WHAT IS A LIFE LEASE?

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You are a third year associate lawyer. You have received a memo from a senior partner asking you to consider the following fact situation:

> A client has dropped off something called a *life lease occupancy agreement.* Under the agreement the client's mother has contracted with the owner and developer of a senior's residential building for the right to occupy a unit in the building for her lifetime. Occupancy in the building is restricted to those 65 years of age or older. The consideration for occupancy is a lump sum of money that is a little less than the purchase price of a comparable condominium, payable upon initial occupancy, and a monthly payment that is equivalent to the pro rata share of the cost to maintain the common areas of the building and to provide for an appropriate capital replacement reserve. Under the agreement she may transfer her right to occupy the unit before her death, or upon her death, and she shall relinquish the right to occupy upon her default under the contract. Her right to transfer is subject to a contracted right of first refusal in favour of the developer to access names off a waiting list the developer may maintain. Upon a transfer or upon default, she shall be entitled to receive the fair market value of the right to occupy, which may or may not be equivalent to the lump sum payment made upon initial occupancy, depending on market conditions. The owner of the land is bound by the

life lease occupancy agreement to enter into a similar agreement with any transferee of the right to occupy.

You are asked to outline the nature of the legal relationship between the owner of the land and the client. You immediately call your spouse, cancel weekend plans, thumb through the 40 page life lease occupancy agreement, dust off your first year law school real property text, and dig into the memo.

You ask yourself, "*What* is a life lease?" You do some preliminary web surfing, and you discover that there are as many forms of life lease as Carter used to have pills. Some are purposely structured as leases; some are not. You find that in Manitoba they are structured as leases, and governed by legislation expressly describing them as such. In Ontario, and other Canadian jurisdictions, there is no legislation, although you discover that it is under consideration.

Still, *what* is "life lease"?

Well, *What's* in a name? You review the life lease occupancy agreement and determine that there is a strong argument that it is not a "*lease*". Further, you determine that the life lease occupancy agreement does not necessarily grant the right to occupy for "*life*". You find other life lease agreements and discover that some grant rights for life, and others supplement the right to occupy for life by permitting the devise of the right to occupy through a will to descendents. Some have restricted the right to occupy to a specific period of years in reaction to a specific legislative interpretation about land transfer tax.

You throw your hands up in the air, and report to the partner that this is going to take quite a bit more time than you or he originally anticipated.

Throughout the 14 years I have been involved in life lease development – initially in Windsor, working with Gary Zock, and since 1995, with Christine Thomas as well, (they being the founders and principals of Life Lease Associates of Canada) I have participated with Gary and Christine in several workshops. My task has been to explain what they have called the "Legal Side of Life Lease" – and the attendees have consisted primarily of non-profit or charitable group representatives who were considering whether they would sponsor a life lease development, in furtherance of the objects and missions of their respective organizations.

My first attempts to outline the concept were rejected by Gary and Christine as too confusing – too hard for the layperson to follow. So, I attempted to come up with an analogy that was understandable. I explained that unlike the *Condominium Act*, governing condominium development and the relationship between the developer, the condominium corporation and the unit owner, or the *Tenant Protection Act* (or its predecessor), governing the residential landlord tenant relationship, there was no *Life Lease Act*. Consequently, said I, in order to determine the place of life lease in the law, one had to resort to common law principles of real estate and contract law in addition to over fifteen provincial or federal Acts or regulations that affect the life lease relationship.

I said that lawyers, requiring some point of departure in figuring out what a life lease was in law, refer firstly to that with which they are most familiar - legislation. Secondly, we resort to traditional common law real property concepts. In so doing, I confessed, we sometimes struggle to force the square peg of a particular fact situation into the round hole of apparently relevant legislation and traditional common law concepts. Is a life lease a lease? Is it a life estate? Is it a license? Does it offend the

Planning Act, the *Tenant Protection Act*, the *Securities Act*, the *Human Rights Code*, the *Condominium Act*, the *Co-operative Corporations Act*, the *Real Estate and Business Brokers Act*, or even the seldom adverted-to *Residential Complex Sales Representation Act*?

I found it easiest to use the analogy of a lease. I cited Anger and Honsberger's description of a lease,[1] and confirmed for the attendees that there are typically two parties to the relationship – the "landlord", and the "tenant". The landlord expressly or impliedly agrees to grant the tenant the right to occupy land in respect of which the landlord is possessed of an interest for a period of time, (the "term"), for "consideration", or, as commonly called, rent.[2]

"Landlord", *"tenant"*, *"agreement"*, *"consideration"* and *"term"*. I then described a life lease in those same terms. Take another look at the associate's task. The fact situation describes an *agreement* (contract), between a *landlord* (the developer), and a *tenant* (the client's mother) to occupy a unit in the developer's building for a lump sum initial payment and a monthly fee (*consideration*). The issue, I explained, was the *"term"*. Is the term in a life lease definite, or at least capable of being made sufficiently definite by the landlord or the tenant to qualify it as a lease?

Let this paper serve as my testimony that not one individual present at any of the workshops professed that the date of his/her death was definite!

Armed with such evidence, I have come to the realization that a life lease is probably not a lease. So, if a life lease is not a lease, what is it? Is it a mere licence, a contractual right to occupy with no accompanying right or interest in land? To that

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1 Anger and Honsberger, *Law of Real Property*, 2nd ed. by A.H. Oosterhoft and W.B. Rayner, Vol. 1 (Aurora, Canada Law Book Inc., 1985), p. 225.

2 Ibid. p. 225.

question, I have responded that while it may not be a lease (which since the 15th century has been considered an interest in land) a life lease grants to the occupier no less interest in land.

Other papers presented in the seminar materials will identify five models of life lease. I will not repeat them here. They are distinguishable, one from the other, based on the redemption price paid to the life lease occupier upon termination of the life lease relationship. The model most prevalent in Ontario, described above in the senior partner's memo, and the model I will refer to in the balance of this paper, is the fair market value model.

Under the fair market value model, the life lease occupier receives the fair market value of his or her interest (however it may be characterized in law, and regardless of what it is called) at the time of the termination of the agreement under which he or she occupies, whether that event occurs upon his or her death, default, or upon his or her voluntary disposition of the interest to a third party while he or she is alive.

I have come to prefer the view that a fair market value life lease is more akin life estate than lease. While the life lease occupier does not acquire a life estate in the same sense that a life tenant acquires a freehold estate that expires upon his or her death, and is therefore uninheritable, it may be said that he or she acquires something more. The life lease occupier is permitted, by contract, to transfer the interest to another through his or her will, making the life lease an inheritable estate.

Consider Justice Blair's analysis of lease versus life estate in *Peterson v. Charboneau*.[3] The case involved the applicability of rent control to a *form* of lease that Mrs. Charboneau utilized when she sold the residential building in which she lived in order to document the reservation of a life interest for herself in her apartment unit in the building. Justice Blair considered the nature of the "lease for life", depicted in the document and he came to the conclusion that it was not a *leasehold* but a *freehold* interest in land:

> "In common parlance, it may be thought that a 'lease for life' is a leasehold interest in land. However, at law that is not the case."[4]

and

> "An estate for life is a *freehold* interest in land."[5]
>
> After quoting *Anger and Honsberger*, Justice Blair continued:
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> "It is apparent … that the language of life estates and the language of landlord and tenant have much in common. Reference is made to an estate 'for the life of *the tenant*', and of that interest being created by '*a lease*', and even 'a contractual lease for life *at a rent*'. Consequently, it is easy to see how the two concepts could be confused, and – in a sense – fused. They are not the same, however, and the use of similar language from one context, in another context, can be confusing and misleading."[6]

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3 Unreported. *Norman Peterson v. Dorothy M. Charboneau and Richard Eyre*, Ontario Court (General Division) Divisional Court, at Ottawa, O'Leary, Southey and Blair JJ., heard November 24, 1997, Court File No. 97-DV-12, Reasons of Blair J. released January 13, 1998.

4 Ibid. p.4.

5 Ibid. p.4.

6 Ibid. p.5.

Just as Justice Blair was obliged to look beyond the rent review officials' pre-conceived understanding of the word "lease", so do lawyers in our attempts define "life lease" in law.

Consider some of the characteristics of life lease and life estates.

Theoretically, the life lease occupier or his descendents may be possessed of his or her interest forever, so long as the individuals actually in residence from time to time qualify for residency. The fair market model agreements set forth a procedure where the occupier's interest is transferred to his or her estate, and a new agreement is entered into at that time. The agreement under which the departing, or departed, occupier occupied is terminated, conditional upon observance of the contractual right of the personal representatives to demand a new agreement for the estate, or for a transferee to whom the estate has transferred the right to occupy. While the agreement that memorializes the life lease relationship is to be terminated upon death, or shortly thereafter, the interest or estate in land does not. The landowner, pursuant to its contractual obligation, enters into a new agreement with the transferee to document the continuing interest or estate. It is a *de facto* inheritable estate, right or interest in real property, terminable upon the exercise of contractual rights (choses in action) that may arise prior to death of the occupier for the time being in the event of default or voluntary transfer, or after death.

The reason that I have come to prefer the life estate analogy to the lease analogy is the concept of determinable estates in land, coupled with the concept life estate.

Again, Anger and Honsberger:

"The determinable estate is one which contains an alternative limitation so that it may determine automatically on either of two events. An example

> is a conveyance to A in fee simple, so long as the property shall continue to be farmed. The estate will determine either when the land is no longer farmed, or when A dies intestate and without heirs, whichever occurs first. The estate upon condition subsequent is one that may be determined by re-entry by the grantor upon the happening of a specified event. Thus in a grant to A in fee simple provided that he does not marry B, the grantor may re-enter to terminate the estate if A does in fact marry B. If the grantor does not re-enter, or if A does not marry B, the estate will continue until its natural determination."[7]

Using life estate nomenclature, the senior partner's memo describes a determinable life estate, or the grant of an estate in part of the landowner's land to the client (life lease occupant), for the lifetime of the client, determinable upon certain conditions subsequent:

1. If she chooses to convey her estate to a prospective transferee, the life estate will determine and revert to the developer for the purpose of permitting the developer the opportunity to exercise a contracted right of first refusal to grant a similar estate to a transferee of the developer's choosing (usually from a waiting list) on terms substantially identical to those offered to her prospective third party transferee.
2. When she dies, her estate trustees may choose to transfer the estate as part of the administration of her estate, and the same rights, duties, privileges and obligations of each party will obtain.

[7] Ibid. p.29.

3. Or, she may have provided in her will that upon her death, the life estate would be devised to a named individual, and in that case, the developer would be obliged by contract to provide another life lease occupancy agreement to the devisee, who would then be possessed of a similar, determinable life estate.
4. If she were to default, for example, in payment of monthly charges, the owner of the land could effect a termination of the agreement and a determination of the life estate.

As lawyers, we must determine if these are real property rights, or merely contractual rights (choses in action) that, upon breach by either party, would be compensible to the other only in damages, and not by way of the recovery of possession. At this point, I do not have an answer; however, I do note that the question recalls pre-15th feudal principles. The feudal concept of landholding did not recognize leasehold interests. A dispossessed tenant could not recover possession, but only sue for compensation. A leasehold was personal, not real, property.[8]

There is more work to be done to establish the life lease relationship in the context of traditional real property law. In the meantime, consistent with my current thinking, I have revised my client's template life lease occupancy agreement (now in its 14th edition!!!) to reflect what I have now called a "life lease interest", which might well be considered, for all intents and purposes (and as strange as this may sound) an *inheritable and determinable life estate*. I attach as an Appendix to my paper, the current Summary of the life lease occupancy agreement that is distributed to my client's prospective non-profit sponsors and purchasers.

[8] Ibid. p. 9.

I turn now to legislation. One commentator was of the opinion that "most arrangements with regard to a "life lease community" are residential tenancy relationships which are governed by the *Tenant Protection Act*." [9]

While the statement may well be true in connection with some life lease models, I have taken issue with that position as regards the fair market value model of life lease. I believe that in many cases lawyers have premised their conclusions on an understandable (for all of the reasons outlined above) misunderstanding of the fair market value model.

It was said of life lease in a fairly representative paper that:

> "Life lease was developed in response to a significant problem. … The problem is how can those who are not in a position to afford or who may not be comfortable with market housing find alternative housing of good quality which is well managed, secure, and may provide relatively easy access to a variety of services."[10]

Life lease, thus considered, is a socio-economic housing tool, an alternative for "advocates for the creation of affordable housing" in a period of "political hostility to social housing"; designed for those "who may not be comfortable with market housing"[11]

Having started from that premise, the following conclusion is understandable:

> "In view of the broad scope of the definitions . . . [in the *Tenant Protection Act*], particularly when interpreted in light of the general judicial approach to interpreting such legislation in a 'generous' or

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9 S.O. 1997, c.24. DeBono, Joseph, *Life Lease" An Unusual Residential Tenancy Agreement*. Paper presented at Ontario Association of Non-Profit Homes and Services for Seniors' workshop, "Life Lease Housing: Making it Work", June 16, 1998.

10 Ibid.

11 Ibid.

> ‘liberal’ fashion so as to ensure that the remedial intent of this legislation (to grant protection to tenants in ‘rental accommodation’) is achieved, it is apparent that most arrangements with regard to a ‘life lease community’ are residential tenancy relationships which are governed by the *Tenant Protection Act*.”[12]

Leaving this conclusion and the premise upon which it is based aside for a moment, there is virtually no doubt that the drafters of the *Tenant Protection Act* did not contemplate the fair market value life lease. In addition, it is at the very least arguable that the plain meaning of the *Act* actually excludes life lease contracts from its application.

Subsection 2(1) of the *Act* provides that it applies “with respect to *rental units* in *residential complexes*, [my emphasis] despite any other Act and despite any agreement or waiver to the contrary”. Unfortunately, “*rental unit*” is not defined except in a circular manner.

And, more’s the pity, all of the defined terms of the *Act* that relate to the landlord/tenant relationship appear to be derived from the *Act's* definition of “*rental unit”*.

Consider the following definitions:[13]

> "*Rental unit” means* any living accommodation used or intended for use as *"rented residential premises"*.
>
> "*Rent” includes* the amount of any consideration paid or given ...by...a tenant to a landlord...for the right to occupy a '*rental unit*'.

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12 Ibid.
13 S.O. 1997, c.24, at ss. 1.(1).

> "*Landlord*" includes…(a) the owner of or other person permitting the occupancy of a '*rental unit*'…"
>
> "*Tenant*" includes a person who pays rent in return for the right to occupy a '*rental unit*'…
>
> "*Tenancy Agreement*" means a written, oral or implied agreement between a landlord and a tenant for occupancy of a '*rental unit*'…
>
> "*Residential Complex*" means…
> (c) A site that is a '*rental unit*'…

Significantly, the *Act* distinguishes between a *"rental unit"* and a *"residential unit"*:

> "*Residential unit*" means any living accommodation used or intended for use as '***residential premises***'…

"*Residential unit[s]*" are '***residential premises***'. "*Rental unit[s]"* are "***rented residential premises"***.

It follows logically that "*Rent", "Landlord", "Tenant", "Tenancy Agreement",* and *Residential Complex" all involve the occupancy of "**rented residential premises**",* not ***"residential premises".***

Life lease units are "*residential units*", or "*rental units*" depending on the actual terms of the relationship between the parties to the relationship, or their intent. Taking notice of the substance and intent of fair market value life lease occupancy agreements, life lease units are more likely to be considered by the parties to the relationship as "*residential units*" or "*residential premises",* than "*rental units*" or "*rented residential premises*". The parties would typically not consider the lump sum consideration paid by a life lease unit occupier as consideration for occupying a "*rental unit*", but rather consideration of the right to occupy a "*residential unit"*. Similarly, the monthly

occupation charge, which some might consider "rent", would not typically be paid in consideration of the right to occupy a "*rental unit*", but rather in consideration of the right to occupy a "*residential unit*".

Based on a strict reading of the *Act*, even single-family dwellings and condominium buildings become "*residential complex[es]*" if they contain a "*rental unit*". The same is true of life lease buildings. The purchasers of single-family dwellings, condominiums, and life lease occupancy units all may enter into conventional residential leases with third parties. In those circumstances, the single-family dwelling, the condominium building, and the life lease building all become "*residential complexes*" and the particular premises all become "*rental units*", falling under the operation of the Act as regards the third parties' tenancies. Again, it depends on the actual terms of the relationship between the parties to the relationship, or their intent, and, it is in that context that it is best to consider the applicability of the *Act* to life lease.

Fair market value life lease residential accommodation is not for those “who are not comfortable with market housing”, is not for “those in greatest financial need”, and is not “affordable housing”[14] (at least in the social housing context).

Life lease residential accommodation is alternative, life style residential accommodation that has certain differences and advantages over conventional rental housing and condominium ownership, and is designed for a market of mature adults of sufficient financial means. In fact, Life Lease Associates of Canada counsels its sponsor group clients to base their unit prices on the median market price of detached single family housing in the geographic area of their clients’ proposed developments.

The occupiers of fair market value life lease units are not the tenants for whose

[14] DeBono, op.cit.

protection the residential tenancy legislation regime was developed. The legislation:

> "represent[s] a response to the perceived need to preserve the supply of 'affordable rental housing' and to provide a higher level of protection for residential tenants. The policy decision to protect the rights of individual tenants is a result of the belief that the owners of property typically have greater resources than tenants who live in such property, creating a situation in which residential tenants are often at a disadvantage when dealing with landlords. This 'inequality of bargaining power' is remedied by means of legislative intervention and the establishment of a legal process that confers upon residential tenants an arsenal of legal rights to protect their interests."[15]

Life lease unit occupiers/purchasers who are capable of producing sums of money equivalent to the sums of money that the purchasers of residential lots in urban subdivisions or condominiums must produce, are not the residential tenants described in the passage above.

In no sense whatsoever do most life lease purchasers consider themselves to be tenants, in intent or by deed, from either an economic, or a social point of view. For the most part, they have substituted the equity in their homes for the right to occupy their life lease unit, and have chosen a distinctive retirement life style, over other styles, such as conventional tenancy. Some life lease communities have made the subletting of units subject to the approval of the board of directors or residents' council of the building, as they do not wish to jeopardize the distinctive integrity of the building.

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[15] Ibid.

If the *Tenant Protection Act* is the source of the greatest number of questions I field regarding life lease, the *Planning Act* [16] runs a close second. Bob Vernon has analysed its relevant provisions in his paper, and in his excellent articles in the *Real Property Reports*.[17] One issue concerns me, however. Do not Mr. Vernon's (and for that matter, Sidney Troister's[18]) conclusions as to the applicability of subsection 50(9) of the *Act* apply equally regardless of whether the underlying legal interest is a lease, or a determinable life estate? Again, to refresh, subsections 50(3), 50(5) and 50(9) of the *Act* are reproduced:

> (3) No person shall convey land *by way of a deed or transfer*, [my emphasis] or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless . . . . .
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> (5) . . . . .. No person shall convey a part of any lot or block of the land *by way of a deed, or transfer*, [my emphasis] or grant, assign or exercise a power of appointment in respect of a part of any lot or block of the land, or mortgage or charge a part of any lot or block of the land, or enter into an agreement of sale and purchase of a part

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16 R.S.O. 1990, c. P.13.

17 Vernon, C. Robert, *Leasehold Interests and Subsection 50(9) of the Planning Act*, 27 R.P.R. (3d) 138 and *Life Lease Housing: An Ownership Alternative for Ontario Seniors*, 37 R.P.R. (3d) 40.

18 Sidney Troister, *Law of Subdivision Control in Ontario*, (Toronto, Carswell, 1994), pp. 218-221.

> of any lot or block of the land or enter into any agreement that has the effect of granting the use of or right in a part of any lot or block of the land directly or by entitlement to renewal for a period of twenty-one years or more unless. . . . ,
>
> (9) Nothing in subsections (3) and (5) prohibits the entering into of an agreement that has the effect of granting the *use of or right in a part of a building or structure* for any period of years.

There is abundant authority that subsection 50(9) exempts from the operation of subsections 50(3) and 50(5) the transfer of rights such as those granted under a life lease occupancy agreement if they are considered leasehold rights.[19] Should the exception apply only if the use or right to occupy is a lease?

The literal reading of the three subsections would appear to suggest that the "*use of or right granted in a part of a building or structure"* is simply less than the "*use of or right"* granted in [all of the] land on which the "*building or structure"* is built. There appears to be no requirement that the "*right"* is a leasehold right or interest, as opposed to a life estate, or, for that matter, any other estate, interest or right in the part of the building.

Indeed, Mr. Vernon appears to suggest in connection with the acquisition of co-operative apartments or office buildings, that the co-op "package of rights, including both shares in a corporation which holds both legal and/or beneficial title to the land and

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[19] Ibid. pp. 218-221 and the cases cited therein, and p. 71. See also, *Re Sears and Scarborough Town Centre Holdings Inc. et al.* (1999) 45 O.R. (3d) 474.

building and a lease or licence to occupy an individual apartment or office unit"[20] qualifies for the subsection 50(9) exception.

Although not always the case, a life estate is typically created by *"way of a deed or transfer"*,[21] and for that reason the *"convey[22][ance]"* of a life estate may be interpreted as a specifically prohibited conveyance of land under subsection (3) and (5), distinct from prohibited mortgages, prohibited agreements of purchase and sale, and also distinct from garden variety grants of *"the use of or right in (a part of any lot or block of the) land"*[23], that are prohibited at the end of those subsections. Is it a reasonable interpretation that that the subsection 50(9) exception would apply to the garden variety prohibitions only? According to *Anger and Honsberger*, "life estates may be created by deed, lease, or will, by statute, or otherwise by operation of the law". [24]

Is it the case, then, that a life estate created by deed is to be considered differently than a life estate created by such other means, presumably by virtue of the fact that it is *"conveyed"*?

In my view, we should be guided by Mr. Troister's consideration of the substance of the *"use of or right"* rather than the form in which it is granted or created. Consider his explanation of subsection 50 (9) of the *Planning Act*:

> "Clearly, a 50 year lease on land with the right to build may not be consistent with the planning goals of a municipality. However, portions of a building may have similar very long term leases but cannot pose a threat to such planning concerns because no subdivision of land is

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20 *Vernon*, op.cit., p. 147.
21 R.S.O. 1990, c. P-13, ss. 50(3) and 50(5).
22 Ibid.
23 Ibid.
24 *Anger and Honsberger*, op.cit., p. 149.

> occurring. In theory, such buildings are akin to the plan of subdivision: the building has received prior approval and once built, its use is fixed and its further subdivision into rented units is irrelevant to the municipality's planning concerns and is in fact within its expectation."[25]

Is it logical that a grant of *"the use of or right in a building or structure"* by way of a lease having a 99 year term certain should qualify for the subsection 50(9) exception, or that the occupancy portion of the bundle of rights granted in a co-operative should, while the grant of an identical right to occupy for an uncertain term (likely shorter) of a life estate granted by way of a deed, lease, will or other document should not?

I have touched on but two of the statutes that have application to the life lease concept. There is much more analysis required to determine where best to place life lease in the real property legislative digest.

One of the objects of our lawmakers is to clarify, through the mechanism of legislation, inconsistent and sometimes artificial and irrelevant legal concepts so that there is certainty and consistency in the application of law to modern relationships between individuals in society. Another is to redress perceived imbalances in those modern relationships, as perceived by the government of the day, and in pursuance of its ideas of social justice. Unfortunately, an unintended collateral consequence is that some legislation becomes too far-reaching in its application. The antidote sometimes requires an antidote. So it is with life lease.

Good, valid arguments have been advanced that residential tenancy legislation, (the example I have cited in this paper), applies to certain models of life lease. Should it

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[25] *Troister*, op.cit., p. 218.

have application to all models? To the fair market value model? I think not. This is a reality that deserves the attention of our legislators, and their advisors, in their deliberations.

In those deliberations, I hope that they would consider the strengths and weaknesses of not just current legislation, but that they would also consider the applicability of current legislation within the broader context of traditional real property common law concepts and their historical evolution.

Consideration of the legal underpinnings of the life lease concept has been extremely challenging to me – and has taken me far outside of the usual parameters of my corporate commercial practice. Throughout, I have benefited enormously from the insight of members of the Ontario Bar, much more versed, and immersed, in real estate law than I, who have reviewed the life lease concept and my template agreements on behalf of sponsor groups and unit purchasers. I am indebted to them. It is they who are determining "*what* is life lease"?