### **III. Issues**

[30] This matter engages the following issues:

- a) Does the Condo Board have the authority to direct the removal of Mr. Way's trees and lilac bush?
- b) If so, was the Motion nevertheless invalid as the Condo Board was not properly constituted in accordance with the Bylaws?
- c) If the Motion is not invalid, did the Condo Board engage in improper conduct as contemplated by section 67 of the *CPA*?

### **IV. Analysis**

#### **A. Does the Condo Board Have the Authority to Direct the Removal of Mr. Way's Trees and Lilac Bush?**

[31] The key dispute between the parties is whether the Agreement places the overarching authority for the removal of trees and bushes in the hands of the Condo Board or whether section 65 of the Bylaws carves out this authority and places it instead of the hands the owners.

[32] Neither party takes the position that the Agreement and section 65 of the Bylaws are in conflict. Both parties say that the Agreement and section 65 can be read together. However, they urge very different interpretations in this regard.

#### **1. Position of the Condo Board**

[33] The Condo Board argues that the Agreement squarely places in them the exclusive right and obligation to maintain all areas in the project, other than the interiors of individual condominium homes. This includes the right and obligation to maintain the trees and the lilac bushes. Absent the consent of the condominium corporation, owners are prohibited from interfering in any way with the areas which the condominium corporation is required to maintain.

[34] Against the background of this primary authority, section 65(a) of the Bylaws must be read as simply permitting owners to maintain shrubs and trees but it does not give owners exclusive authority over shrubs and trees. If the shrubs or trees become a problem, and the

Condo Board says that the trees or shrubs must be removed, then the owner is responsible to remove them. Notably, according to the Condo Board, section 65(a) does not say owners are responsible for all the resulting damages that might be caused by the trees or shrubs. They are only responsible to remove them. If there is resulting damage from the tree, the condominium corporation would be responsible to remedy the damages. Further, “owners are responsible to remove them if they cause damage to the Residence, Unit or Common Property” should not be read as owners being able to wait until the tree or shrub has actually caused damage. According to the Condo Board, this would create an untenable situation and disregard the need for preventative maintenance.

[35] Similarly, sections 65(b) and (c) ought to be read as allowing the owners some room for individualization through flower beds or planting shrubs. This also saves the condominium corporation some money so they do not bear the cost of maintaining all landscaping.

## **2. Position of Mr. Way**

[36] For his part, Mr. Way argues that the Agreement simply establishes a plenary power in the condominium corporation over all areas other than the interiors of the individual condominium homes. The Bylaws, however, dictate how that plenary power is to be exercised. By enacting section 65 of the Bylaws, the condominium has made some risk management or policy choices for effective governance. Section 65 allocates risk between the parties. It takes the responsibility and costs of the management of trees and shrubs away from the corporation and instead puts that responsibility on the owners. The result is a risk management trade-off between unit holders in terms of who is responsible for what.

[37] As a result of this risk management trade off and section 65 of the Bylaws, Mr. Way has the legal authority to decide to keep his two trees and his lilac bush. This is particularly the case where there is no current evidence of any damage being caused by the trees and lilac bush.

## **3. The Agreement**

[38] The Agreement is plain that the condominium corporation has the exclusive right and obligation to maintain all areas of the Village at Terra Losa, other than the interiors of individual condominium homes. The Agreement prevents the owners, without the consent of the Condo Board, from essentially making changes or altering or otherwise affecting the exterior of their homes. Owners are similarly prohibited, without the consent of the Condo Board, from interfering in any way with the areas which the condominium corporation is required to maintain.

[39] As noted in *Maciejko* at para. 35, the Agreement does not bind the Condo Board or the condominium corporation because it is not an agreement with the condominium corporation. Rather, the Agreement is an agreement among and between the individual owners. Together, they have created a recognized encumbrance of the land of each owner, by which they have implicitly contracted with themselves to allow the Condo Board to maintain the exterior of all units.

[40] Mr. Way points to the fact that the Agreement does not bind the Condo Board to support the notion that the Condo Board may conduct the business of the condominium corporation in a manner different from the Agreement if the same is provided for in the Bylaws.

[41] However, as pointed out at para 36 of *Maciejko*, these are two separate relationships. Between themselves, the owners have set a procedure and standards. They instruct the

condominium corporation – which they also own – to operate in a certain manner and within their mutual agreement. The Agreement operates, in that sense, in a manner not all that different from a unanimous shareholder’s agreement. While the Agreement may not bind the condominium corporation itself, the effect of the Agreement is nevertheless to direct the condominium corporation, through the Condo Board, to carry out the affairs of the condominium corporation in a specific manner. In this case, the Condo Board has been directed by the owners, through the Agreement, to maintain everything except the interior of the condominium homes.

[42] This direction is further reinforced by section 101 of the Bylaws which provides that the condominium corporation shall abide by the Agreement and its terms. In the event the condominium corporation breaches the terms of the Agreement, any owner may take such steps as he deems necessary to ensure compliance with the Agreement and any costs, including legal costs, associated with taking such steps shall be borne by the condominium corporation.

[43] In *Maciejko*, Germaine J. concluded that the condominium corporation had the legal mandate to maintain the exterior of the units in accordance with the restrictive covenant and the bylaws at issue in that case. The bylaws in that case similarly provided that the board, not the unit owners, had the burden of the repair and maintenance of the exteriors of the individual units.

[44] I accept, as a starting point, that the Agreement places exclusive responsibility in the condominium corporation, through the Condo Board, to maintain everything outside the interior of the condominium homes. This would include Mr. Way’s trees and lilac bushes.

[45] It should also be noted that the Agreement does not operate to transform everything other than the interior of the individual condominium homes into Common property. Common property has its own definition under the Bylaws and in a bare land condominium Common property consists of all areas outside the defined unit boundaries. The Agreement operates independently to clothe the Condo Board with the obligation to maintain everything outside of the interior of the condominium homes, even though the property which is outside the interior of the condominium homes but within the defined unit boundaries is not Common property.

#### **4. Interplay Between the Agreement and Section 65 of the Bylaws**

##### **i. Can the Agreement and Section 65 of the Bylaws be Read Harmoniously?**

[46] I will examine first whether section 65 of the Bylaws and the Agreement can be read together in a harmonious fashion such that, when read together, it is clear with whom the authority to remove the trees and lilac bush lies.

[47] Turning first to section 65(a), I accept that the first part of section 65(a): “owners are allowed to maintain shrubs and trees on their Unit” can be read together with the Agreement in that as long as the owners have obtained the written consent of the Condo Board (as required by the Agreement), they may maintain shrubs and trees on their Unit. Similarly, section 65(b) requires owners to obtain the consent of the Condo Board to create flower beds. The first sentence of section 65(b) simply replicates what is already contained in the Agreement.

[48] Matters become less clear, however, with respect to the remaining provisions of section 65. Section 65(c) provides that “Owners who wish to establish flower beds or plant shrubs or trees adjacent to their Residence, are responsible for the care and maintenance of this landscaping”.

[49] I have difficulty seeing how this provision dovetails with the terms of the Agreement. The Agreement provides that the condominium corporation has the exclusive right and obligation to maintain all areas in the project, other than the interiors of individual condominium homes. Flower beds, shrubs and trees are all plainly found outside the interiors of the individual condominium homes. Section 65(c), on the other hand, places the responsibility to care and maintain the flower beds, shrubs and trees (areas outside of the interior of the individual condominium homes) on the owners. These are mutually exclusive options: the Agreement says the condominium corporation has the exclusive right and obligation to maintain the flower beds, shrubs and trees (as they are outside the interiors of the homes); and section 65(c) of the Bylaws says the owners are responsible for the care and maintenance of flower beds, shrubs and trees.

[50] Similarly, the second part of section 65(a) provides that owners are responsible to remove trees and shrubs if they cause damage to the Residence, Unit or Common property. But again, the Agreement places this exclusive right and obligation with the condominium corporation given that trees and shrubs fall outside the home interiors. The provisions cannot be reconciled or read together. Each places the right and obligation to maintain trees and shrubs with a different party.

[51] I note that the term “responsible for” or “responsible to” is used in all of sections 65(a), (b) and (c) of the Bylaws. The plain meaning of “responsible for” is having an obligation to do something, or having care or control over something. In my view, “responsible for or to” is very much a synonym to the phrase “having the exclusive right and obligation” as used in the Agreement. The use of this language reinforces the idea that each of the Agreement and the Bylaws intended to place responsibility, and not some lesser obligation such as consultation, for example, on each of the condominium corporation and the owners. The language used magnifies the existence of the conflict.

[52] The Condo Board argues that all section 65(a) means is that if the Condo Board directs an owner to remove a tree or shrub then the owners must do so. Even if this were so, making an owner responsible to remove the tree or shrub, appears again to clash with the Condominium’s exclusive right and obligation in the Agreement to maintain everything outside the interior of the homes. To the extent that section 65(a) can be interpreted as making the owners responsible for the costs associated with the removal of the trees, the Agreement places a general obligation on the condominium corporation to maintain the trees, which in my view, would also encompass the costs of their removal.

[53] Mr. Way argues these conflicts can be resolved by an application of the statutory interpretation principle that where a general provision and a specific provision are in conflict, the specific provision prevails to the extent of the inconsistency. In other words, Mr. Way submits that the more specific Bylaw 65 should prevail over the more general Agreement to the extent that they are inconsistent. As authority for this point, Mr. Way points to the decision of *Condominium Plan No. 772 1806 v Gobeil*, 2011 ABQB 318 where the Court held that a bylaw that specifically governed the placing of sheds on common property should prevail over a bylaw which contained more general provisions.

[54] I am not persuaded that this maxim has application in the present case. While I accept that both the Agreement and the Bylaws form part of the overall governance framework of the condominium corporation, and that both the Agreement and the Bylaws bind the Condo Board

and the owners, the fact remains, as found in *Maciejko*, that the Agreement and the Bylaws are distinct legal arrangements.

[55] The Agreement is an agreement among and between the individual owners by which they have implicitly contracted with themselves to allow the Condo Board to maintain the exterior of all units. The Bylaws are the internal governing rules of the condominium corporation, enacted under the *CPA*, that regulate the rights and obligations of unit owners, the Condo Board, and govern the management and use of units and Common property. The Bylaws are statutory governance instruments. They are not a private agreement.

[56] The purpose of the “specific governing the general” maxim is to preserve coherence within a legal instrument and ensure that meaningful effect is given to all parts of that legal instrument. The underlying presumption is that the drafter of the instrument intended the instrument to operate harmoniously without provisions that conflict. To this extent, I accept that the maxim of the specific governing the general can apply as between conflicting bylaws found in one set of bylaws or as between conflicting statutory provisions contained within one statute.

[57] However, the same policy considerations do not necessarily apply as between different legal instruments. There is no presumption that separate legal instruments, even if they deal with similar subject matter, were intended to operate coherently with another distinct legal arrangement. In other words, in my view, the maxim is intended to apply within one legal instrument and not as between distinct legal instruments. Therefore, it would not apply to resolve conflicts between the Agreement and the Bylaws. To apply the maxim properly, we would need to compare apples to apples and not apples to oranges, as we have in the present case. Accordingly, I decline to apply the “specific governs the general” maxim to resolve the conflicts between the Agreement and the Bylaws.

[58] As such, I am of the view that the Agreement and section 65 of the Bylaws conflict and it is not possible to read them harmoniously so as to determine who holds the authority to make decisions regarding the removal of trees and the lilac bush.

**ii. If the Agreement and the Bylaws Cannot be Read Harmoniously, can it be said that the Bylaws Amend the Terms of the Agreement?**

[59] I have also considered, to the extent that the Agreement and the Bylaws cannot simply be read harmoniously, whether the Bylaws might be said to have amended the terms of the Agreement such that section 65 would apply to place authority with the owners to make care and maintenance decisions with respect to their trees and shrubs.

[60] The predominant question here is whether condominium bylaws can be used to amend or vary the terms of a restrictive covenant which is found on the title to each condominium unit. I have determined that the Bylaws cannot be used to amend or vary the terms of the Agreement. I have reached this conclusion in light of the distinct nature of the Agreement and the Bylaws.

[61] As noted previously, the Agreement is an agreement among and between the individual owners by which they have implicitly contracted with themselves to allow the Condo Board to maintain the exterior of all units. As submitted by the Condo Board, in order to amend or discharge the Agreement, a restrictive covenant, the consent of all registered owners of the Village of Terra Losa would be required. Presumably, the terms of any amending agreement would also need to be registered on the titles to the Units.

[62] By contrast, the Bylaws are the internal governing rules of the condominium corporation. They are adopted by the condominium corporation acting through the owners, in accordance with the *CPA*. Bylaws may be amended, repealed, or replaced only by the owners, typically by special resolution. A special resolution generally requires approval of 75% of the owners and owners representing 75% of the unit factors: *CPA* sections 1(1)(x) and 32(3). Accordingly, the Bylaws may be amended by less than the consent of all the owners.

[63] While it is true that the owners have the authority to amend both the Agreement and the Bylaws, it is difficult to see how the Agreement (a legal instrument which cannot be amended absent consent of all the owners) could be amended or varied through the Bylaws (which requires less than the consent of all the owners to amend). The Bylaws cannot do indirectly what the owners themselves could not do directly (in the event they had less than the consent of all the owners).

[64] Again, it must be recalled that restrictive covenants and condominium bylaws are of a different legal character. Restrictive covenants are proprietary interests registered on title and enforceable by those entitled to their benefit. Condominium bylaws derive authority solely from the *CPA* and govern the internal affairs of the condominium corporation. The condominium corporation, as a legal stranger to the Agreement, cannot, through the Bylaws, alter or vary a covenant that exists as between the individual owners. In my view, internal governance provisions cannot alter registered propriety rights.

[65] As noted earlier, Mr. Way argues the Agreement provides only a plenary power to the condominium corporation over all areas in the project, other than the interiors of individual Condominium Homes. Section 65 of the Bylaws simply sets out how that plenary power is to be exercised. However, my concern with this approach is that section 65 of the Bylaws does not simply set out how the plenary power is to be exercised by the condominium corporation. Rather, insofar as section 65, the Bylaws purport to transfer part of the plenary power from the condominium corporation to the owners. In other words, section 65 of the Bylaws does not just dictate how the power is to be exercised, it effectively amends who can exercise the power. Given my view that the Bylaws cannot be used to amend or alter the Agreement, to the extent that section 65 of the Bylaws attempts to modify who has authority over “all areas in the project other than the interiors of individual condominium homes”, section 65 must be viewed as inoperative while the terms of the Agreement would continue in force.

[66] In *Langston v Condominium Corporation No 0112806*, 2021 ABQB 849; aff'd 2022 ABCA 319, the condominium bylaws of a bare land condominium required prior approval of the condominium board for any improvements made to a unit. Owners sought and were granted approval from the condo board to construct a cabin. These approvals were later found to be flawed as the approvals ignored the terms of a restrictive covenant registered against the condominium units which set out several building restrictions. While factually distinct from the present case, the result in *Langston* provides some support for the notion that condominium bylaws cannot amend, ignore or override the terms of an applicable restrictive covenant.

##### **5. Conclusion on Authority to Direct the Removal of Mr. Way's Trees and Lilac Bush**

[67] Given that the Agreement and section 65 of the Bylaws cannot be read harmoniously to determine who has authority to direct the removal of Mr. Way's trees and lilac bush and as a result of my finding that that the Bylaws cannot be used to amend the terms of the Agreement, I

am left to conclude that the Agreement must prevail. As the Agreement provides the condominium corporation with the exclusive right and obligation to maintain all areas in the project other than the interiors of individual condominium homes (which would include the trees and lilac bush), I find that the Condo Board has the authority to direct the removal of Mr. Way's trees and lilac bush.

**B. If the Condo Board Maintains the Authority to Direct the Removal of Mr. Way's Trees and Lilac Bush, was the Motion Nevertheless Invalid as the Condo Board was not Properly Constituted in Accordance with the Bylaws?**

[68] Mr. Way argues that if the Condo Board has the authority to direct the removal of the trees and lilac bush, the Motion to do so was invalid as the Condo Board was not properly constituted according to the Bylaws.

[69] The June 15, 2022 AGM Minutes state as follows: "Bylaw 3 Board Members should consist of not less than three and not more than seven members. We currently have four Board members and the Board is not changing the number of members at the present time. This can change at any time that the Board feels a need to do so."

[70] Mr. Way points out that section 3(g) of the Bylaws requires that at least three persons be elected or acclaimed to the Condo Board at the Annual General Meeting ("AGM") in order to exercise the power of the Board. Section 3 contemplates that candidates for Condo Board membership will be nominated, although no specific nomination process is prescribed other than nominees must make full disclosure of any conflicts or potential conflicts.

[71] Section 3(d) of the Bylaws provides that where there are more candidates than vacancies, the Board shall consist of those persons who receive the most votes. Where those nominated are equal to or less than the vacancies then those nominated are elected by acclamation.

[72] Mr. Way compares the events of the June 15, 2022 AGM to the AGM which occurred in 2019. The June 4, 2019 AGM Minutes describe that two Board members are stepping down and the terms of two other Board members have expired and they will need to be voted in again to remain on the Board. A vote was taken, the incumbents were re-elected and two new Board members were also elected. Mr. Way points out that as members of the current Condo Board were present at the June 4, 2019 election, they ought to have had knowledge of the fact that their terms expired and that, at the June 15, 2022 AGM, they were required to be nominated and re-elected in order to continue as Board Members.

[73] Mr. Way further attests that he was present at the June 15, 2022 AGM and witnessed that there was no nomination of candidates for election to the Condo Board and no election of the Condo Board.

[74] Mr. Way notes that the condominium corporation, through the Condo Board, is bound to do all things required of it by the Bylaws: section 8(b). He argues that it would be an act of bad faith for the Condo Board to try to enforce the Motion when it could not be bothered to follow the Bylaws and ensure it was properly constituted to pass the Motion in the first place.

[75] For his part, Mr. Goryniuk attests that no objections were made at the AGM to the statement in his President's Report on June 15, 2022 that the four board members would continue at that time.

[76] The Condo Board also relies on section 28(9) of the *CPA* which provides that: “All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.”

[77] Mr. Way suggests that reliance on section 28(9) of the *CPA* can be defeated because the Condo Board acted in bad faith by passing the Motion, which it submits is contrary to section 65 of the Bylaws and also because the Condo Board acted in bad faith by failing to follow the election Bylaws.

[78] Given my earlier finding that the Condo Board has the authority to direct the removal of Mr. Way’s trees and lilac bush, I cannot find that the Condo Board acted in bad faith simply by passing the Motion. In my view, the Condo Board had the authority to pass the Motion. Similarly, I am not prepared to find that the Condo Board acted in bad faith with respect to its conduct at the June 15, 2022 AGM. While I agree with Mr. Way that the nomination and election or acclamation process contemplated by the Bylaws does not appear to have been strictly followed, this does not necessarily equate with a finding of bad faith.

[79] While the nomination and election processes set out in the Bylaws were not strictly followed, the issue of the constitution and composition of the Condo Board was nevertheless addressed at the June 15, 2022 AGM during the President’s Report. The effect of what transpired was that the four incumbent members of the Condo Board were acclaimed as Condo Board members for the following term. No one, including Mr. Way, objected to this process at that time. It was not a textbook example of how the Board elections should have taken place but nor can I find that it was a textbook example of bad faith. It is not as if the composition of the Condo Board was not raised or addressed at all at the AGM. Had that been the case, there may have been more of a spectre that the four incumbent members were trying to extend their terms as Condo Board members absent the knowledge or consent of the owners. But this is not what occurred here.

[80] I do not suggest here that the Condo Board should not follow its Bylaws to the letter. Going forward, the Condo Board should pay heed to the election process prescribed in the Bylaws and ensure that the process is properly followed and recorded in the future. While the Condo Board fell short of these obligations in June 2022, I am not prepared to find these shortcomings amounted to bad faith.

[81] Accordingly, I am of the view that section 28(9) of the *CPA* does apply and that the Motion remains valid notwithstanding that there was a defect in the formalities of the 2022 Condo Board election process.

[82] Mr. Way also argues that section 28(9) of the *CPA* should not apply as there are no third parties or financial or contractual obligations that are at issue. While it may be that a finding that the Motion was invalid would not impact any existing third-party interests, section 28(9) is not, in my view, limited to acts of the Condo Board that impact third parties. Section 28(9) applies to all acts done in good faith, whether they impact third party interests or not. There is good reason for this.

[83] A condo board may undertake many acts during the course of its term which impact the owners (as opposed to third parties). If a defect in the constitution of the condo board is

discovered at a later point and all condo board decisions made by that board in the course of its terms had to accordingly be declared invalid and undone, this could well throw the management and administration of the condominium into disarray. In my view, section 28(9) of the *CPA* exists not only to protect third party interests but also to ensure that the condominium corporation continues to run in an effective and orderly fashion notwithstanding any defects later discovered in the constitution of the condo board.

[84] This brings me to consider as well the remedy that would have been sought by Mr. Way arising from the Condo Board's failure to strictly adhere to its' election Bylaws. In the event that I had found that the Condo Board was improperly constituted and could not be saved by section 28(9), Mr. Way sought to have only the Motion declared invalid. He did not ask however that I find that other acts of the Condo Board which took place over its term are invalid. I do not see how such a narrow remedy would flow. In my view, if the Condo Board was improperly constituted and could not be saved by section 28(9), then it would follow that all its acts would during the course of its term would need to be declared invalid, and not just the Motion. I appreciate that Mr. Way is attempting to confine his remedy to what is at issue in these proceedings, but either the Condo Board is improperly constituted, or it is not. It cannot be improperly constituted for the purposes of the Motion only.

[85] In the result, I decline to find that the Motion is invalid as a result of any improper constitution of the Condo Board.

### **C. If the Motion is not Invalid, did the Condo Board Engage in Improper Conduct as Contemplated by Section 67 of the *CPA*?**

[86] Section 67 of the *CPA* allows the Court to review and consider whether the Condo Board has engaged in improper conduct. Improper conduct is defined in section 67(1)(a)(iii) as the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party. Interested party includes an owner: section 67(1)(b).

[87] Oppressive conduct is conduct that is burdensome, harsh, wrongful or which lacks probity or fair dealing. The term "unfairly prejudicial" means acts that are unjustly or inequitably detrimental: *Thai v Condominium Corporation No. 9610243*, 2024 ABCA 326 at para 8.

[88] A two-part test, relying on corporate oppression principles, is used to determine whether there is conduct that is oppressive or unfairly prejudicial: (1) examined objectively, does the evidence support the asserted reasonable expectation of the owner?; and (2) does the evidence establish that the reasonable expectation of the owner was violated by action that was significantly unfair?: *Judge v Condominium Plan No. 8322264*, 2024 ABKB 666 at para 54; *Spicer v Condominium Corp. 041156*, 2023 ABKB 611 at para 54; *Lupuliak v Condominium Plan No 8211689*, 2022 ABQB 65 at para. 55; and *Condominium Corporation No 0312235 v Scott*, 2015 ABQB 171 at para 46.

#### **1. Reasonable Expectations**

[89] The concept of reasonable expectations is objective and contextual, taking into account the facts of the specific case, the relationships at issue and the entire context. The actual expectation of a particular stakeholder is not conclusive. The plaintiff must identify the expectations that were allegedly violated and establish that those expectations were reasonably

held, based on factors that may include general commercial practice, the nature of the corporation, the relationship between the parties, steps that the claimant could have taken to protect themselves, the fair resolution of stakeholders' conflicting interests and, importantly, representations and agreements: *Laakso v Condominium Corporation No 8011365*, 2013 ABQB 153 at para 26.

[90] In the present case, Mr. Way has not expressly articulated in his written or oral argument the reasonable expectation that he asserts was infringed. To the extent the argument is premised, by virtue of section 65 of the Bylaws, on Mr. Way having a reasonable expectation that he has the legal authority to determine when and if his trees and lilac bush should be removed, I do not find that this reasonable expectation is borne out by the evidence.

[91] While I accept that section 65 of the Bylaws, could, when read in isolation, create a reasonable expectation in the owners that they are responsible for the care and maintenance of their landscaping, section 65 cannot be considered in isolation of the Agreement or in the absence of other evidence regarding the Condo Board's removal of trees and bushes.

[92] As noted earlier, Mr. Goryniuk's evidence outlines various decisions with respect to tree removal taken by the Condo Board from 2016-2023. It also appears that, except for Mr. Way, the owners affected by the tree removals were in agreement with the Condo Board's decision to remove the tree.

[93] The current Bylaws have been in force since 2007. Notwithstanding that section 65 of the Bylaws has been in existence since 2007, it is clear from Mr. Goryniuk's evidence that the Condo Board has been making decisions with respect to the removal of trees as far back as 2016. It is clear that Mr. Way did not agree with the Condo Board's decision to remove his trees back in 2016 as the AGM Minutes for June 7, 2016 reflect that Mr. Way tried to get the Condo Board to justify the removal of his spruce trees. However, throughout, it was the Condo Board making the decisions in terms of which trees would be removed and when. In the circumstances, I cannot see how there would be any reasonable expectation on Mr. Way's part that he, or any other owners, had the authority to determine what would happen with trees or bushes on their property.

[94] However, I am prepared to find that Mr. Way had a reasonable expectation that his concerns would be seriously considered and investigated by the Condo Board prior to it making any final decisions with respect to the removal of his spruce trees and lilac bushes. In support of this finding, I note the following evidence:

- The June 7, 2016 President Report states as follows:  
“The Condo Board has taken a vote last year. The Board voted that the owners will have the choice on whether to replace the trees at their unit. It was discussed that this Condo Association has always worked with the owner of each unit to let them have some say in the looks of their unit. This includes flower beds, rock gardens, rocks, etc., within reason and with Board approval of course. We believe these trees should be no different.”
- The Minutes of the AGM from May 30, 2017 state as follows:

“It was asked by an owner if the Board has a “policy” on trees in the Village. There is no formal policy in existence. A common-sense approach is taken by the Board in this matter. If an existing tree is felt to be diseased or a danger to property, a decision on how to handle this is made by the Board. It should be noted that any and all removals, should it get to that point, is approved by a majority or all 7 Board members. Any trees removed have thus far been old pine/spruce trees. As previously mentioned it is these trees that create problems with cones, disease and root systems. No more of these types of trees will be planted. Any “problems” with trees should be presented in writing and the Board will work with the owners to deal with this matter to, in most cases, everyone’s satisfaction.”

- The minutes from the July 15, 2020 Condo Board meeting state that six more trees will be removed in the Village. The owners are all in agreement with the removal of these trees.
- The Minutes of the AGM from June 15, 2022 state “Thank homeowners for working with and supporting the board members. Sometimes decisions are made for the Village that not all homeowners agree with but we try to accommodate everyone’s needs and wants.”
- The May 12, 2023 letter from the Condo Board to Mr. Way states that a tree had to be removed from Unit #24 and that the board explained the reasons and the owner of Unit #24 accepted that the tree in her front yard had to go. Similarly, the board explained the reasons for tree removal to the owner in Unit #21 and she accepted that the tree had to be removed.
- During cross-examination on affidavit on January 13, 2025, Mr. Goryniuk acknowledged that in all other cases of the removal of spruce trees, the Condo Board had the approval of the owners.
- Bylaw 2.2 provides that should any Owner have any suggestions, requests, questions or complaints for the Corporation, they shall be in writing and addressed to the Corporation. Upon receipt of a properly submitted written application, the Board shall: (a) within 14 calendar days of the next regular Board Meeting, respond to the applicant in writing given the decision of the Board; (b) The Board shall give reasons for an unfavourable decision or otherwise advise the Owner applicant of remedies, if any, that would make such application acceptable to the Board.
- Schedule “A” to the Bylaws: Board Member’s Code of Ethics states as follows under the heading “Performance of Duties”: “I will duly consider the information and advice provided by others and will seek opinions, when appropriate, from experienced professionals when necessary to reach a proper decision.”

[95] This evidence demonstrates a number of expressions by the Condo Board that it has “always worked with the owner of each unit” with respect to flower beds, rock gardens, rocks, and trees; that “any problems with trees should be presented in writing and the Board will work with the owners to deal with this matter to, in most cases, everyone’s satisfaction”; and that “sometimes decisions are made for the Village that not all homeowners agree with but we try to accommodate everyone’s needs and wants.” In my view, these are representations by the Condo Board to the owners that it will take a collaborative first at first instance, prior to making any final decisions with respect to tree or bush removal.

[96] Similarly, there are several references to the owners being in agreement with the decision to remove the tree. I do not suggest here that the consent of the owner must be obtained to remove the tree, but I note this simply because the Condo Board could not have known whether the owner consented to the decision to remove the tree unless the owner and Condo Board had engaged in some form of discussions or investigations with respect to the tree removal that were shared with the owner prior to the tree being removed.

[97] Likewise, Bylaw 2.2 provides a process whereby owners can raise concerns and the Board is to give reasons for an unfavourable decision. Through the Board’s reasons, the owner can then assess whether or how the owner’s concerns were taken into consideration.

[98] Schedule A of the Bylaws makes clear that Condo Board members are to consider the information and advice provided by others, presumably this includes the owners, and to seek opinions from experienced professionals when necessary to reach a proper decision. This supports Mr. Way’s reasonable expectations that his concerns would have been reviewed and considered in at least some fashion by the Condo Board prior to a final decision being made.

[99] In *Aubin v Condominium Plan No 862 2917*, 2025 ABCA 248, noise issues were a concern in the building. The owner requested that the condo board hire an expert to conduct an acoustical study. When the condo board would not, the owner did so at her own expense. The Court of Appeal found that it was reasonable for the owner to expect that the condo board would correct the deficiency or at least carry out an investigation and report its findings. It was reasonable for the owner to expect that more than an informal sound transfer experiment would be undertaken, particularly after she obtained the acoustical analysis indicated that the sound barrier was inadequate.

[100] The Court of Appeal found that the acoustical analysis was new information sufficient to raise a *prima facie* case and trigger the condo board’s obligation to investigate further using appropriately qualified individuals. The owner had an expectation this would occur, and this expectation was both subjectively and objectively reasonable.

[101] In my view, a similar duty to investigate was triggered in the present case where Mr. Way articulated a number of concerns with respect to the tree removal including increased electrical and cooling costs, loss of property value as well as an indication that he had consulted experts who indicated that his spruce trees and shrubs were not causing any damage to his residence or unit. I appreciate that in the present case no expert report was provided to the Condo Board by Mr. Way, but in my view, after providing this information to the Condo Board, Mr. Way had both a subjectively and objectively reasonable expectation that the Condo Board would at least meet with him and conduct some degree of investigation into the concerns he had raised. At minimum, the Condo Board could have asked for Mr. Way to share the information obtained through his expert consultation or shared the information it had obtained from its own arborist.

## 2. Were Mr. Way's Reasonable Expectations Infringed by the Condo Board?

[102] Mr. Way points to several instances that he states amply demonstrate the improper conduct of the Condo Board in this case. First, Mr. Way asserts that the Condo Board failed to consult with or notify Mr. Way of its March 14, 2023 decision to remove his trees and lilac bush. The Condo Board also failed to conduct a diligent investigation of the concerns raised by Mr. Way or to consult with him regarding steps that might be taken to mitigate the impacts to Mr. Way if his trees were removed.

[103] I share Mr. Way's concerns in this regard. I note first that the Motion reads as follows: "Three spruce trees will be removed this year. The trees in particular are leaking sap on our property and fixtures. Also, the roots of these trees are becoming a cause for concern. Untended lilac bushes will also be removed which will give our Village a more pleasant appearance. Completing this project was moved by Cherry Weatherman, seconded by Len Goryniuk and approved by the Board".

[104] The Motion did not specifically reference the fact that it was referring to Mr. Way's trees or lilac bush. Mr. Way's evidence was that he only found out that it might be his trees and bush after reviewing the minutes of the March 14, 2023 Condo Board meeting and becoming concerned that the Motion related to his trees and bush. In my view, this conduct fails to meet the bar of "fair dealing" with Mr. Way. Not only was Mr. Way not notified by the Condo Board of the decision to remove his trees, or even that his trees were going to be discussed for possible removal at the Condo Board meeting, but the Motion did not even specify in the Condo Board minutes whose trees were affected by the Motion. Mr. Way was left to suss out on his own that the Condo Board had made a decision to remove his trees and lilac bush.

[105] After determining that it might be his trees at issue, Mr. Way wrote to the Condo Board on May 1, 2023 and politely asked to meet with the Condo Board at their next meeting in order to obtain a better understanding of the arbor care policy and to discuss options and recommendations.

[106] Having received no response from the Condo Board, Mr. Way wrote to them again on May 11, 2023. He again asked to attend the Condo Board's next meeting to learn more about the discussions which affected his trees and lilac bush. He set out his concerns with the tree removal including increased heating and cooling costs, the lack of windbreak and the loss in property value. He asked the Condo Board to advise when they could meet. No meeting ever took place.

[107] The Condo Board responded by letter on May 12, 2023 thanking Mr. Way for his letter and stating "the board has delt [sic] with this problem before and determined that these trees were very beautiful until they became a problem and then needed to be removed." The letter also stated "The board isn't anti-tree. We have to take into consideration all factors and any liabilities that might arise from the damage the trees could cause in the near future. Thousands of dollars in repairs to lawns, sidewalks, driveways, patios and pony walls as well as any damages to our underground drainage system" (emphasis in original). The balance of the letter describes other situations where the Condo Board decided to remove trees and the owners accepted those decisions.

[108] While there is no doubt that the Condo Board responded promptly to Mr. Way's May 11, 2023 letter, the letter speaks only in generalities about why trees might be removed. The letter

does not address the concerns raised by Mr. Way about the removal of his trees or indicate why, in the Condo Board's view, his trees and lilac bush specifically needed to be removed.

[109] The Condo Board wrote again to Mr. Way on June 4, 2023 indicating that they had received his May 1, 2023 letter. The Condo Board informed Mr. Way that "the Condo Board has often discussed the concern we have with the two large spruce trees so close to your residence. We have also shared our concerns with the state of the lilac bush also next to your unit." The letter also indicates that the Board Maintenance Officer had previously advised Mr. Way of the Condo Board's concerns and what their plans were with regard to removal of these trees. The Condo Board confirmed that the trees would be removed that summer.

[110] There was no evidence before the Court of any written communications to Mr. Way regarding the Condo Board's concerns about his trees or lilac bush prior to the Motion being passed on March 14, 2023. Mr. Goryniuk indicated that there had been verbal communications with Mr. Way regarding his trees but could not recall when these communications took place.

[111] Mr. Way responded on June 5, 2023, pointing out that no evidence had been provided to him that his trees or lilac bushes were causing any damage and reiterating his concerns that the removal of his trees and bush would cause loss of enjoyment of his patio, residence and unit, loss of health and well-being, loss of property value and increased heating and electrical cooling costs. Mr. Way further indicated that he had consulted experts who indicated that his trees and shrubs were not causing damage to his residence or unit. Mr. Way proposed that the Condo Board provide him in writing with the reasons and evidence for removing the trees and bush. He then asked to be provided with a reasonable amount of time to consider the Condo Board's position and to seek the advice of professionals. This was to be followed by the Condo Board fully considering the response of Mr. Way and the parties working together to propose resolutions.

[112] The Condo Board responded on June 9, 2023 and advised Mr. Way that the bush could easily be an impediment should there be an emergency situation that could result in impending evacuation of the basement area. With respect to the trees, the Condo Board indicated it had been monitoring the growth of the trees and bush for several years and that the Condo Board was unanimous in removing two large spruce trees that, with time, could seriously damage both the structure of Mr. Way's unit and the courtyard walls. As well, underground damage to service lines could also be affected by the roots of these trees. The Condo Board stated that "the Board has exercised due diligence in advising you both verbally and in writing of our intentions in this regard. Our latest letter to you was dated May 12, 2023." The Condo Board then confirmed its decision to remove the trees and bush.

[113] The minutes of the August 14, 2023 Board Meeting state as follows:

The Board has for some time now, had a concern with two spruce trees and a lilac bush on one of the Owner's property. The Board wishes to remove them as they are very close to the Owner's residence. We wish to be proactive in ensuring that the roots of these large trees do not damage the Owner's structure nor any underground pipes near the structure. Any damage would cost the Board thousands of dollars and could well result in a special assessment being required of all owners. Again, we want to be pro-active in avoiding any future problems. As well, during a heavy rainfall, the rain water flows over the edge of the

Owner's eavestrough like a waterfall. This, of course, is due to the eaves being plugged with pine cones and needles. Drainage is an issue we have to deal with.

[114] It is clear that there was no evidence of any actual damage being caused by Mr. Way's trees or lilac bush (the safety concern with respect to the lilac bush will be addressed further below). Mr. Goryniuk acknowledged during cross-examination on affidavit that there was no evidence of any damage to Mr. Way's unit, residence, foundation or drainage pipes. Indeed, Mr. Goryniuk was not even aware of where the drainage pipes were located on Mr. Way's property in relation to the trees.

[115] Mr. Goryniuk attested that the Condo Board had retained an arborist to deal with Mr. Way's trees. Mr. Goryniuk stated that the arborist said that while there's no indication right now that there's any damage, the root system of those trees are very dangerous and due to the proximity of the trees to the structure, could very easily cause damage down the road if they're not dealt with properly. According to Mr. Goryniuk, the arborist said the best way to deal with these risks would be to remove those trees and plant other trees in place that don't have the root structure that the spruce trees have. No written report was prepared by the arborist and no affidavit from the arborist was before the Court in these proceedings. Mr. Goryniuk further acknowledged during cross-examination that the Condo Board would consider information from another arborist about ways to mitigate the risks posed by the spruce trees.

[116] Mr. Goryniuk also acknowledged that none of the Condo Board members were arborists or experts on trees but "we know what we saw". He stated further "our maintenance girl told me that she had two comments from arborists about spruce trees and their roots. And neither one would say one way or the other whether that could damage the property or whether it wouldn't damage the property. And they said for legal reasons, we're not going to give an answer to that question because if it does damage the property and they say it won't, well, there's a lawsuit and vice versa."

[117] Mr. Goryniuk also stated during cross-examination that a letter was written to Mr. Way in July 2024 about the roots of the spruce trees causing a retaining wall to shift and become unsafe. Ultimately, after review, this statement was found to be incorrect and there was no letter sent to Mr. Way in July 2024 about concerns arising from the roots of the spruce trees. Further, during cross-examination, Mr. Goryniuk confirmed that the retaining wall was not the Condo Board's concern.

[118] Under cross-examination, Mr. Goryniuk acknowledged that no below ground assessment had ever been undertaken to assess the risk of damage and no quotes had ever been obtained for the cost of the same. Similarly, no structural engineers or geotechnical experts were consulted about potential concerns to retaining walls as a result of the spruce tree roots.

[119] In the circumstances, I am at a loss to understand why the Condo Board refused to meet with Mr. Way or to engage with him with respect to the concerns he had raised. The evidence is clear that there was no damage being caused by the trees or the lilac bushes at the time the Motion was passed. However, at the same time, Mr. Way raised a number of detriments that would be suffered by him in the event the trees and lilac bush were removed including increased heating and cooling costs, loss of enjoyment of his property and loss of property value.

[120] While Mr. Goryniuk stated that an arborist opined that there could be damage in the future and the proactive approach was to remove the trees, he also spoke of arborists refusing to

opine on the damage that might be caused by spruce trees for legal reasons. Mr. Goryniuk testified that while the Condo Board members were not experts on trees, they “knew what they saw.” However, in the absence of there being any actual damage caused by the trees and bush and in the absence of having conducted any investigations into the damage being caused by the trees, it is unclear just “what they saw” other than the fact that the trees were in close proximity to the residence.

[121] Here, the Condo Board was faced with an owner who raised legitimate concerns about the Condo Board’s decision to remove his trees. Mr. Way also shared that he had spoken with an expert. He proposed a process whereby, once he had a clear idea of the Condo Board’s concerns with respect to his trees and bush, that he would review the same and seek the advice of professionals. This advice would then be shared with the Condo Board for its review. Again, it is difficult to understand why Mr. Way’s proposal was not given any consideration, particularly in light of Mr. Goryniuk’s acknowledgement under cross-examination the Condo Board would consider information from another arborist about ways to mitigate the risks posed by the spruce trees.

[122] Instead, the Condo Board pressed forward, in steadfast determination, with its decision to remove the trees and lilac bush. There were no meaningful attempts to consider Mr. Way’s concerns or to investigate whether the trees and bush had to be removed in the summer of 2023 or whether their removal could be delayed for some time or whether there were mitigation strategies or other options besides the removal of the trees and bush.

[123] Despite Mr. Way’s reasonable expectation that his concerns would be considered and that some degree of investigation would be undertaken to address his concerns, in light of the evidence of that the trees were not causing any damage, the Condo Board refused to even meet with Mr. Way to discuss the issues. The refusal to meet with him or at least provide him with an opportunity to seek out his own professional advice is largely inexplicable.

[124] These circumstances then give rise to a real concern that the Condo Board allowed their view of Mr. Way to improperly influence their refusal to meet with him. Mr. Goryniuk acknowledged during cross-examination that Mr. Way’s complaining had affected the Condo Board’s view of Mr. Way and it is clear that Mr. Way was viewed as a “complainer” rather than someone who pitched in around the Village and helped out.

[125] With respect to the lilac bushes, the minutes of the September 22, 2020 Condo Board meeting state: “Also, some hedges were trimmed particularly for safety reasons. No hedges can be blocking basement windows for safety reasons in case of a fire or other factors which may make outdoor access to a basement window a necessity.”

[126] The November 26, 2020 Maintenance Report attached to the December 1, 2020 President’s Report provides as follows:

Some units have bushes in front of their window wells which cause a restriction with the need to exit the unit from the inside should there be a fire or emergency. Emily and I had time to cut down some of them but some units still have them along the window wells. The stumps remaining at those units will be removed next summer. Should you choose to keep them you must trim them away from the window wells at your own expense or if you write a letter to the board to have them removed we will schedule the removal for next summer.

[127] Section 2.2 of the Bylaws requires that the Board shall give reasons for an unfavourable decision or otherwise advise the Owner applicant of remedies, if any, that would make such application acceptable to the Board. If the Condo Board's true concern was that the lilac bush posed a safety risk, it appears from the above that the Condo Board's accepted solution has been to trim the bush away from the window wells. In these circumstances, it is unclear why it was not communicated to Mr. Way that he could trim the bush around the window well rather than having the bush removed, or at minimum, why the Condo Board refused to meet with Mr. Way to discuss this option and any other options to address the concerns presented by the lilac bush.

[128] In response to Mr. Way's argument that the Condo Board engaged in improper conduct, the Condo Board argued that there is nothing special about Mr. Way's circumstances such that he should be treated any differently than the other owners at the Village when it comes to decisions to remove trees. As the Condo Board put it in their brief, there is no evidence suggesting that the consideration of trees and bushes on Mr. Way's unit are *sui generis* to those found on other units at the Village of Terra Rosa.

[129] The Condo Board argues that Mr. Way was given an opportunity as part of this application to file materials but he chose not to file any affidavit from an arborist or structural engineer. The Condo Board argues that he had an obligation to do so rather than to rely on hearsay in terms of the arborist's opinion if he wanted his objections to be seriously considered or to establish that his situation should be considered differently from that of other condo owners. However, I note here that Mr. Goryniuk similarly spoke in his evidence of what the arborist told him. The Condo Board likewise did not file any affidavit evidence from an arborist in support of its decision to remove the trees and lilac bush. If indeed, these expert opinions were available, I am at a loss to understand why the parties would not have shared them with each other long before becoming entrenched in this litigation.

[130] It is true that there is nothing different about Mr. Way's situation in that the Condo Board has the authority to make the ultimate decision about the removal of trees and shrubs from a unit. However, in my view, the difference here is that in other cases where the Condo Board has directed the removal of trees or shrubs, the owner has agreed with the decision. To this extent, the Condo Board has never had to deal with a process where objections were raised by an owner. In my view, where an owner raises legitimate concerns, the Condo Board must still exercise its powers in a manner that is not oppressive and does not unfairly prejudice or unfairly disregard the interests of Mr. Way. That is what has been examined here.

[131] Mr. Way also raises concerns with the Condo Board's shifting reasons for the tree removal. The March 14, 2023 Motion described the concerns with the trees as leaking sap and "the roots of these trees are becoming a cause for concern". The lilac bush was described as "untended" and its removal was to give the Village a more pleasant appearance. The May 12, 2023 letter from the Condo Board cites concerns with damage that the trees could cause in the near future to lawns, sidewalks, driveways, patios, pony walls and the underground drainage system. The June 4, 2023 letter from the Condo Board cites concerns with the spruce trees being so close to the residence. On June 9, 2023, the Condo Board set out in its letter that over time the trees could seriously damage both the structure of his unit and the courtyard walls as well underground service lines. At this point, the concern with the lilac bush is now stated as a safety concern rather than an appearance concern. The August 14, 2023 Board meeting minutes add clogged eavestroughs from pine cones and needles as a concern. Mr. Goryniuk's December 4, 2024 Affidavit provides that the roots from the spruce trees on Mr. Way's property appear to

have caused a retaining wall near the south entrance to the condominium complex to shift and become unstable. Sap is again mentioned as a concern. Later, during cross-examination on affidavit, Mr. Goryniuk stated that the retaining wall was not the Condo Board's concern.

[132] I agree with Mr. Way that the reasons for the tree and bush removal do appear to have somewhat shifted or evolved over time. This gives the appearance of the Condo Board trying to justify its original decision by providing additional reasons for the decision which were not offered at first instance as part of the Motion. It also raises questions as to whether the decision at first instance was arbitrary when new and different reasons for the original decision are offered at different points. Further, the shifting reasons for the decision to remove the trees and lilac bush make it difficult for Mr. Way to adequately respond to the Condo Board's concerns where he is faced with a moving target.

[133] For the reasons set out above, I am satisfied that the Condo Board's conduct infringed Mr. Way's reasonable expectation that his concerns would be meaningfully addressed and that some form of investigation would be undertaken to determine the necessity of removing Mr. Way's trees and lilac bush at that point in time. I am satisfied that in refusing to meet with Mr. Way, engage with his concerns or conduct any meaningful investigation into the need to remove the trees, the Condo Board unfairly disregarded Mr. Way's interests. Accordingly, the Condo Board has engaged in improper conduct as contemplated by section 67 of the *CPA*.

[134] In reaching this conclusion, I am cognizant that the law requires elected boards of condominium corporations to be given considerable deference and respect: *Gobeil* at para. 10 and *Langston v Condominium Corporation No 0112806*, 2021 ABCA 849 at para. 19. However, as noted in *Gobeil*, where a Court is satisfied that improper conduct has taken place, as I am here, the Court may direct and grant any of the remedies set out in section 67(2) of the *CPA*.

[135] In terms of remedy, I will follow the approach in *Gobeil*. I set aside the Motion and direct that the Condo Board reconsider the decision to remove Mr. Way's trees and lilac bush in accordance with the process that was initially sought by Mr. Way on June 5, 2023:

- a) Within 30 days of this decision, the Condo Board must provide to Mr. Way in writing its reasons for wanting to remove the trees and lilac bush. To the extent there is any documentation from an arborist which supports the Condo Board's position regarding removal of the trees and lilac bush, this also must be provided to Mr. Way within the same timeframe.
- b) Mr. Way will then be provided with 90 days to consider the Condo Board's position and to consult professionals in this matter. Mr. Way will then provide his response and any professional opinion obtained regarding removal of the trees to the Condo Board.
- c) With 15 days of the Condo Board receiving Mr. Way's response and any professional opinion, Mr. Way and the Condo Board must meet to discuss, in good faith, options for the trees and lilac bush moving forward.
- d) If no resolution can be reached within 45 days of the Condo Board receiving Mr. Way's response and any professional opinion, the Condo Board may proceed with making the final decision as to removal of the trees and lilac bush having regard to the response and any professional

opinions provided by Mr. Way. That decision must be provided to Mr. Way in writing.

- e) The above timeframes may be varied by agreement in writing between the parties.

[136] I remind the Condo Board that it must give serious consideration to Mr. Way's response and in particular to any arborist opinion with respect to the removal of the trees and lilac bush and further, it must give serious consideration to reasonable options other than removal of the trees and lilac bush such as cutting back the lilac bush where it obscures the window well rather than removing the bush completely.

[137] I note as well here that I do not have concerns with the Condo Board taking a proactive approach to tree and bush removal. I agree that the Condo Board should not have to wait until actual damage occurs. However, when legitimate concerns are raised by an owner and professional opinions can provide guidance, then the Condo Board must act from a place of "informed proactivity", rather than its own best guess that the trees and bush should be removed at this time.

## **V. Governance structure of Village at Terra Rosa**

[138] Before concluding, I offer a few words for consideration by the Condo Board. In reviewing the Agreement and the Bylaws when assessing this matter, it was somewhat challenging to knit all the pieces together in a cohesive whole.

[139] The position taken by the Condo Board in this application, which I have accepted, is that it holds the exclusive right and obligation to maintain everything other than the interior of the individual condominium homes.

[140] Section 8(j) requires the corporation to maintain and keep in a state of good repair: (i) all outside surfaces of the Residence (defined as the dwelling (including the garage) constructed on any unit), including all outside surfaces of all buildings, including roofs, eavestroughs, siding, any deck, patio or courtyard, foundations, exterior drains, exterior beams and trim, all roofing materials and all exterior windows and their assemblies.

[141] Section 83(b) provides that subject to Bylaw 8(j), each Owner shall be responsible for the repair and maintenance of the interior of his residence and any improvements or betterments (including upgrades) made to his Unit, save and except for the exterior of the Residence which shall remain the responsibility of the Corporation.

[142] Section 8(j) and 83(b) appear consistent with the Condo Board's position that it holds the exclusive right and obligation to maintain everything other than the interior of the individual condominium homes.

[143] However, it also appears that there are several provisions of the Bylaws, which at least on their face, do not read as consistent with the Condo Board's position. I have already discussed my concerns with section 65 of the Bylaws earlier in these reasons.

[144] As a further example, section 71 of the Bylaws provides that each owner shall keep and maintain any portions of any flower bed, deck, patio or courtyard adjacent to his Unit in a neat, trim, clean and well-groomed condition and in a generally well cared for state consistent with good and proper deck, patio, courtyard or flower bed care. This appears to contradict section 8(j)

which places the requirement on the condominium corporation to maintain and keep in a state of good repair decks, patio and courtyards.

[145] Further, section 83(a) provides that each Owner shall be responsible for ice and snow removal from his Residence's back steps and the Unit patio, courtyard or deck. Again, this appears inconsistent with the Condo Board's position that it holds the exclusive right and obligation to maintain everything other than the interior of the individual condominium homes.

[146] I note as well Exhibit "K" to Mr. Goryniuk's December 4, 2024 Affidavit, which contains Condo Board meeting minutes from September 22, 2020. Under the section President's Report, it states as follows:

Another point that bears repeating: our village is, unlike many others in the area, a bare land condominium. That means that you, as owners, are responsible for the appearance on your outside unit. Some of you may feel that it is the Board's responsibility to upkeep your yards. This is not the case. Bylaw 71 states, in part, "Each owner shall keep and maintain any portions of any flower bed, deck or courtyard adjacent to his Unit in a neat, trim, clean, and well-groomed condition and in a generally well cared for state consistent with good and proper deck, patio, courtyard or flower bed care (including any flower beds, decks or patios within the Unit). Owners shall also be responsible for all snow and ice removal from his Residence and Unit rear steps, courtyard, deck or patio.[...] Please ensure that a proper Fall cleanup is done by you in your yards.

[147] This excerpt of the President's Report does not explain how the direction to the Owners to care for their yards is consistent with the Corporation's duty to maintain all outside surfaces of the Residence including decks, patios and courtyards under section 8(j)(i) of the Bylaws or to maintain Unit lawn maintenance under 8(c) of the Bylaws.

[148] I highlight this provision of the President's Report as it appears in stark contrast to the position taken by the Condo Board in this application. When asked about this discrepancy between the position that the Condo Board takes in the present application and what it conveyed in the President's Report, counsel for the Condo Board indicated that he did not agree with what was stated in the President's Report and that in any event, it is the Condo Board's legal obligation that should govern and not the Condo Board's interpretation of their legal obligations as set out in the President's Report.

[149] I note as well that in making arguments with respect to sections 65(b) and (c) of the Bylaws, the Condo Board argued that these provisions ought to be read as allowing the owners some room for individualization through flower beds or planting shrubs. They also argued that these provisions save the condominium corporation some money so they do not bear the cost of maintaining all landscaping. In my view, this argument blows hot and cold with respect to the Agreement. Either the condominium retains exclusive right and obligation (including the costs) of maintaining everything outside the interior of the individual condominium homes or it doesn't. It strikes me that the Condo Board cannot invoke the Agreement at its convenience to say that it has the authority to make the decisions regarding the removal of trees and bushes and then say that it is also permissible to download the obligations of the Agreement to the owners through the Bylaws in other cases to save itself some money. The Condo Board cannot have it both ways.

[150] For the purposes of this application, I do not need to and have not resolved any of these additional perceived conflicts between what the Bylaws state and the Condo Board's position that it holds the exclusive right and obligation to maintain everything other than the interior of the individual condominium homes. I raise these issues simply as a note to the Condo Board that it may be worth reviewing their overall governance structure and what they understand the rights and obligations to be between the respective owners and the condominium corporation. Given my findings in this case, it may be that attempts to download the responsibility for items outside the interior of the individual condominium homes (and their associated costs) to the owners could be viewed as offside the Agreement. Ensuring that the governance structure is clearly understood by both the Condo Board and the owners and that the lines of authority are clear will go a long way to avoiding future misunderstandings, disputes and litigation.

## **VI. Conclusion**

[151] The Condo Board has the authority to direct the removal of Mr. Way's trees and lilac bush.

[152] I decline to find that the Motion is invalid as a result of any improper constitution of the Condo Board.

[153] Mr. Way had both a subjectively and objectively reasonable expectation that the Condo Board would meet with him and conduct some degree of investigation into the concerns he had raised regarding the removal of his trees and lilac bush.

[154] The Condo Board's conduct infringed Mr. Way's reasonable expectation that his concerns would be meaningfully addressed and that some form of investigation would be undertaken to determine the necessity of removing Mr. Way's trees and lilac bush. In refusing to meet with Mr. Way, engage with his concerns or conduct any meaningful investigation into the need to remove the trees, the Condo Board unfairly disregarded Mr. Way's interests. Accordingly, the Condo Board has engaged in improper conduct as contemplated by section 67 of the *CPA*.

[155] I set aside the Motion and direct that the Condo Board reconsider the decision to remove Mr. Way's trees and lilac bush in accordance with the process that was initially sought by Mr. Way on June 5, 2023:

- a) Within 30 days of this decision, the Condo Board must provide to Mr. Way in writing its reasons for wanting to remove the trees and lilac bush. To the extent there is any documentation from the arborist which supports the Condo Board's position regarding removal of the trees and lilac bush, this also must be provided to Mr. Way within the same timeframe.
- b) Mr. Way will then be provided with 90 days to consider the Condo Board's position and to consult professionals in this matter. Mr. Way will then provide his response and any professional opinion obtained regarding removal of the trees to the Condo Board.
- c) With 15 days of the Condo Board receiving Mr. Way's response and any professional opinion, Mr. Way and the Condo Board must meet to discuss, in good faith, options for the trees and lilac bush moving forward.

- d) If no resolution can be reached within 45 days of the Condo Board receiving Mr. Way's response and any professional opinion, the Condo Board may proceed with making the final decision as to removal of the trees and lilac bush, having regard to the response and any professional opinions provided by Mr. Way. That decision must be provided to Mr. Way in writing.
- e) The above timeframes may be varied by agreement in writing between the parties.

[156] As a final note, I will borrow from the comments of Feasby J. in *Lupuliak* at para. 90. As noted there, participation in condominium projects necessarily involves a surrender of some degree of proprietary independence. At the same time, however, it is important that condominium governance be responsive to legitimate concerns of individual unit owners. It is difficult to understand why this matter went all the way through a court proceeding. While the Condo Board may have perceived Mr. Way as a difficult personality, there was much to be gained by meeting with him and considering his legitimate concerns. That process may well have led to solutions or at least understandings that would very likely have cost much less, both emotionally and financially, than this litigation.

[157] Success in this matter is mixed. The Condo Board was successful in establishing that it has the authority to decide whether trees or bushes should be removed and it was successful in resisting the argument that the Motion was invalid due to improper composition of the Condo Board. Mr. Way was successful in establishing improper conduct on the part of the Condo Board pursuant to section 67 of the CPA. I would ask the parties to consider costs in light of the mixed success. If the parties are not able to agree on costs, they may return to me within 60 days to determine a procedure for addressing costs.

Heard on the 29<sup>th</sup> day of April, 2025.

**Dated** at the City of Edmonton, Alberta this 2<sup>nd</sup> day of April, 2026.

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**A.K. Akgungor**  
**J.C.K.B.A.**

**Appearances:**

Mr. Brian Sussman, K.C.  
Biamonte LLP  
for the Applicant

Mr. Dipesh Mistry  
Barrister & Solicitor  
for the Respondent