

Case Name:

**Pointe of View Marketing & Management Inc. v.  
Condominium Corp. No. 011 1661**

IN THE MATTER OF the Condominium Property Act,  
R.S.A. 2000, Chapter C-22 and Amendments Thereto:

Between

Pointe of View Marketing & Management Inc.,

applicant, and

The Owners: Condominium Corporation No. 011 1661,  
respondent

[2003] A.J. No. 1371

2003 ABQB 883

Action No. 0301 05812

**Alberta Court of Queen's Bench**

**Judicial District of Calgary**

**Kenny J.**

Heard: October 16, 2003.

Judgment: filed November 6, 2003.

(19 paras.)

*Real property — Condominiums — Corporation — Duties and rights of unit holders — Use bylaws — Bylaws, resolutions and restrictive covenants — Validity (incl. voting requirements) — Common property — Actions respecting.*

This was an application by Pointe of View, the owner of a condominium unit, for an order requiring the condominium corporation to allow its clients reasonable access to its premises. Pointe of View also sought to add a subsidiary numbered company as a party to the application. Pointe of View, which had developed the building, sold one unit on the second floor to the numbered subsidiary and leased the unit. The second floor was occupied by recreational facilities for the residential unit owners. Disputes arose concerning the access by the business's clients to the unit. Residents were concerned for security reasons, and the corporation enacted bylaws which limited the access by the business clients. Pointe of View argued that the order was necessary in order to allow it reasonable access to its premises, and that the bylaw contravened the Condominium Property Act. It sought the order adding the numbered company as a party on the ground that it was the owner of the unit.

**HELD:** Application allowed. Any interested party was entitled to bring an application under the Condominium Property Act. Therefore, the application to add the numbered company as an applicant was allowed. The bylaw contravened the Act. On a literal reading, it prohibited Pointe of View and its customers from accessing any of the common areas, including the elevator and hallway. Therefore, the bylaw was oppressive and prejudicial to Pointe of View's interests. The condominium corporation was ordered to allow Pointe of View's clients and visitors the same access to the second floor as residential owners.

**Statutes, Regulations and Rules Cited:**

Alberta Rules of Court, Rule 38(1).

Condominium Property Act, R.S.A. 2000, c. C-22, s. 67.

QUICKLAW

**Counsel:**

Judy D. Burke, for the applicant.

Blair R. Carbert and Michelle Colley, for the respondent.

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REASONS FOR JUDGMENT

**KENNY J.:**—

INTRODUCTION

¶ 1 Pointe of View owns a commercial condominium unit in West Pointe Plaza. This is an application by Pointe of View Marketing and Management Inc. ("Pointe of View") for an order adding another entity as an Applicant and directing the Condominium Corporation (the "Owners") to provide them and their visitors reasonable access to the building.

BACKGROUND

¶ 2 West Pointe Plaza is a condominium building in downtown Calgary. The main floor consists of a foyer and several businesses. Access to the main floor businesses is from the outside of the building. The second floor consists of a recreational area accessible only to owners, a foyer and a business condominium. It is this second floor unit which is the subject matter of this application.

¶ 3 687866 Alberta Ltd. is the current owner of the second floor unit, Unit 6. That company is a subsidiary of Pointe of View. In January of 2002 Pointe of View sold the unit to 687866 Alberta Ltd. and then leased it back from them.

¶ 4 Pointe of View actively carried on their business at those premises until May of 2002 when they moved to another location. The unit has been vacant since that time. All other units outside of the first two floors are residential condominium units.

¶ 5 In addition to being an owner and then a tenant of the complex, Pointe of View was also the developer. The original plans of the building show an interior stairway that would provide direct access from street level to the second floor commercial unit. Although in the plans, that interior stairway was never built. There have also been discussions between the parties about constructing an elevator accessible from the outside which would provide direct access from street level to the unit. No agreement in that regard has been finalized.

¶ 6 The right of access to both the business tenants and the residential tenants is provided for in the By-Laws. The By-Laws differentiate between the two such that business tenants have limited access to certain areas of the building.

¶ 7 Once unit holders started moving into the complex, the issue of access became significant. As would be expected, there were many different people going in and out of the building, particularly trades, couriers, designers, etc. As the developer, a lot of this traffic went through the Pointe of View office on the second floor. All unit holders became concerned about security. At that time any business or residential owner was able to allow visitors into the building through an intercom system. Once inside the building there was unrestricted access to any floor. Given the concerns about security, the owners decided to disable the intercom system and issued all of the residential owners new keys which allowed both the owner and their visitors access only to their particular floor in the building. The Applicant however, as a business owner, was required to escort their visitors to and from the main doors.

QUICKLAW

¶ 8 Presently, Pointe of View either has an agreement or are negotiating an agreement to sell their unit to another business. Access is an issue which the Applicant needs to have resolved in contemplation of any sale.

#### ISSUES

1. Should 687866 Alberta Ltd. be added as an Applicant?
2. Are the arrangements for access to the second floor business unit oppressive or unfairly prejudicial or do they unfairly disregard the interests of the business unit owner?

#### DISCUSSION

1. Should 687866 Alberta Ltd. be added as an Applicant?

¶ 9 The Applicant wishes to add 687866 Alberta Ltd. as an Applicant to accurately reflect the current circumstances. 687866 Alberta Ltd. is the current owner of the condominium unit and Pointe of View is the lessor. Rule 38(1) of the Alberta Rules of Court allows for the addition or substitution of a plaintiff (applicant) at any stage of the proceedings. Section 67 of the Condominium Property Act R.S.A. 2000, c. C-22, the section under which this application is brought, provides that any interested party may bring an application for relief. The Act defines an interested party as an owner, a corporation, a member of the Board, a registered mortgagee or any other person who has a registered interest in the unit. 687866 Alberta Ltd. is the current registered owner of the unit and Pointe of View has a registered interest in the unit having filed a caveat to protect its lease.

¶ 10 The Owners oppose the application saying that 687866 Alberta Ltd. was the owner of the property at the start of these proceedings and so could have been added at that time. While that may be the case, there is no question that 687866 Alberta Ltd. has an interest in the property as the owner. It is important that they be a party in this application. There is no procedural or substantive reason not to add them as a party.

2. Are the arrangements for access to the second floor business unit oppressive or unfairly prejudicial or do they unfairly disregard the interests of the business unit owner?

¶ 11 The By-Laws provide the jurisdiction to the Board of the Condominium Corporation to make rules and regulations that it deems appropriate to deal with the owners' use, enjoyment and management of the Common Property. It is the Board, through the By-Laws, that is charged with not only controlling and managing the property but also with enforcing the By-Laws. The Court is not to interfere with the decisions made by the Board and the By-Laws unless the Court finds that a particular by-law or restrictive covenant is prohibited under the Condominium Property Act.

¶ 12 It is the position of Pointe of View that the Owners are in breach of s. 67 of the Act. In particular, they say that the Board has conducted itself in a manner that is oppressive or unfairly prejudicial or unfairly disregards the interests of an interested party.

¶ 13 The Owners take the position that neither Pointe of View nor 687866 Alberta Ltd. are "interested parties" with respect to this issue of use of Common Property because neither entity is operating a business there at the moment. They ask how can Pointe of View argue that they are restricted or hampered by the Rules or that their interests are unfairly disregarded, prejudiced or oppressed when the space is empty. It is difficult to support that argument. By definition under the Act, both Applicants fit the definition of interested party. One is an owner and the other has a registered interest in the unit. There is nothing that says that an interest can only be adversely affected if it is in operation. Whether that rule is oppressive or unfairly prejudicial or unfairly disregards the interest of an

interested party can be decided without knowing the nature of the business in the premises.

¶ 14 The Owners rely on By-Law No. 58(e)(i). That By-Law is not easy to read. At its simplest it says:

... other than the right of access and use of that portion of the Common Property designated business ... the customers, lessees and invitees of the Business Units shall not be entitled to access or use of that portion of the Common Property, or any other portion of the Common Property ... and the Business Unit Owners shall ensure that its customers and invitees do not enter upon or use any of the ... Common Property, other than the Common Property hereinbefore described ...

¶ 15 Read literally, Pointe of View and its customers and invitees cannot access or use any portion of the Common Property outside of the actual business unit itself. This would include, on a literal reading, the entrance doors, the elevator lobby and the elevators. It is hard to argue that a By-Law which restricts access to the building by Pointe of View and its customers and invitees is not oppressive, unfairly prejudicial or unfairly disregards the interest of the party. When one then turns to the first phrase of the By-Law it says, "other than the right of access". This would appear to conflict with the rest of the By-Law which prohibits access as earlier indicated.

¶ 16 The Owners argue that they are not restricting access but, instead, have just imposed restrictions on how the Common Property can be used by visitors to the business unit. That is not how By-Law 58(e)(i) reads however, I accept the interpretation put forward by the Owners that there is no restriction on access to the Common Property by employees, owners and visitors but simply, in their view, reasonable restrictions on how the Common Property can be used.

¶ 17 Going back now to the issues of access and security. The new security system operates as follows. For all residential unit owners and the subject business premises on the second floor, visitors are buzzed in by the owner. The main floor of the premises consists only of the front doors to the condominium building, a lobby and the elevators. The elevator keypads have been modified so that once a visitor enters the elevator they only have access to the floor of the unit holder buzzing them in. The same would apply to the subject business premises on the second floor. It is there that the rules differ for the subject business unit. The new rule says that when a visitor buzzes into the business premises, someone must go down to the main floor, meet the person at the door, let them in and accompany them up to the second floor in the elevator. At the end of their business, they would again be accompanied down the elevator from the second floor to the main floor and escorted to the front doors of the building. The rationale for this, according to the Owners is that a business occupant is likely to have more visitors than a residential occupant and therefore it is necessary to restrict the manner in which those visitors can enter onto the property to ensure that the safety and security needs of the Owners is respected.

¶ 18 When asked what exactly is the concern that this type of restriction is trying to address, counsel for the Owners indicated that there is a risk that a courier, for example, who is at the front door at the same time that a visitor to a residential unit was buzzed in could enter the door at the same time as the visitor to the residential unit. Once in the elevator, the courier might stay on the elevator and get off on the same floor as the visitor to a residential unit. While those are risks, they would be minimal and certainly would be no different than the risk to residential owners. There is a possibility that a stranger could enter the building at the same time as an owner or visitor and get on the elevator only to exit on the same floor as the owner or visitor to a residential unit. It seems odd to place that restriction on the Applicants when there is no limit to the number of guests that a residential owner can have. To apply that reasoning, all owners should be required to go to the front door to greet their guests and to escort them out again to ensure that they get on and off the elevator only on the floor that they are supposed to. When looked at in this light, there can be no other conclusion drawn than that the additional restriction placed on the subject unit is unfairly prejudicial to and unfairly disregards the interest of the owner and lessee.

DECISION

¶ 19 The application is granted. 687866 Alberta Ltd. shall be added as an Applicant to this action and there shall be a further order that the Condominium Corporation provide the Applicants and their visitors access in the same manner as the residential owners. In particular, the requirement that the Applicants meet and escort their visitors to and from the front door is lifted.

KENNY J.

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## QUICKCITE

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**Court:** 2003 Alberta Court of Queen's Bench

**Reported at:**

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