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CONTRACTS FOR THE SALE AND PURCHASE OF LAND: PURCHASER'S REMEDIES

Under the present law of Alberta, specific performance of a contract for the sale and purchase of land will not be granted to the purchaser under the contract unless the land is unique in the sense that no substitute is readily available. A related rule of the present law is that a contract for the sale and purchase of land does not confer an interest in the land on the purchaser unless specific performance is available, for the further consequence that the purchaser is unable to file and maintain a caveat against the title to the land. The present law stems from a 1996 decision of the Supreme Court of Canada applied in numerous cases in Alberta.

In 1996, the Supreme Court of Canada, in S*emelhago vs Paramadevan*, [1996] 2 S.C.R.415, said that it is no longer the case that every piece of real estate is unique and that it therefore cannot be assumed that damages for breach of a contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The issue in *Semelhago* was the amount of damages in lieu of specific performance that should be granted to the purchaser under a contract for the sale and purchase of land. The availability of specific performance to the purchaser was not an issue. However, Sopinka, J., made statements by way of obiter dictum which, although the statements did not bear on the case before the Court and dealt with questions not argued before the Court, have been accepted and applied by later decisions of the Alberta Court of Appeal and Alberta Queen's Bench and must be taken as establishing the present law of Alberta. The Court said at paragraphs 20 – 22:

> "While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development that is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available. It is no longer appropriate, therefore, to maintain a distinction in the approach for specific performance as between realty and personalty. It cannot be assumed that damages for breach of a contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land has no peculiar or special value … Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief… *Specific performance should, therefore, not be granted as a matter of course absence evidence that the property is unique to the extent that its substitute would not be readily available.*" [Emphasis added]

The dicta in *Semelhago* has been accepted by the Alberta Court of Appeal in a number of cases. The conclusion that damages is an adequate remedy unless the land is unique has had additional consequences. On the basis of *Semelhago*, the Alberta Court of Appeal in *1244034 Alberta Ltd. vs Walton International Group Inc.* (2007), 422 A.R 189 [C.A.], leave to appeal SCC refused [2008] S.C.C.A 43, has held at paragraph 17: "Once it has been determined that damages are an adequate remedy, there is no interest in land capable of protection by caveat." That is, a purchaser under a contract for sale and purchase of non-unique land has no claim to, or interest in, the land itself, but only a contract right against the vendor.

The interest in land and consequent right to file a caveat had been important protection to purchasers. Under the pre-*Semelhago* law of Alberta, a purchaser under contract for the sale and purchase of land was generally regarded as the equitable owner of the land, with the right to file a caveat against the certificate of title to the land. Uniqueness of the land was presumed. The purchaser's interest was not said to be dependent on the availability of specific performance. The purchaser thus had a right to the land and the purchaser could protect that interest and priority by filing a caveat. A purchaser thus had reasonable assurance that, upon performance of its obligations under the contract, it would get the land. The decisions of the Alberta Court of Appeal in *Walton* and the Court of Queen's Bench in *1404761 Alberta Ltd. vs Compro Developments Ltd.* [2010] A.J. No. 258 have extinguished that assurance. In 1404761 the court considered whether a lease and the caveat registered to protect the leasehold interest were valid. The Court of Queen's Bench per Ross, J. noted that a case for validity of the lease is not sufficient to give the tenant an interest in the land. In order to have an interest in land capable of supporting a caveat, the tenant must show a prima facie claim to the

land that the caveat is registered against [*Thomas C. Assaly Corp. vs. Alberta Industrial Development Ltd.* (1982), 41 A.R. 436 (C.A.)]. "This requires more than showing an arguable case that they are party to a valid agreement relating to the land. It also requires showing an arguable case that they are entitled to a remedy that would grant them an interest in those lands; in other words, that they are entitled to remedy of specific performance." Therefore, the Court concluded that there was nothing to suggest that damages would be an inadequate remedy for the loss of the tenant's commercial opportunity "… with no arguable interest in land to be protected, there is no basis to tie up development of the land pending litigation…." While the tenant could pursue its claim for damages against the landlord, the Court concluded that its caveat must be discharged.

These decisions have virtually eliminated two long-standing protections for purchasers of land:

- A purchaser of land should be entitled to an order of specific performance to force transfer of the land if the owner backs out of the deal; and
- The purchaser should be able to register a caveat in the Land Titles Office to protect the purchaser's contract to buy the land.

The current law in Alberta is that these protections are available only if the land is unique in the sense that no substitute is available for it. This renders it almost impossible to obtain an order of specific performance since damages will be considered an adequate substitute in most cases. Without the ability to obtain specific performance, a purchaser no longer has an interest in land sufficient to file a caveat, leaving the purchaser vulnerable to subsequently registered competing interests.

As leave to appeal the *Walton* decision to the Supreme Court of Canada was denied in 2008, the Alberta Law Reform Institute has engaged in public consultation and determined that the previous law should be restored. The Alberta Law Reform Institute in their final report No. 97 dated October 2009 recommends that legislation be enacted to provide that any land which is the subject of a contract for sale and purchase is conclusively deemed to be unique. This would enable the purchaser to obtain an order of specific performance, if needed. It will also restore the purchaser's ability to file a caveat. The Alberta Law Reform Institute also recommends that the phrase "contract for the sale and purchase of land" be broadly defined in the legislation to include all the different forms such a contract can take, specifically:

> (a) a contract providing for payment of the purchase price over time;
> (b) a contract entered into for closing at a future time;
> (c) an option for the purchase of the land where the option has been exercised;
> (d) an offer in writing:
> (i) by a purchaser to an owner of land for the purchase of the land from the owner; or
> (ii) by an owner of land to a purchaser for the sale of the land to the purchaser if the offer has been accepted in writing by the other party, and
> (e) an agreement to grant a lease.

To date, the Alberta Legislature has not acted on these recommendations. Short of legislative reform, a purchaser may want to consider additional language in a contract for the sale and purchase of land something along the following lines:

> (a) the parties agree that land is unique;
> (b) the parties agree that specific performance is an available remedy; and
> (c) the vendor agrees that the purchaser has an interest in the subject lands upon execution of the agreement and that such interest does not terminate unless the purchase agreement is terminated by reason of non-satisfaction of conditions or the purchaser's refusal to close once the vendor has properly complied with its obligations to complete the transaction.

Written by: Teresa Tomkinson ▲

COMPANY COMPUTER, EMPLOYEE PICTURES: A PRIVACY ISSUE OR A PROPERTY ISSUE?

In the case of *R. v. Cole (*2011 ONCA 218.), the Ontario Court of Appeal opens a new chapter in the truly 21st century struggle between employer and employee regarding who controls electronic equipment—here, a workplace laptop, and who owns its non-workplace content. Although a criminal case, its analysis involves a consideration of the scope of the expectation of privacy under Section 8 of the *Charter of Rights and Freedoms* and thus furthers our understanding of how to approach disputes between employers and employees over the use and abuse of workplace computer equipment.

THE FACTS OF THE CASE

Cole was a communications technology teacher for the Rainbow District School Board in Sudbury, Ontario. As a member of the school's technology committee, Cole was to use a school-supplied laptop for teaching and also to assist in supervising a laptop program for students. He was also one of several

individuals who possessed domain administration rights to the school's network, so that he could monitor student activity on the network. As such, he had the authority to access remotely the data stored on student computers connected to the network, and did so regularly as a part of his duties.

As with many employers, the School Board had a Policy banning inappropriate and sexually explicit content on School Board-issued laptops. Teachers were, however, permitted to use the School Board's laptops for personal purposes, and were allowed to take them home during weekends and vacations.

Using his authority to access student computer accounts, Cole remotely opened a student's email, found photographs of another student posing nude in sexually explicit situations, and copied those photographs onto the hard drive of his School Board-issued laptop. He then saved them in a hidden folder on the hard drive. Sometime later, another School Board computer technician, who had become suspicious over the large amount of activity between Cole's laptop and the school's server, remotely accessed Cole's hard drive to perform a virus scan. In the course of doing so, he found the photographs and reported the matter to the school's principal. The next morning, the principal asked Cole to hand over his laptop and to provide his password. Cole presented the laptop but refused to divulge his password. Subsequently, the principal had his technicians access and search the laptop. They copied temporary Internet files that revealed Cole's browsing history and placed them onto a disc. Those files contained large numbers of pornographic images.

The principal turned the laptop over to the police. The police viewed the data that had been obtained by the school's technicians, and then charged Cole with possession of child pornography and unauthorized use of a computer contrary to Sections 163.1(4) and 342.1(1) of the *Criminal Code*. Some weeks later, the police performed a warrantless search of the laptop's contents.

TREATMENT BY THE COURTS

At trial, counsel for Cole challenged the admission of evidence derived from the searches of the laptop performed by the school and by the police, arguing that the searches violated Cole's expectation of privacy. The trial judge agreed substantially with this argument, and found that – whatever the official school policy might have been – the *de facto* policy was that teachers were allowed to load personal material onto their laptops, and therefore had the right to protect that material from review by the school or by third parties such as the police. The trial judge also found that the police's warrantless search and seizure of the laptop and the discs created by the school's computer technician was a breach of the *Charter*. As a result, this evidence was excluded at trial.

The matter was appealed to the Ontario Superior Court of Justice, which ordered a new trial on that grounds that Cole had a "subjective expectation of privacy" in the contents of the laptop. However, the Court also held that the the School Board's Policy was a term of Cole's employment, and that since he had effectively agreed to the School Board's right to monitor his work, email, and other data stored on the laptop, he had waived his right to privacy in respect of that material. That waiver was still in effect, in the Superior Court's view, when the laptop and discs were handed over to the police. Consequently, the appeal was allowed.

Cole in turn appealed to the Ontario Court of Appeal, Ontario's highest court. The Court of Appeal agreed with the lower courts that Cole had a subjective expectation of privacy in its contents. Importantly, the Court also found that this *subjective* expectation was *objectively* valid: first, evidence to the effect that other teachers also customarily used their computers to store sensitive personal information; and second, the deficiency (or perceived deficiency) of the School Board's Policy:

> …there was no clear privacy policy relating to teachers' laptops. The only privacy provision in the Policy…related to email; it emphasized that attempts would be made to request the user's permission if access was required for system/trouble-shooting purposes. It did not provide for the monitoring or search of the teachers' laptops. [at para. 39]

In the result, the Court found that Cole's expectation of privacy in the information stored on the hard drive of the laptop was reasonable, subject only to the "limited right of access" by his employer's technicians to perform work-related functions. Cole's appeal was allowed, the matter was remitted back to trial, and the Court made an order excluding from evidence the laptop and the disc containing temporary Internet files relating to browsing history. Cole now awaits his new trial.

LESSONS AND IMPLICATIONS

What can we learn from *Cole*? First, employers must have clear, properly worded policies with respect to employee use of laptops and other digital devices owned by the employer. The language found in the School Board's Policy was not aggressive enough to displace the "expectation of privacy" claimed by Cole and later ratified by the Court. The language of the School Board's Policy was a slight "modification" of Cole's privacy right, allowing School

Board technicians only to access teacher laptops remotely for the purposes of system security and maintenance. Obviously, much more is required in this age where employers routinely hand out laptops and other devices, knowing that they will be used for work and non-work purposes by the employees who receive them.

Second, any such policies should include very clear indications that the employer has the power to monitor and search workplace computers, laptops, and other devices. The courts will not infer the existence of such a power based on the nature of the employer-employee relationship alone. Further, employers should not undermine their efforts by implying (or certainly by stating directly, as here) that personal use of laptops and other devices is permitted to any degree beyond the minimal, lest the employer nurture an unwanted "expectation of privacy" with respect to it.

Third, policies concerning permitted and prohibited uses of workplace computer equipment should be communicated directly to affected employees, whose understanding and acceptance of them should be acknowledged in writing. The employer's ability to enforce policies of that kind, or rely upon them in court, will be undermined where there is evidence of some confusion with respect to them. These may also be included in employment agreements, rather than in supplemental policy documents, in order to give them greater force.

CONCLUSION

More than a decade into the 21st century, it is clear that we are in an age of dependence on computer technology. This dependence is one that not only crosses into workplace and private life, it is also a dependence that may blur the line between the two as employer-issued laptops, and other devices ubiquitously cover both spheres. Now, more than ever, clear policies to deal with this blurring is needed to ensure the proper enforcement of the employer's wishes regarding its equipment.

Written by: Steve Eichler ▲

THE ALBERTA LAND STEWARDSHIP ACT, IMPLICATIONS AND PROPOSED AMENDMENTS

In previous years, land use planning in Alberta had been scattered over different levels of government and across different provincial departments, agencies and regulatory bodies. To better support the Government of Alberta's Land-Use Framework, the *Alberta Land Stewardship Act* ("ALSA") was enacted in October 2009. It created a single land planning process, covering both private and public lands.

ALSA enabled the creation of 7 regional land use plans to cover the entire province, with the intention that the plans be complete by the end of 2012. These regional plans will integrate provincial energy, environment, water and other polices at the regional level. The regional plans will also provide for the creation of sub-regional plans and issue-specific plans. A regulatory advisory council for each of the 7 planning regions may help provide advice on the development of these plans. These regulatory advisory councils will be comprised of government, industry, non-government organizations and First Nations peoples.

Once a regional land use plan is created, it will be elevated to the status of a regulation. In cases of conflict, ALSA and its regional land use plans will prevail over other enactments. As a result, statutory consents consisting of approvals, licenses, registrations, authorizations and agreements issued or authorized under other enactments or regulatory instruments must comply with ALSA and its regional plans.

The implications for ALSA are broad. Projects will no longer be assessed strictly on an individual basis, but will also be assessed according to issues pertaining to the particular land-use region. As each of the 7 regions will have their own land-use plan and specific criteria, cumulative thresholds for certain activities will likely vary from region to region. This may result in approval for a project being declined in one region, whereas the same project may have been approved in another. However, once a regional plan is in place, it should help provide a roadmap for industry to align their activities to fit within the appropriate plan.

BILL 10 AMENDMENTS

Although ALSA was enacted quite recently, Bill 10 has already been introduced, and proposes to amend certain provisions of the Act, including:

- Redefining the purpose of the Act to state that Government must respect the property and other rights of persons and cannot infringe on these rights without due process.
- Requiring appropriate public consultation before a proposed regional plan or amendment is carried out and requiring that the newly created or amended plan be put before the Legislative Assembly.
- Providing reasonable notice of any proposed compensation and calculation of this compensation, if a person's statutory consent under other enactments is affected or rescinded.
- Notification of a 12 month limitation period from a regional plan or amendment coming into force, for a registered landowner to seek compensation for taking of their private land or freehold minerals. The landowner can also apply for a review of the regional plan or amendment affecting them.
- The ability of a person that holds title to property within the regional plan to apply for a variation regarding restrictions, limitations or requirements on land use.

The full impact of ALSA and its proposed amendments will not be known until the regional plans have been defined and implemented. Once implemented, industry should have a better understanding as to what the relevant regional plan requires of them.

Written by: Ebru Ozcan ▲