# Court of Queen's Bench of Alberta

**Citation: Owners: Condominium Plan No. 942 2336 v. Jeremy Chai Professional Corporation, 2005 ABQB 837**



**Date:** 20051109
**Docket:** 0503 01743
**Registry:** Edmonton

Between:

**The Owners: Condominium Plan No.: 942 2336**

Applicant (Plaintiff)

- and -

**Jeremy Chai Professional Corporation, Rhonda Quewezance, 973828 Alberta Ltd., 123456 Alberta Ltd., ABC Alberta Ltd., John Doe and Jane Doe**

Respondents (Defendants)

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**Reasons for Judgment**
**of the**
**Honourable Mr. Justice Donald Lee**

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[1] The Applicant Owners of the Condominium Plan No.: 942 2336 apply for an interim injunction, an interlocutory injunction and a permanent injunction restraining the Defendants and any third party acting under the authority of the Defendants from:

(a) operating an illegal brothel business from the units described in the Statement of Claim in this action, with the illegal business presently being conducted; and

(b) making any further alternations or modifications to the units described in the Statement of Claim in this action.

[2] The Applicant owners of the condominium plan also seek a declaration that the Respondents are in breach of the Bylaws of the Applicant, a mandatory injunction requiring the Respondents to repair the units the common property in the building to meet the standards of the applicable *Alberta Building Code*; and an order that the Defendants pay solicitor-client costs; as well as further and alternative relief.

[3] The Applicants specify that the grounds for their motion include that the Defendants are operating an illegal business out of the units described, namely that of a brothel. They also allege that the Defendants have made alterations to the units in breach of the condominium Bylaws, and that such alterations have caused the Applicant damages; and that the Defendants continue to make such improper alterations in breach of the terms of the Bylaws of the Condominium Corporation.

[4] The Defendants have filed a counterclaim and their own Notice of Motion in this matter alleging amongst other things oppressive conduct by the owners of the Condominium Corporation. Counsel have asked me not to deal at this time with this Counterclaim or Cross Motion.

[5] The Defendants Jeremy Chai Professional Corporation, Rhonda Quewezance, and 973828 Alberta Ltd., were or are the owners of condominium units within the Condominium Corporation.

[6] The Bylaws of the Condominium Corporation prohibit owners of units in the condominium plan from:

(a) making changes to the floor, party walls, plumbing, heating, air conditioning, mechanical and/or electrical systems within or outside its Units without the prior written consent of the Board of the Applicants;

(b) making or causing to be made structural alterations or additions to its Unit without having the design and specifications to the alterations or additions approved in writing by the Board of the Applicant;

(c) using the Corporation Property in such a manner that unreasonably interferes with the use and enjoyment thereof by other owners, occupants, visitors or invitees;

(d) using their Units or permitting it to be used in any manner or for any purpose which may cause nuisance or hazard to any other owner or occupant or their respective families visitors or invitees;

(e) permitting invitees to trespass on any part of the Corporation Property to which another owner is entitled to exclusive use;

(f) obstructing or permit any sidewalks, walkways, passages, driveways or parking areas to be obstructed by invitees;

(g) allowing the area around its Unit to become untidy;

(h) use the Unit for commercial or professional purposes that may be illegal or injurious to the reputation of the project.

[Emphasis added]

[7] The Applicant alleges that the units are currently being used by the Defendants for commercial or professional purposes that may be "illegal or injurious to the reputation of the project".

[8] The essence of the complaint with respect to the "illegal or injurious" activities are based the Affidavit of a Director of the Condominium Corporation, a Statutory Declaration attached to it, and on an advertisement that appeared in a local magazine promoting the business in question operated out of the condominium units.

[9] The Statutory Declaration describes an incident that allegedly took place at 4:34 p.m. on November 30, 2004 in which a former police officer hired by the Board swears that he attended the premises, and was led to one of the rooms in the back of the premises, which contained only a shower, television and a massage style bed. The Statutory Declaration goes on to describe that once inside the room at the back, the female attendant indicated that the premises were not actually used for the purposes of massages, but rather were used as an adult entertainment centre. The attendant is then allegedly asked by the Deponent of the Statutory Declaration whether he could get a massage, and the attendant described different options in which she essentially solicited sex for a fee.

[10] The advertisement for the business contains a picture of an individual who is described as "young, hot, and a Brazilian transsexual". The business name also contains certain sexual innuendos, although it consists of only five letters.

[11] The other major complaint by the Applicant Condominium Corporation is the alterations that have been allegedly made to the premises that have caused damage to the common property, and are being made contrary to the Bylaws of the Condominium Corporation.

[12] The Defendants respond that this is not the proper subject matter of injunctive relief at this time, as a trial must be held to test the evidence of the Applicant Condominium Corporation.

[13] Furthermore, the Defendants submit that they are operating a licenced business regulated by the City of Edmonton, and that no illegal activity *per se* is being carried out within the premises.

[14] On cross-examination on Affidavit the Defendant, Ms. Quewezance, was asked about what activities were carried out within the premises. Her responses appears to be that she does not really know what is going on within the premises.

[15] The Applicant Condominium Corporation suggests that this is affirmation of their allegation of what is happening in the premises, namely that it is being operated as a brothel.

[16] Counsel for the Applicant Condominium Corporation cites s. 213 of the *Criminal Code of Canada* which describes offences in relationship to prostitution. This section reads as follows:

> 213(1) Offence in relation to prostitution - Every person who in a public place or in any place open to public view
>
> (a) stops or attempts to stop any motor vehicle,
> (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
>
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
>
> (2) Definition of "public place" - In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.
>
> [Emphasis added]

[17] While it is clear that this section largely applies to public solicitation, for the purposes of prostitution, counsel for the Condominium Corporation submits that "public place" includes any place in which the public "has access as a right or by invitation, express or implied," which in counsel's submission would include the private rooms within the massage parlour business.

[18] Counsel for the Condominium Corporation also argues that if no illegal activity is going on within the condominium premises, the Defendants need not be concerned with the injunctive relief claimed which prohibit such illegal activity.

**Conclusion**

[19] The Condominium Corporation applies to stop the operation of an illegal brothel business it says is being conducted from the units described, and cites amongst other things its view that s.

213 of the *Criminal Code*, which describes prostitution related offences, is being violated within the Condominium Corporation premises.

[20] While this application does not exclusively focus on sections of the *Criminal Code*, it does not seem to me that the definition of “public place” defined as any place which the public “has access as a right or by invitation, express or implied”, would be intended to include private rooms in the back of a massage parlour.

[21] While the massage parlour may be open to the public for business, presumably the public does not have access as a right or by expressed or implied invitation to those back private rooms. Even though the former police officer deposed in a Statutory Declaration that he gained access on one occasion, it was in his words only by invitation of the attendant.

[22] I might add that it is not generally a good practice to attach a Declaration or Affidavit to an omnibus Affidavit by another person as was done here with respect to the former police officer's Statutory Declaration, since it can restrict the Defendant's right to cross-examine the deponent.

[23] Even if this is not a correct application of s. 213 of the *Criminal Code* to the evidence before me, the one incident in question described by the Deponent in the Statutory Declaration along with the advertisement in the local See Magazine is not sufficient to establish the operation of an illegal brothel business from the units described.

[24] However I note that the Edmonton Police Service's own public website currently clearly indicates that this is also their enforcement view on this subject. It reads as follows:

> What is Legal?
>
> The following acts relating to prostitution are not against the law
>
> > **Being a prostitute**: it is not illegal to be a prostitute if you are over 18.
> >
> > **Loitering**: many business owners who own establishments where prostitutes congregate are frustrated with why the police cannot simply go and arrest someone who is standing on a corner and is obviously a prostitute. Loitering is not illegal. In the past, prostitutes could be arrested under vagrancy laws if they were standing for some time on a street corner. These laws were repealed some time ago. Police can only encourage prostitutes to move from a certain location. They cannot arrest them unless they are doing something illegal.
> >
> > **Supporting family members**: prostitutes who use their wages to support their children are not committing an illegal act and the children cannot be charged with "living off the avails of prostitution."

> **Escort agencies**: it is not illegal for an individual to work for an escort agency as long as they are licensed to do so by the city. Further, engaging in non-sexual services while working for the agency is not illegal. For example, an escort who merely accompanies a john, or client, to a social gathering is not doing anything illegal. However, if it is implied that a sex act is available but will cost the client extra and a discussion ensues about price for sexual services, and if the discussion occurs in a public place, then the john and the escort are committing an illegal act (i.e., communication for the purpose of prostitution -- s. 213). If, however, the discussion occurs in a private residence, no offence has been committed.
>
> **Massage parlours**: it is not illegal for an individual to work for a massage parlour as long as they are licensed to do so by the city. Further, engaging in non-sexual services while working for the parlour is not illegal. A masseuse who actually just gives massages is not doing anything illegal. Performing sexual services in a massage clinic may be illegal if the police can prove the clinic is a place which has as its purpose prostitution. If it is implied that a sex act is available but will cost the client extra and a discussion ensues about price for sexual services the masseuse and client are committing an illegal act (communication for the purpose of prostitution -- s. 213) unless the discussion occurs in a massage room. In that case, no illegal act has been committed.
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> http://www.police.edmonton.ab.ca/pages/prostitution/publicinfo/legal2.htm
> [Emphasis Added]

[25] This is consistent then with my view of the law in this area, and is consistent with what I understand is Parliament's view that sex between consenting adults (whether for consideration or not) which takes place in a private place is not a state concern, subject to the operation of the “bawdy-house” prohibitions.

[26] In that regard, neither counsel referred to the actual section that deals with the operation of brothels as defined in the *Criminal Code* which is s. 197. This section describes “common bawdy-house” as being “a place that is kept or occupied or resorted to by one or more persons for the purpose of prostitution or for the practice of acts of indecency”.

[27] On the evidence before me, Ms. Quewezance says that she is not aware of what specifically is happening within the premises. Even if this were wilful blindness on her part, it does not establish that she actually knows what is going on within the private rooms, and there is no evidence before me as to whether or not the individual(s) in question that allegedly attempted to sell sex for money was in fact an employee, or an independent operator/contractor. Common sense would certainly suggest that they will claim at least to be independent operator(s) or contractor(s).

[28] Accordingly, allegations concerning whether or not an illegal brothel business is being run from the premises, or an illegal business for that matter are difficult to establish based on the evidence before me.

[29] The Defendants submit argument that because the City of Edmonton regulates and grants business licences to massage parlours, including the Defendants' business, that somehow these City of Edmonton licenses make what occurs in the Defendants' business legal or lawful. They cite among other things Fradsham, P.C.J.'s decision in ***R. v. Manion***, 2005 ABPC 35. I conclude that paragraphs 46 to 52 may be relevant: –

> [46] It is useful to review the salient facts:
>
> 1. The accused decided to operate an escort agency. She wanted to organize its operations in such a way as to comply with the law. She knew full well that prostitution services would likely be provided by the women participating in the escort services, but she ensured that the decision whether or not to provide prostitution services would be decided entirely by the woman and the customer. The fee payable by the escort to the accused was not dependant upon or related to what occurred between the escort and the customer.
>
> 2. The accused obtained all required licences from the City of Calgary. The accused made inquiries of the City whether her proposed method of operation was lawful. I am satisfied that the accused formed an honest, but mistaken belief that she was operating her escort agency within the law. That mistaken belief might have resulted from erroneous advice from the City, or the accused misunderstanding the advice received from the City, or the accused unintentionally misrepresenting the facts to the City when she sought the advice, or a combination of these factors.
>
> 3. The City charges a licence fee for escort agencies which is approximately 36 times what is charged other businesses. The escorts themselves are charged licencing fees. Those significantly larger fees are charged because the City is of the view that escort agencies must be more closely monitored because of public health concerns. <u>It would require a level of naivete of which even judges are not capable to fail to conclude that the City's concern for public health issues relating to escort agencies stems from the City's knowledge that on many occasions escort agencies are a vehicle for the delivery of prostitution services.</u> The City cannot have it both ways. Even a passing adherence to the concept of consistency prevents the City from charging large licencing fees to escort agencies to pay the cost of increased monitoring due to public health concerns, while at the same time denying that the City knows that escort agencies are often involved in the provision of prostitution services. Some philosophical

> individuals in the community might even wonder out loud whether there might be similarities between the City charging large fees to licence people it thinks are prostitutes (or involved in prostitution), and an escort agency charging fees to its escorts which it thinks are prostitutes. While I need not address that issue in this case, the fact that it might be the subject of discussion is relevant to the appearance of the City reviewing the current massage licence of the accused. I will elaborate on that later in these Reasons.
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> [Emphasis Added]

4. The accused needs a massage therapist licence from the City in order to practice her current profession in Calgary. In other words, the City that licenced the accused to run the escort agency (and, at least from the point of view of the accused, gave the impression that its mode of operation was acceptable), is the same entity which will determine whether the accused ought to lose her current massage therapy licence (and, consequently, her livelihood) because she has been found guilty of an offence arising from the escort agency activity the City had previously licenced.

[47] In my view, this rather unique situation places both the City and the accused in difficult positions. If the City should revoke the accused's massage therapist licence, the lingering question will be whether the revocation was in some way related to the accused's allegation that the very same City had condoned the way she ran her escort agency operation. The City will be placed in the awkward position of being seen to rule on the question of whether the accused's massage therapist licence should be revoked when the City's involvement in the accused's escort agency operation[8] is raised to explain the accused's criminal conviction.

[48] I need not predict whether the City would or would not be influenced by these factors should it be called upon to review the accused's massage therapist licence. However, I am of the opinion that a reasonable person, apprized of all the facts, would conclude that there is at least the appearance that the City would be placed in a conflict of interest in such a review. I am satisfied that such an appearance is a sufficient reason to permit, though not compel, a course of action which will result in removing from City review the issue of the accused's massage therapist licence.

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[8] The City's involvement arises from both the advice allegedly given to the accused by the City, and from the City, knowing of the prostitution activities often associated with escort agencies, licencing those agencies and charging them significantly increased licencing fees because of concern about resultant public health issues.

[49] One last matter must be addressed under the heading of "Special Circumstances", and it is really a discussion of what is not a special circumstance. That the facts in the case at Bar involve prostitution is not a "special circumstance" which should advocate either in favour of or against the granting of a conditional discharge. Although society generally seems to frown on prostitution, society has not made adult prostitution a crime. However, while not making adult prostitution, in and of itself, a crime, society has made illegal certain activities which involve the legal activity of prostitution (e.g., communication in a public place or place open to public view for the purposes of prostitution, and the other offences created in sections 212 and 213 of the *Criminal Code*). Accordingly, in crafting a sentence in this case, I should not be influenced one way or the other by any particular moral view of prostitution. Judges should not use the sentencing provisions of the *Criminal Code* to pass moral judgment on activities (e.g., adult prostitution) which have not been outlawed by Parliament. When using the sentencing provisions of the *Criminal Code* to deter an accused and others from certain conduct, judges should restrict themselves to deterring criminal conduct, and should not use the sentencing process to impose a particular moral view which has not been legislated by Parliament.[9]

**Disposition In This Case**

[50] When I consider all the factors in this case, I am satisfied that it would be in the best interests of the accused to grant her a discharge. I am also satisfied that to do so would not be contrary to the public interest. In my view, the registration of a conviction against this particular accused in the particular facts of this case[10], would result in a disproportionate penalty for the crime committed.

[51] Having said that, I agree with the Crown that there is much merit in crafting a disposition which will discourage others from the offence of living on the avails of prostitution of another person. Accordingly, I am going to make the granting

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9 In saying this, I am mindful that on occasion Courts, when sentencing an accused, must order a person to refrain from otherwise legal conduct (e.g., refrain from the purchase, possession or consumption of alcohol) when that restriction is necessary to help prevent the commission of further criminal offences. However, a Court would be in error if it were to order an adult to refrain from alcohol consumption simply because the judge was of the personal view that abstinence is morally superior conduct.

10 One feature of the facts of this case is that the accused, in attempting to run her escort agency within the law, found herself misled by society's (and therefore the law's) ambivalence towards prostitution (as referred to under the heading "Special Circumstances").

of a discharge to the accused conditional upon, *inter alia*, her making a monetary contribution to a charitable organization.

[52] I grant the accused a discharge conditional upon her successfully complying with a probation order having a duration of 15 months. The terms of the probation order are as follows:

1. Keep the peace and be of good behaviour.

2. Appear before the court when required to do so by the court.

3. Notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

4. Report to a probation officer within two working days after the making of this order and thereafter when required by the probation officer and in the manner directed by the probation officer.

5. Prior to the expiration of the 14th month of this order: (i) donate the sum of $3,000 to a charitable organization approved by the Court; and (ii) provide, in a form satisfactory to her probation officer, proof that she has made the $3,000 donation.

[30] It must be borne in mind that ***R. v. Manion*** was a sentencing decision after the Accused plead guilty living off the avails of prostitution of another person during the course of operating an escort agency contrary to s. 212(1) of the *Criminal Code*, which is a different section than those which apply to the present alleged activities.

[31] In any event, as the City of Edmonton has no jurisdiction with respect the criminal law, it cannot authorize illegal activities such as bawdy-houses and prostitution related offences. Their licencing and regulatory regime must be limited to their municipal jurisdiction, and as such the City of Edmonton licenses which exist here are pretty marginal considerations when it comes to determining whether the alleged events occur within the premises.

[32] The Condominium Corporation argues in the alternative that the business being conducted on the premises is also “injurious to the reputation of the project”. However they have not technically listed this as a grounds of relief or a grounds upon which the application is based. Therefore I could simply dismiss this Notice of Motion, and force the Condominium Corporation to re-file based on relief that it was seeking to prohibit the operation of a business being conducted on the premises that is “injurious to the reputation of a project”.

[33] I have decided however that this is an unnecessary step, and that I should deal with the issue on the basis that it is at least incidentally before me, or forms the subject matter of “further or alternative relief” as specified in the current Notice of Motion.

[34] In this regard counsel for the Condominium Corporation indicates that if the Defendants' business opened up beside the Courthouse, that this would clearly be injurious to the reputation of the area. There is some other evidence that the Applicant Condominium Corporation has raised on this ground.

[35] This other evidence includes Condominium Corporation members noticing more litter in the parking lot in the mornings, parking problems associated with the units in question or with individuals visiting the unit in question who appear to park in stalls other than those designated for those units, and issues surrounding the attempted removal by two female occupants of the units of signage put up by the Condominium Corporation in front of the business in question indicating that “this area is under video surveillance”.

[36] In this regard, however it is very important to note that the Condominium Corporation and units in question are located in a strip mall complex of businesses, largely unoccupied at night. This is clearly different from a business that operates in a centre or area near or on a main thoroughfare.

[37] The provocative name of the business is primarily intended to delineate the business’ general purpose, and may or may not necessarily be “injurious to the reputation of the project”, without specific evidence from mall patrons and/or business records establishing financial loss attributable to the Defendants business operations.

[38] The increased parking litter appears to be noticed on a sporadic or incidental basis, which in any event is insufficient in quantity or its nature to be “injurious to the reputation of the project” *per se*.

[39] In other words, there is no specific evidence before me that either the name of the business, or the litter, have affected the reputation of the strip mall, or the individual businesses therein.

[40] The problem related to the parking stalls almost seems in essence to consist of a battle of will between the Applicant and the Defendants. The Applicant obviously believes that a brothel or illegal sex business is being carried out within the premises. It would not be hard to conclude that putting up signage around the front of the business alluding to the “Area Being Under Video Surveillance” would have a chilling affect on any individuals intending to patronize the Defendants' business.

[41] I note that the police were apparently called with respect to the alleged removal of the signs, and no action was taken by the police against the Defendants. In fact, no police action ever has been taken as far as I can tell against the Defendants' business in any way.

[42] With respect to the ex-police officer who was hired by the Condominium Corporation to investigate, and who deposed that he was solicited for sex in the units, whatever took place within the business took place in a back private room between two individuals, who certainly could not have been observed by the general public who would use the services and businesses of this Condominium Corporation. The advertisement that was placed in the See Magazine for this business, also does not specifically describe any particular business or activity *per se* being conducted in these premises.

[43] I conclude that these pieces of evidence do not establish that the unit is being used for a purpose "injurious to the reputation of the project".

[44] As for the renovation, alteration, additions, and structural changes to the units that have caused considerable controversy and expense between these parties, the only obvious problem that has appeared is an improperly vented dryer vent, which admittedly caused considerable damage.

[45] I understand this problem has now been corrected, albeit with some considerable difficulty. I do not conclude however that an improperly vented dryer vent, no matter how much damage was caused, constitutes a deliberate and fragrant attempt by the Defendants to breach the Bylaws.

[46] In fact, the Bylaws may not directly be violated by this improperly vented dryer vent as it may not constitute the type of structural alterations or additions to the units floor, party walls, plumbing, heating, air conditioning, mechanical and/or electrical systems contemplated in the Bylaws.

[47] Even if I am incorrect in that regard, the problem has been solved, and it is not likely to reoccur.

[48] Accordingly injunctive relief is not necessary simply to prohibit conduct that is not *per se* illegal or contrary to the Bylaws otherwise; or to restrain breaches that are not continuing.

[49] While the Court has the jurisdiction to use injunctive relief to enforce breaches of the bylaw, and even evict a tenant because of breaches of the bylaw even though the tenant was an owner, I am not satisfied on the basis of the tri-parti legal test that the Applicant has satisfied its burden of establishing that it will suffer irreparable harm if the injunction is not granted. I also conclude that some of the issues and deficiencies in the evidence raised herein by me lead me to believe that the balance of convenience test does not favour the granting of an injunction in these circumstances.

[50] There may be serious issues as between these parties, but they will have to be resolved at trial.

[51] The Applicant has already acknowledged correctly that this Court is not in a position to make a Declaration that the Defendants are in breach of the Bylaws of the Plaintiff based on the current information.

[52] As such the request for interim injunctive relief with respect to the business being operated out of the units in question, and with respect to the making of any further alterations and modifications to the units in question, is dismissed with costs awarded to the Defendants.



Heard on the 4th day of November, 2005.
**Dated** at the City of Edmonton, Alberta this 9th day of November, 2005.

**Donald Lee**
**J.C.Q.B.A.**

**Appearances:**

Vanace Siakaluk
Oshry & Company
for the Plaintiff

Victoria Archer
Gledhill Larocque
for the Defendants