August 26, 2013

Is a Lease with an Option to Renew a Subdivision?

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Case commented on: *Strathcona County v. Half Moon Lake Resort Ltd*., 2013 ABQB 405

The main question in this case was whether an option to renew a lease that was added by Half Moon Lake Resort to a campsite rental agreement whose form had been consented to by Strathcona County and approved by the court in a consent order was forbidden by that order. This was the issue in three separate applications before Justice Brian R. Burrows. Half Moon Lake Resort applied for a declaration that the renewal option was not prohibited by the consent order, Strathcona County applied for a declaration that campsite leases in a form different than that approved by the consent order were invalid, and the Registrar of Land Titles sought directions about the obligations imposed on that office by the consent order. But the essence of this dispute, which began in 1999, was that Half Moon Lake Resort wanted to "sell" 216 individual campsites on an unsubdivided parcel of land — or come as close as the law allowed to selling each campsite without subdividing the land, thereby maximizing the value of each campsite and the security of tenure for each campsite "owner."

Facts

Half Moon Lake is a small, crescent-shaped body of water that is located quite close to Edmonton. The commercially-run Half Moon Lake Resort at the south end of the lake provides access to the lake. Half Moon Lake Resort is situated on one 139 acre unsubdivided parcel of land. The parcel includes 216 campsites for recreational use. The development of the campsites was approved in permits issued by Strathcona County in 1990, 1998 and 2002.

Beginning in 1999, Half Moon Lake Resort tried to use a variety of methods to transfer title-like interests in individual campsites to purchasers. The court prohibited them from using three of those methods — sale, perpetual lease, and 35 year lease — because all three amounted to unapproved subdivisions. See *Strathcona County v Half Moon Lake Resort*, 2000 ABQB 356, for Justice Ritter's decision declaring the 35 year lease method to be invalid and *Half Moon Lake Resort v Strathcona (County)*, 2001 ABCA 50, upholding the decision of Justice Ritter and the unreported decision of Justice Agrios declaring the sale and perpetual lease methods to be invalid.

In October 2001 Half Moon Lake Resort applied to the court for permission to lease an interest in the campsites and that application was settled with a consent order on November 16, 2001. That consent order allowed Half Moon Lake Resort to use the form of campsite rental agreement that was attached to the order. A January 2002 "Amended and Restated Consent Order" replaced the first one, with the same form of campsite rental agreement attached, and it was the January 2002 consent order which was before the court.

The form of the campsite rental agreement that was approved provided that the term of the agreement "shall be for a period of Thirty-Five (35) years, more or less, expiring on August 31, 2037." (There was a dispute among the parties about when the term actually expired: 35 years after it started or on August 31, 2037 regardless of how many years had passed since the agreement was signed. The court held (paras 46-48) that the term ended on August 31 of the 35th year after the year the lease was granted.) All of the consideration for the lease was payable on execution of the agreement, i.e., a one-time, up-front payment.

Of the 216 campsite areas available for rent, 72 are currently subject to campsite rental agreements. Of these 72 agreements, 32 are in the form approved in the consent order. Of the remaining 39 campsite rental agreements, 27 involve Armac Investments Ltd. as the lessee and Armac's management is the same as Half Moon Lake Resort's management. The other twelve campsite lease agreements with renewal options have individuals as lessees. The 39 agreements contain a renewal option in one of the two following forms:

> Providing that this lease is in good standing, the lessee shall have the option to renew this lease for two additional further periods of 35 years upon giving written notice one year before the expiration of the term of this lease and the second term. The lease rate shall be established by the Owner.
>
> or
>
> Provided that this lease is in good standing, the Lessee shall have the option to renew this lease for two (2) additional further periods of 35 years upon giving written notice one year before the expiration of the term of this lease and the second term. The lease rate shall be by mutual agreement, failing which it is to be determined by arbitration under the *Arbitration Act*, RSA 2000, c A-43.

In its application, Half Moon Lake Resort sought the court's approval of a differently worded renewal option:

> *Option/Right of First Refusal to Re-Rent*
>
> Provided that the Renter has strictly and continuously performed all of the Renter's obligations under this Agreement and any renewal thereof, the Renter shall have the option/right of first refusal to re-rent the Campsite for two (2) additional further periods of Thirty-Five (35) years upon giving written notice to the Owner prior to the expiration of the term of this Agreement and the second term. Any such re-rent of the Campsite for an additional term shall be on the same terms and conditions as this Agreement, save and except that the Rental Rate payable for the renewal term(s) shall be negotiated between the Owner and the Renter based upon fair market rental value, and failing agreement in the matter shall be resolved in accordance with the *Arbitration Act*, provided however that the Rental Rate payable by the Renter for any renewal term shall not in any event be greater than $_____. This Option/Right of First Refusal to Re-Rent is contractual only and is not intended to bind or create an interest in land.

With an initial 35 year term, and two options to renew for two additional thirty-five year terms, the leasehold estates created by the campsite rental agreements containing one of these provisions could last 105 years. It was the possibility of this 105 year duration that was the problem with the two implemented renewal options and the proposed one as well.

Law

Subdivision regulation, like zoning, is an important regulatory device of city planning. Section 652(1) of the *Municipal Government Act*, RSA 2000, c M-26 is the key provision:

> 652(1) A Registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing a parcel of land unless the subdivision has been approved by a subdivision authority.

Subdivision is "the division of a parcel of land by an instrument", such as a transfer or subdivision plan: *Municipal Government Act*, section 616(ee). The need for subdivision approval is usually triggered any time land is divided into two or more lots, units, plots, or interests for the purpose of offer, sale, lease, or development.

Section 94(1) of the *Land Titles Act*, RSA 2000, c L-4, makes it clear that a sale of unsubdivided parcels of land is illegal:

> 94(1) No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until a plan creating the lots has been registered.
> (2) A person who contravenes subsection (1) is guilty of an offence.

Decision and Comments

There was no question that Half Moon Lake Resort was entitled to enter into long term campsite leases that gave lessees rights approaching as closely as possible those of a fee simple title holder without effecting an unapproved subdivision of their 139 acre parcel of land. All parties had agreed that the 35 year lease attached to the consent order did not cross that line. But Strathcona County argued that the 39 campsite rental agreements with the options to renew did cross that line, i.e., that an instrument which might result in making the term of the lease 105 years would effect a subdivision.

Half Moon Lake Resort's first step in their first argument was that the proposed renewal option provision was an *in personam* contractual right and not an interest in land, i.e., not a property right. The second step was their submission that only interests in land created by the campsite rental agreement were relevant to deciding if the lease effected a subdivision. Presumably part of that argument was based on the last sentence in their proposed renewal clause — "This Option/Right of First Refusal to Re-Rent is contractual only and is not intended to bind or create an interest in land" — and a contract or commercial lawyer's faith in the magic power of words to create their own reality in law: if the parties do not intend to create property rights, then abracadabra, they do not. However, whether or not an interest in land is created is a question of law, not a question of interpretation. (And I am ignoring the "Right of First Refusal to Re-Rent" wording, as did the court, because the proposed provision is clearly an option. Lessees in good standing need only give notice of their exercise of their option before the end of the term; there is no requirement for an offer to lease by a third party as there would be in a right of first refusal. A right of first refusal is, at common law, a personal covenant that does not run with the land,

although in Alberta the legislature has made a right of first refusal to acquire an interest in land an equitable interest in land: *Law of Property Act*, RSA 2000, c L-7, section 63(1)(a).)

Justice Burrows did not deal with this first argument. Instead, he rejected (at para 52) Half Moon Lake Resort's argument that characteristics of the transaction other than its character as a conveyance of an interest in land were not relevant. He could have dealt with the property-based argument. Before the Supreme Court of Canada's problematic decision in *Semelhago v. Paramadevan*, [1996] 2 SCR 415, there was no question that an option to renew a leasehold estate was itself a separate interest in land. But because the majority in *Semehago* (at para 20) saw land as "real estate" and characterized it as "mass produced [in] much in the same way as other consumer products," it inadvertently introduced a great deal of uncertainty into property law and one can no longer say that every option to renew a leasehold estate is an interest in land; now one has to prove entitlement to specific performance. (See the Alberta Law Reform Institute's Final Report No. 97 on Contracts for the Sale and Purchase of Land: Purchaser's Remedies for more on *Semelhago* and its particularly litigation-increasing effects in a land titles system).

However, Justice Burrows did not go down the property law road. Having decided that he could look at more than the interests in land created in the transaction, he focused on the duration of the term. Because of the wording of section 652(1) of the *Municipal Government Act*, regardless of what parties may call their transaction and documents, if their effect is to subdivide a parcel of land, then subdivision approval from the relevant municipal authority is required. Justice Burrows referred (at paras 53-55) to a number of cases which have said it does not matter how the parties dress up their transaction, the question is whether it "may have the effect of subdividing the parcel."

Justice Burrows therefore determined that the proposed renewal option would create a lease that was indistinguishable from a 105 year lease where the rent was payable every 35 years (at para 51). He relied on Justice Ritter, in *Strathcona County v Half Moon Lake Resort*, 2000 ABQB 356, and the observation that, for natural persons, a very lengthy lease term is practically the same as a perpetual lease. Thus, Justice Burrows concluded (at para 51) that "if the renewal option provision were permitted, the lease would effectively separate the campsite area leased from the parcel of land for which title was issued." It would therefore effect a subdivision.

Justice Burrows directed that Half Moon Lake Resort omit option to renew provisions in its future campsite rental agreements. That resolved Half Moon Lake Resort's application.

The applications of Strathcona County and the Registrar of Land Titles were concerned with the 39 campsite lease agreements that already contained renewal options. The County wanted a declaration that the inclusion of the options violated the consent order and constituted contempt of court on the part of Half Moon Lake Resort. It also wanted a declaration that the Registrar's registration of the 39 agreements against Half Moon Lake Resort's title was a breach of the consent order and contempt of court on the part of the Registrar.

Half Moon Lake Resort again argued that the renewal option was contractual only, and not an interest in land, and thus registration of agreements with the options did not breach the consent order which only prohibited them from selling or leasing "any other interest in the Lands" other than the lease in the form attached to the order. Once again Justice Burrows did not deal with the question of whether the options to renew were interests in land, this time on the basis that even if they were it would not be determinative of the issue. Instead he took a close look at the language

of the consent order and noted (at para 61) that the term of art that refers to an interest which runs with the land is usually "interest in land," not "interest in the Lands." The latter phrase, the one used in the consent order, was a broader, more encompassing term, a term that included anything that effected a subdivision.

Justice Burrows therefore found the renewal option provisions in the 39 campsite rental agreements to be invalid. Because those agreements also included a provision making every provision severable from the rest of the agreement, which would remain valid, the rest of the provisions in the campsite rental agreements could stand.

On the contempt application against Half Moon Lake Resort, Justice Burrows fined the company $1,000. He denied the County the solicitor-client costs it sought as a penalty because the County had overstated its case, alleging more breaches of the consent order than the court found to exist.

As for the County's application with respect to the Registrar, the Registrar argued that the obligations imposed on him by the following terms of the consent order were ambiguous:

> 5. The Registrar of Titles shall:
> (a) except as follows not accept for registration any instrument that has the effect of transferring any interest of the Registered Owner respecting the Lands without a prior court order or written consent of the County authorizing the same. . . .

Justice Burrows concluded (at para 73) there were two possible ways to understand these instructions. He interpreted the instructions to require the Registrar to decide whether an instrument submitted for registration had the effect of transferring an interest of Half Moon Lake Resort in the lands other than the interest transferred by the approved form. But he conceded it was also possible to interpret the instructions to mean that that the Registrar was required to decide whether an interest not in the approved form was an interest in land. The Registrar could have decided the option to renew was not an interest in land (but the basis on which this was a plausible conclusion was not discussed). Thus, the Registrar was not in contempt.

Justice Burrows did not stop there, however. Not only was the Registrar not in contempt in this case, but Justice Burrows was "doubtful … that the Registrar should ever be held in contempt when he makes an error in carrying out instructions contained in a court order like the consent order" (at para 74). He noted that many *Land Titles Act*, RSA 2000, c L-4 provisions require the Registrar to exercise his judgment, that there is no suggestion in the *Act* that if he makes an error in exercising his judgment that he violates the *Act*, and that there is a process in section 184 of the *Act* for referring issues to the Court if someone thinks the Registrar has made an error. Justice Burrows indicated (at para 75) that the County should have availed itself of that process in this case and foregone the "poorly advised" contempt application which "served no purpose." He ordered that the Registrar's costs be paid by the County.

As for the third application before him, the Registrar's application, Justice Burrows held the Registrar no longer needed directions with respect to the 39 agreements. He had declared the option renewal provisions invalid and severed them from the campsite rental agreements. As for future campsite rental agreements, Justice Burrows thought it appropriate (at paras 79-80) for the Registrar to assess whether any such agreement was in the form approved by the court, but his obligations should be simplified and the wording of the order clarified. Justice Burrows therefore made the form of the new consent order part of his judgment (at para 81) and invited counsel to improve on his wordsmithing.

Concluding Remark

I have noted in three separate places that Justice Burrows avoided dealing with whether or not the option to renew provision in the campsite rental agreements was an interest in land. His reasons for doing so, in each instance, were good ones. However, as a property law professor, I cannot help but regret the lack of property law in much current case law. This case is a minor instance. The Supreme Court of Canada's decisions on Aboriginal title are much more important examples, with the meaning of the Crown's "radical title" and other concepts left under-specified and unanalyzed. Other Commonwealth jurisdictions — Australia for example — do not avoid tough property law questions. And as a result they have a more vibrant property law scholarship and livelier public debates.