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When is a Lease an Improper Subdivision of Land?

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Case Commented On: *Paskal Holdings Inc v Loedeman*, 2017 ABCA 29 (CanLII)

An instrument or a caveat related to an instrument "that has the effect or may have the effect of subdividing a parcel of land" cannot be registered at a Land Titles Office unless a subdivision has been approved by the appropriate planning authority, according to subsections 652(1) and (5) of the *Municipal Government Act*, RSA 2000, c M-26. Section 94(1) of the *Land Titles Act*, RSA 2000, c L-4 provides that "[n]o 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." Both of these prohibitions have much broader scope than might be apparent on first reading. Neither is restricted to sales of fee simple title. In fact, over the years the most difficult applications of this prohibition have involved leases of portions of parcels of land, such as leases of farmsteads on quarter sections, stand-alone stores in mall developments, and RV or mobile home lots. The most recent decision of the Alberta Court of Appeal in this area — *Paskal Holdings Inc v Loedeman* — might settle some issues.

Facts

In 2007, Ray Grisnich Farms Ltd bought a quarter section of land from Aalt and Aartje Loedeman for a substantially reduced price because the company leased "the house and buildings only located on 10 acres more or less" back to the couple, who were in their 60s. The Loedemans filed a caveat against the quarter section, claiming an interest under the lease.

The lease gave the Loedemans what the Court of Appeal described, in its effect, as "an inalienable life interest" (at para 5). The recitals to the lease provided:

- Lessor has purchased the property from the Lessee and desires to allow the Lessee to remain on the property for their lifetime and shall lease for their benefit only.
- Lessor is desirous of leasing the house and buildings only located on 10 acres more of less.

The lease went on to create a term that ran from March 1, 2007 to March 1, 2057 and then provided:

> 1) … It is the intent of the parties that the Lessee shall be entitled to live on the property for their lifetimes. If the Lessee leaves the property, this lease shall terminate automatically. (at para 6)

The annual rent was only one dollar. In addition to other more typical covenants made by the Loedemans, they also promised not to assign, transfer or sublet the leased property.

Paskal Holdings acquired the quarter section in 2014 and also paid substantially less than the market value because of the lease. When differences arose between the Loedemans and the new owner, Paskal Holdings applied to have the lease and the caveat declared invalid for three reasons. All three arguments were rejected by the Chambers Judge, Justice R. A. Jerke. The three arguments became the three grounds of appeal and all three were dismissed by the Court of Appeal (Justices Patricia Rowbotham, Brian O'Farrell, and Frederica Schutz).

Grounds of Appeal

First, Paskal Holdings argued that the lease was in effect a subdivision and the Loedemans had not obtained the required subdivision approval. This ground of appeal is the focus of this post.

Second, Paskal Holdings argued that the description of the leased land — "the house and buildings only located on 10 acres more or less" — was not "sufficient to identify the land", as required by section 95(2) of the *Land Titles Act*, RSA 2000, c L-4. With respect to the second argument, both the Chambers Judge and the Court of Appeal determined that the description was sufficient for the purposes of the *Land Titles Act* because the description was valid under the common law: the land was generally identifiable and the element of "house and buildings" and that of "10 acres more or less" were not conflicting or patently ambiguous, even if clarification of the specific boundaries would require extrinsic evidence (paras 33-37). I will not deal any with further with this issue, except to note that this is the first time that section 95(2) has been judicially considered (at para 30).

Third, Paskal Holdings argued that the caveat misstated the Loedemans' interest because the caveat claimed an interest in the entire quarter section, and not just the leased ten acres. The Court of Appeal agreed that the caveat appeared to claim the entire quarter section but blamed it on section 130 of the *Land Titles Ac*t, which requires that caveats be in the prescribed form and the prescribed form itself, Form 36. That form requires that the description of the land in the caveat match the description of the land in the certificate of title the caveat would be filed against (at para 41). Because there had been no subdivision, the caveat had to describe the entire quarter section, no matter how much of the quarter section was claimed.

The "lease as an improper subdivision" Ground of Appeal

With respect to the first argument, both the chambers judge and the Court of Appeal concluded that the lease was not an improper subdivision. According to the Court of Appeal, the decision of the chambers judge was reasonable because he considered all of the relevant factors and relied in particular on two: first, that the lease's 50-year term was subject to early termination if the Loedemans left the land and, second, that the Loedemans could not alienate the land and therefore lacked a major incident of ownership (at para 24).

The Court of Appeal first noted three statutory provisions, found in two different types of legislation. The first was section 94(1) of the *Land Titles Act*:

> 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. (emphasis added)

The Court of Appeal does not say why a provision about selling lots is relevant in this case. However, in *Strathcona (County) v Half Moon Lake Resort Ltd*., 2001 ABCA 50 (CanLII),

section 94(1) was applied to contracts conveying leased or exclusive use portions of parcels of land because courts look to the substance of the transaction and ask whether the interests conveyed had "the hallmarks of a fee simple interest" (at para 27).

The second and third provisions are found in planning legislation, now located in Part 17 of the *Municipal Government Act*, RSA 2000, c M-26. Their applicability to the facts in *Paskal Holdings* is more apparent on their face. Section 562(1) and (5) provide:

> 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.
> . . .
> (5) A Registrar may not accept a caveat for registration that relates to an instrument that has the effect or may have the effect of subdividing a parcel of land unless
> (a) subdivision approval is not required in respect of that subdivision pursuant to subsection (2), or
> (b) subdivision approval has been granted in respect of that subdivision. (emphasis added)

In reaching their decision, the Court of Appeal reviewed three of the Alberta cases that had previously considered these statutory provisions or their predecessors.

In *Otan Developments Ltd v Kuropatha*, 1978 ALTASCAD 259 (CanLII), the purchaser wanted to buy 3.9 acres of a larger 137.7 acre parcel of land, of which only 2.9 acres had been subdivided. Attempts to obtain subdivision approval for the one acre were unsuccessful. As a result, title to the 2.9 acre parcel was conveyed to the purchaser in a sale that included payment for the one acre parcel and the one acre was leased for a 49-year term at an annual rent of one dollar. The purchaser filed a caveat against the entire 137.7 acre parcel. In the lease, the seller promised to obtain subdivision approval for the one acre parcel, if possible, and was granted a limited right to enter upon the one acre without notice to carry out surveying. Subsequently, Otan Developments acquired the 137.7 acre parcel, subject to the purchaser's caveat, and then applied for an order to remove the caveat. Justice Morrow, writing for the majority in the Court of Appeal, upheld the chambers judge's order to remove the caveat.

Paskal Holdings relied on the decision of Justice Morrow for three points (at para 18). First, Justice Morrow had concluded that the lease of a portion of a larger parcel was an attempt to dispose of the one acre if and when subdivision approval was obtained. Second, allowing the caveat to remain on title would defeat the purpose of the planning legislation then in effect. Third, in *obiter*, Justice Morrow noted that in some circumstances a portion of a parcel could be leased without thwarting the purposes of the planning legislation. The Court of Appeal did not note the specific circumstances that Justice Morrow set out, which have been the subject of some controversy.

Strathcona (County) v Half Moon Lake Resort Ltd, 2001 ABCA 50 (CanLII) was an appeal from three Court of Queen's Bench decisions, all dealing with the same large campground and dude ranch resort on 139 acres abutting Half Moon Lake. The focus of *Paskal Holding*s was on the third appeal, which was an appeal from the decision of Justice Ritter in *Strathcona County v Half Moon Lake Resort Limited*, 2000 ABQB 356 (CanLII). It concerned a contract where the resort owner had leased 50 of 225 sites and proposed to lease 179 more. Each lease had a 35-year term and rent for the entire term was prepaid in a lump sum. Lessees paid their share of the property

taxes for the entire 139 acres. A tenants' association had the power to regulate the use of each leased site and the common areas and to consent to proposed improvements on the leased sites. Justice Ritter concluded (at para 31) that the leases were in effect a sale without subdivision approval and therefore contrary to section 95(1) of the *Land Titles Act* and void for illegality.

Paskal Holdings (at para 19) summarized Justice Ritter's list of factors to consider when deciding whether or not a lease is, in effect, a sale:

- the length of the term
- the nature of the property
- whether the property is fully developed
- whether existing or potential development or redevelopment is authorized development and, if not, who is responsible for dealing with the development authority
- whether the lease impacts or potentially impacts on or affects the purposes of subdivision in more than a transitory way
- the nature of the lessee
- any history which points to what might be a colourable transaction
- whether the lease includes an option to purchase
- when rent is payable
- the cost of ownership

Justice Ritter had held that neither the length of the lease nor the one-time lump sum payment of rent was determinative on their own. Instead, according to *Paskal Holdings*, the "critical point was the degree of control the property owner retained over the lands." There was "virtually no control" because many of the rights normally retained by a lessor had been delegated to a tenants' association (at para 20). Oddly enough, "degree of control" or incidents of ownership is not one of the list of factors to be considered.

The last precedent that *Paskal Holdings* relied upon was the 1982 Court of Queen's Bench decision of Justice Miller in *Knowlton v Alberta (Registrar of Land Titles for North Alberta Land Registration District)*, 1982 CanLII 1118 (AB QB). *Knowlton* featured a lease with a long term and one prepaid lump sum rent payment, as did *Half Moon Lake Resort*, but the lease in *Knowlton* was held to be valid.

Knowlton and two others were the registered owners of a parcel of land for which the previous registered owner had obtained a development permit to construct a shopping centre from the City of Edmonton. That permit authorized the building of three separate structures. The new owners entered into a lease with McDonalds' Restaurants of Canada for a portion of the lot where the general commercial building was to be located. The term of the lease was 40 years with an option to renew for a further 10 years. The rent under the first 40-year term of the lease — $535,000 — was payable in one lump sum at the beginning of the term. McDonalds' attempt to register a caveat was rejected on the basis that the lease might have the effect of subdividing a parcel of land without subdivision approval. The owners applied to the court for an order declaring that the lease did not have that effect and directing the Registrar to accept the caveat for registration.

Paskal Holdings again referenced the *obiter* comment by Justice Morrow in *Otan Developments*, summarizing it as follows: "not every lease of less than a registered parcel is unregisterable" (at para 21). *Paskal Holdings* followed this with a reference to a statement it attributed to Justice

Miller (but which was a quote from two passages in Frederick A. Laux, *The Planning Act (Alberta)* (1979) at 82 and 83-84 where Professor Laux put forward his expert opinion on the conflicting views in the case law), saying:

> He stated that there would be cases when a lease of land (such as 'the lease of a portion of farmland, of a shopping centre, of an office building, or of an apartment block') would not constitute a subdivision and would not detract from the objects of the *Planning Act*: para 18. (at para 21).

After quoting Laux, Justice Miller summarized the passage by stating that "a lease of a portion of a shopping centre may, but not must, be seen as unregisterable" (at para 19). And the last version of Professor Laux's text — *Planning Law and Practice in Alberta*, 3rd ed (Edmonton: Juriliber, 2013) — does not contain the opinions quoted by Justice Miller in 1982 and goes no further than saying that the case law is "*not necessarily* to be construed as meaning that all leases of part of a parcel [have] the effect of subdividing the parcel" (at 11-16, emphasis added).

Turning to the facts of *Knowlton*, *Paskal Holdings* observed (at para 21) that Justice Miller did remark on the lengthy term of the lease — 40 years plus an option to renew for a further 10 years — but attributed its length to a bona fide commercial reason, namely recouping the investment the lessee was required to make in constructing a restaurant. Justice Miller held that the length of the lease was not determinative and neither was the lump sum payment of rent which, he conceded, did make the transaction resemble an outright purchase. The determinative factors were what Justice Miller called (at paras 23-24) "the rights and obligations imposed upon the parties" by the lease: the lessee could not assign or sublet without the lessor's approval, the lessor retained the right to put its own signs on the leased premises and to enter and show them, and the lease required the adjacent parking areas maintained by McDonalds be available to patrons of other mall tenants. These facts illustrated that the lessee did not have complete control (at paras 25-26). In addition, the absence of any intent by the parties to circumvent planning legislation (evidenced by the subdivision approval granted for the whole shopping centre parcel and the related development permit for free-standing buildings) and the lack of previous unsuccessful attempts to subdivide the land were noted by both Justice Miller (*Knowlton*, at para 23) and by the Court in *Paskal Holdings* (at para 21).

The general principle that *Paskal Holdings* took from its review of those three cases was that "each transaction must be closely examined to determine its true character" (at para 22). In other words, whether a lease is in effect a subdivision or a sale is a question of substance, not form, demanding a case-by-case approach.

In holding that the chambers judge's decision was reasonable, *Paskal Holdings* noted that he had considered all of the factors that suggested the Loedemans' lease was really a sale: the lengthy term of the lease (50 years), the lack of early termination provisions in the event of default by the Loedemans, the nominal rent and the reduced sale price of the land (at para 23). The chambers judge, however, found the provision of early termination on leaving the land and the absence of a power to alienate the land to be the most significant factors (at para 24).

Paskal Holdings held that the Loedemans' lease was more like the one in *Knowlton*, adding that many of the factors present in *Otan Developments* and *Half Moon Lake Resort* were missing here. Specifically, in this case there was a lack of "colourable attempts to circumvent subdivision approval," a factor that played a role in both of those earlier cases (at para 25). Finally, *Paskal*

Holdings considered that there was no evidence of any impact on planning goals, tying its conclusion to the purpose of the *Land Titles Act* and the *Municipal Government Act* (at para 26). By adding these two additional reasons, it appears that the Court of Appeal not only thought that the chambers judge made no palpable and overriding error, but also that his decision was correct.

There are two reasons why *Paskal Holdings'* value as a precedent might be doubtful. The first is that, although not itemized in *Paskal Holdings* in the list of factors to be considered when deciding whether or not a lease is, in effect, a sale, the presence or absence of the incidents of fee simple ownership has become increasingly significant in the last two Court of Appeal decisions: *Half Moon Lake Resort* and *Paskal Holdings*. Its major role is, unfortunately, obscured by its absence from that list (at para 19) — unfortunate because lists are prominent and easy things to seize upon when looking for summaries of the law. The second is the unusual facts of this case and, specifically, the inalienable nature of the interest and its resemblance to a life estate. Both make *Paskal Holdings* easily distinguishable.

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