

Valuing the Value of Land, Not the Land: Affirming the Unavailability of Specific Performance of Agreements for the Purchase and Sale of Land

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Cases Considered:

[365733 Alberta Ltd. v. Tiberio, 2008 ABCA 341](#)

The Alberta Court of Appeal issued a brief memorandum of judgment unanimously affirming the June 2008 judgment of Madam Justice Adele Kent in [365733 Alberta Ltd. v. Tiberio, 2008 ABQB 328](#). I previously commented on this case in my post on Justice Kent's decision, ["Challenging Purchasers' Ability to Obtain Specific Performance of Agreements for the Purchase and Sale of Land."](#)

The grounds of appeal in the Court of Appeal were based on the tests used by Justice Kent. Did she apply the correct test to determine that the lands in issue, the Bishell lands, were not unique to the appellant? And did she apply the correct test to determine that the appellant's caveat should be discharged?

The issue for Justice Kent, however, was whether the remedy of specific performance was available on the specific facts of the case. A grant of specific performance is discretionary. The Court of Appeal does not, in its analysis, refer to any specific test applied by Justice Kent to guide her discretion. The Court of Appeal instead notes that her finding of fact - that the appellant's only interest in the Bishell lands was for investment and profit making purposes - was well supported by the evidence. The respondents had called evidence to show that the appellants had, with their consent, listed the Bishell lands for sale with one realtor in November 2000, a second realtor in March 2001, and a third in October 2002. This evidence of the appellant's efforts to sell the Bishell lands appeared to be decisive. It supported Justice Kent's conclusion that damages were an adequate remedy. Indeed, the Court of Appeal held (at para. 12) that it was "plain and clear from the evidence that specific performance is not available in this case."

In dismissing the appeal from Justice Kent's judgment, the Court of Appeal also affirmed its decision in [1244034 Alberta Ltd. v. Walton International Group Inc., 2007 ABCA 372](#) on the consequences of a finding that damages are an adequate remedy for breach of an agreement for the purchase and sale of land. Upon such a finding, the caveat must be discharged. Why?

Because, to quote from *Walton International* (at para 17) “[o]nce it has been determined that damages are an adequate remedy, there is no “interest in land” capable of protection by caveat.”

Although the Court of Appeal decision is very fact-based, the tests used by Justice Kent were recited (at paras. 6, 10 and 11), even if not evaluated or commented upon. The land must be unique and that uniqueness must be connected to the person seeking specific performance. It is not unique if it is acquired for the purpose of sale at a profit. Those who value the value of land, and not the land itself, are adequately compensated with money.