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2008 CAPL MERIT AWARDS



2008 CAPL Merit Awards

CAPL Honours Those Who Have
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The Lazy Man's Option or Future Dating the 91 CAPL Lease Form

Bad, Bad, Bad

2008 CAPL Conference

80s Fashion:
Don'tchya Just Love It?

Lazy Man's Option

Future Dating The 91 CAPL Lease Form – Bad, Bad, Bad

AS I SIT HERE ON OUR HOUSE BOAT ON THE SHUSWAP, HAVING YET ANOTHER COLD BEVERAGE AND DOING MY BEST TO IGNORE MY KIDS, my mind drifts to thinking about potential problems with future dating freehold leases. I mention this thought to my lovely wife and her eyes glaze over and she remarks, yet again, on the theme of how utterly boring my job must be. So, as usual, I smile, ignore my wife, and turn my mind to the question of whether a landman should care about the future dating of freehold leases. I really think so. Here's why.

Option Agreements (Good)

In the old days, when someone wanted to acquire a future freehold mineral lease on lands that were subject to a pre-existing lease, they would acquire an option to lease from the fee simple mineral owner. Options work because they are a present grant of the option to acquire a future interest in the lands. Because an option to acquire a *profit à prendre* is specifically enforceable, such options are vested interests and are caveatable. Option agreements have even been blessed by the Supreme Court of Canada as enforceable in both contract law and under the land titles system. Simple, straight forward. All is good.

Unfortunately, some broker or landman must have decided that option agreements were just too much work. You need to sign the option, pay option consideration, file an option caveat, then exercise your option by letter to the lessor, sign and date the attached lease and file another caveat. Yuck. Seems very hard. Why not just sign a lease and make it effective in the future?

Double Dating the 91 CAPL Lease Form (Really Bad)

The worst attempt at future dating a 91 CAPL lease was the practise of amending the form by adding the words "to be effective on ____" after the date at the top of the lease. The lease thus reads:

"This indenture made on the 5th day of August 2008, to be effective on the 1st day of November 2008"

This form of double dating may void the lease in its entirety as it creates a potentially irresolvable ambiguity within the lease terminology. This is because the 91 CAPL form uses various words to describe the date of the lease, including:

- (a) "commencing on the date hereof" when referring to the primary term;
- (b) "the date first written above" when referring to the anniversary date; and
- (c) "the date of this lease" when referring to the offset well trigger date.

When you have only one date, there is no problem. When you have two dates you have a big problem.

Most of the terms used to describe the lease date imply the date of execution. This should be expected since the form is set up to have only the execution date at the top. When you add a second date (the new effective date) without any other modifications to the form, you have serious interpretation problems as the form never contemplated this change. In such a case a court may simply find the document void for ambiguity and declare the lease a nullity.

At the very least you run the risk of the primary term being found by a court to expire on the execution date and not the effective date. In our example this would occur almost three months sooner than expected. Mighty big problem if you tend to spud your wells right before the expiry of your freehold leases.



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Courts have dealt with similar problems in commercial leases and have decided to simply make the leases unenforceable during the pre-effective date period, but thereafter valid.

Future Dating the 91 CAPL Lease Form (Almost as Bad)

A somewhat less awful practise is to amend the date reference in the 91 CAPL lease to read "This indenture made effective on the 1st day of November 2008". Somewhat better but still potential ambiguity. The problem will arise where the affidavit of execution of the lessor clearly indicates the lease was signed well before the effective date. In such a case we are still left to wonder what is "the date hereof" under the lease.

Effective Date Under the 99 CAPL Lease Form

The ambiguity issue is resolved under the 99 CAPL lease which adds a defined "effective date" and amends the date references in the form to always refer to the effective date. So, contractual ambiguity as an issue is eliminated. However we are still left with the legal issue of the granting of a present demise.

Present Demise

In my view, a lease that is effective on a future date does not grant a present demise on the date of execution, only on the effective date. As a lessee holding such a document you really cannot argue otherwise. If you argue that the lease is a valid grant on the date of execution, then the lease is likely invalid (at least until the effective date) as a present demise could not be granted at that point in time due to the existence of the prior lease granting exclusive possession of the lands. This means that until the effective date of the lease you have no enforceable agreement with the lessor and certainly no interest in land. You are at risk of the lessor deciding that he/she is unhappy with your lease terms and entering into an option to lease with a third party. Such an option agreement would be a present grant of a future right to lease. As the option is a present vesting, it would be the earliest enforceable agreement with the lessor.

An even worse possibility is that a court might find that the execution date of the lease is the date of the attempt grant of a present demise of the lands. As the lease was granted during the term of a pre-existing lease of exclusive possession, the lessor is unable to grant a present demise. It may be that such an improper attempt to grant a present demise makes the lease void. For me, this seems a somewhat harsh result. Courts have dealt with similar problems in commercial leases and have decided to simply make the leases unenforceable during the pre-effective date period, but thereafter valid. For me the real issue is why would anyone take the risk?

Caveating – Vested Interest In Land

Irrespective of the issue of the contractual validity of effective date leases, a significant and unavoidable land titles problem arises. The issue is that under the Land Titles Act a caveat is only valid with respect to existing rights. You cannot register a caveat prior to the date of the underlying agreement. A caveat can only protect the interest (if any) of the caveator at the time the caveat is registered. A caveat cannot protect interests subsequently obtained by the caveator.

So again as per our example, the lease is actually signed August 5, 2008 but effective November 1, 2008. You file your caveat on August 10th. Your caveat actually refers to the interest being protected as a lease "to be effective November 1, 2008". In my view this is a textbook example of an invalid caveat. The risk you therefore face is an unscrupulous land owner getting a better offer, signing a second lease and having the second lessee file a caveat and taking proceedings to lapse your caveat. Under the Torrens system (land titles law) once your bad caveat has lapsed and removed from title, the second lessee's caveat has priority as against the world. As between third parties (you and the other lessee) land titles law always beats contract law. This is true even where the top lease is dated subsequent to the effective date of your lease. Don't start talking about suing the land owner for breach of contract. Don't want to hear it, never happens (although you may conceivably receive damages).

Your only option is to caveat (or caveat a second time) after the effective date of the lease (i.e. after November 1, 2008). If there are no adverse caveats in the interim, then your post November 1, 2008 caveat will at least be valid on its face (although the underlying lease may be invalid as discussed above). So time to dig out all your effective date leases and re-caveat same. Just do it.

Best Practice

The moral of this article is simple: stop using effective date leases for future leasing, and in particular stop amending the 91 CAPL form to try to make it an effective date lease. If you want to top lease lands, do so by way of option. So long as you properly administer your option file the result will be a valid and subsisting lease.

It never ceases to amaze me how industry can create potential problems in freehold leasing right from the very first line on the top of the CAPL form. ☹

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