

Rights of First Refusal and Options to Purchase: What's the Difference?

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Cases Considered:

[Koppe v. Garneau Lofts Inc., 2008 ABQB 354](#)

Garneau Lofts Inc. had redeveloped commercial property in an historical structure which had been St. Joseph's Hospital on Whyte Avenue, in the City of Edmonton. The redeveloped property, with shops on the main floor, became known as the Garneau Lofts, combining unique, luxurious suites with a popular Whyte Avenue location. Dr. Sandy Koppe, an optometrist, had leased a portion of the Garneau Lofts for an upscale boutique eye wear store. He had leased it on behalf of his employer, Eye Care Optometric Group Ltd., a company in which his daughters were the only directors and shareholders.

The Offer to Lease which Koppe and Garneau Lofts Inc. had entered into contained a heading entitled "Option to Purchase," which was followed by both typewritten and handwritten words. The typewritten words stated that "during the period July 1, 1997 to June 30, 1999, Dr. Sandy Koppe shall have an *option to purchase* his lease space for \$180 per sq. ft. plus G.S.T." (emphasis added). The handwritten words followed, added at the instance of Koppe and set out that "[d]uring the period July 1, 1999 to June 30, 2002, Dr. Sandy Koppe shall have *first right of refusal* to purchase the lease space for \$180 per sq. ft. plus G.S.T." (emphasis added).

The Lease which Koppe and Garneau Lofts entered into implemented the Offer to Lease. Section 30 of the Lease contained an option to purchase at \$342,000, which was \$180 per square foot plus G.S.T. That option was limited to June 30, 1999. Section 31 specified that "[p]rovided the tenant has not exercised his option to purchase aforesaid and has not sublet or assigned the demised premises, the tenant shall have a ten (10) day first right of refusal commencing the period July 1, 1999 to and including June 30, 2002, to purchase the demised premises provided the purchase price is set at \$180 per square foot plus G.S.T." (emphasis added).

An option to purchase property is a right to buy property at a pre-determined price. The right lasts until a specified time has expired. The holder of the option does not have to buy the property. The owner of the property, however, does have to sell the property to the holder of the option if the holder performs all terms and conditions of the option. A right of first refusal, also called a right of pre-emption (but not called a "first right of refusal"), is usually a promise by the owner of property not to sell it without first offering it to the holder of the right on the same

terms and conditions. If the owner receives a bona fide offer that they want to accept, the holder of the right of first refusal has a specified amount of time to match that offer and buy the property. An option to purchase is usually used when a prospective purchaser knows that they want the land or that they may want it within a certain time period. A right of first refusal is usually used if the potential purchaser wants to have the opportunity to buy the land should it come on the market.

According to Paul M. Perell, the author of “Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land” (1991) 70 Canadian Bar Review 1 and subsequent case comments in the area, the distinguishing feature of a right of refusal is that it is a negative right. It confers no immediate right to the prospective purchaser but instead it imposes an obligation on the owner that should they decide to sell, they cannot do so without giving the prospective purchaser the first chance to buy. As for an option to purchase, Perell lists three principal features: (1) exclusivity and irrevocability of the offer to sell within the time period specified in the option; (2) specification of how the contract of sale may be created by the option holder; and (3) obligation of the parties to enter into a contract of sale if the option is exercised.

In Alberta, a right of first refusal is a property interest in the land even before it has been triggered. It is a property interest because section 63(1) of the *Law of Property Act*, R.S.A. 2000, c. L-7, provides that it is an equitable interest in land. Making a right of first refusal to acquire an interest in land protects the holders of such rights in cases where the owner of the land breached their contractual promise and did not give the right holder the first opportunity to purchase but agreed to sell the land to a third party. A binding agreement to sell land to a third party used to give that third party a property right which would take priority over the mere contractual right of the holder of the right of first refusal. I say “used to” because the certainty has disappeared: see my post on [“Challenging Purchasers’ Ability to Obtain Specific Performance of Agreements for the Purchase and Sale of Land.”](#)

In 2001, Garneau Lofts agreed to sell the unsold shops in the building, and one of these shops was the Eye Care premises, Koppe’s lease space. Garneau Lofts realized they probably had to offer the Eye Care premises to Koppe in order to comply with the lease and so called him and told him he could purchase the property for \$390,000 but he needed to decide very quickly. Koppe did make the offer to purchase on behalf of Eye Care, but after three months, the deal collapsed. Koppe apparently could not raise the funds necessary for the purchase.

Koppe continued on in the leased premises but soon realized that he would lose his chance to buy the space unless he acted. He explained his problems to a friend and, shortly thereafter, CRH Capital Corporation made an offer of \$345,000 for the property, \$45,000 less than the collapsed deal and much closer to Koppe expired option price. CRH appears to have told Koppe about their offer and Koppe almost immediately offered to buy the Eye Care premises for \$342,000, referring to the right of first refusal in section 31 of the lease. However, Garneau Lofts was not interested in accepting CRH’s \$345,000 offer.

In the application in this case, heard by Mr. Justice Terrance D. Clackson, Koppe advanced a claim for ownership of the Eye Care premises and Garneau Lofts applied for vacant possession of those premises. The lease had expired but Koppe continued in the lease space.

The main issue before Mr. Justice Clackson was whether or not the section 31 right of first refusal could be exercised by Koppe. Koppe argued that section 31 was a second option to purchase and, as such, did not require an offer from a third party before Koppe could exercise it. Section 31 of the lease, after all, said that Koppe had a “ten (10) day first right of refusal . . . to purchase the demised premises provided the purchase price is set at \$180 per square foot plus G.S.T.” The price was ascertainable, as it is in an option. In the alternative, Koppe argued that his rights under section 31 arose when an offer was made, period. His rights were not dependent upon that offer being acceptable to Garneau Lofts. Part of the reason Koppe had room to make these two arguments is, of course, the phrase he added in handwriting to describe the right he wanted, the awkward sounding “first right of refusal.” Garneau Lofts, of course, argued that Koppe had a right of first refusal which was only triggered by a bona fide offer by a third party which was acceptable to the owner - the usual understanding of a right of first refusal. Garneau Lofts had an alternative argument as well, namely, that section 31 was so uncertain and vague that it was not enforceable.

Mr. Justice Clackson agreed that there was an ambiguity in section 31 about what was meant by “first right of refusal”. There was nothing in section 31 itself to help determine this, but was there anything in the other parts of the parties’ contract or the circumstances that would? Mr. Justice Clackson considered a number of facts. First, Koppe’s intent was to protect his interest in the upscale and prestigious location of the Eye Care premises. Second, the word “option” was used in section 30, but nowhere in section 31. This second point meant that Koppe’s first argument failed; if section 31 was a second option to purchase, the language would have mimicked that of section 30. Third, the parties conduct in 2001, when a third party had made an acceptable offer, indicated that Koppe and Garneau Lofts intended section 31 to operate as a means to protect Koppe from a sale to a third party. The parties both conducted themselves as if the words “first right of refusal” meant “a right of first refusal to meet a third party offer.”

However, was it a right to meet a third party offer or a right to meet a bona fide third party offer that Garneau Lofts was willing to accept? The latter would be typical of commercial rights of first refusal, but section 31 said nothing about whether the offer had to be bona fide or whether it had to be acceptable to Garneau Lofts. Neither did it say anything about how Koppe was to exercise the right. Mr. Justice Clackson decided that, because all facts pointed toward Koppe and Garneau Lofts intending the words “first right of refusal” in the commercial sense of “right of first refusal to meet a third party offer,” it followed that section 31 should be interpreted in the standard commercial way. That meant that, before Koppe would have the right to buy the Eye Care premises for \$342,000 plus G.S.T., any third party offer had to be acceptable to Garneau Lofts.

Once Mr. Justice Clackson determined that section 31 had to be triggered by a bona fide offer that the owner wanted to accept, the result followed quickly. The only third party offer was the

one for \$345,000 from CRH Capital Corporation. Mr. Justice Clackson did not have to address the question of whether this offer was a bona fide one, despite some suggestion in his summary of the facts that its bona fides might be questionable. What was undisputed was that Garneau Lofts had not been willing to accept CRH's offer and so Koppe's right of first refusal was not triggered. As a result, Koppe lost his claim to the Eye Care premises and Garneau Lofts was granted vacant possession of the space.