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ALRI has offices at the University of Alberta and the University of Calgary. ALRI's contact information is:

402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291

Fax: (780) 492-1790
E-mail: *reform@alri.ualberta.ca*

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The members of our Board have contributed to the analysis of the issues, and to the development of the final policy proposals. We acknowledge, with gratitude, their continued dedication and support.

H.J. Lyndon Irwin, Q.C. was a member of the Board until August 2009. He was not able to approve this final report, but he did participate in the formative stages of the Report for Discussion and the development of the draft. This was an area of particular interest and expertise for our former colleague.

SUMMARY

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, with the further consequence that, unless the land is unique in that sense, the purchaser is unable to file and maintain a caveat against the title to the land.

These aspects of Alberta law are based upon a rule that equitable remedies are not to be granted if damages is an adequate remedy. This rule was adopted in the early days of equity to demarcate the boundaries between common law and equity. It was supplemented by a rule that damages was an adequate remedy for a purchaser for a breach of a contract for the sale and purchase of property unless the property was unique. However, equity considered that every parcel of land was unique, so that specific performance was generally available to a purchaser of land in the event of breach of contract by their vendor. This was the traditional law of Alberta until 1996.

In 1996, the Supreme Court of Canada, in *Semelhago v. Paramadevan*,[1] 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 Court said that "specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available." The dicta in *Semelhago* have been accepted by the Alberta Court of Appeal in a number of cases, and constitute the law of Alberta. On the basis of *Semelhago*, the Alberta Court of Appeal has also held that "once it

[1] *Semelhago v. Paramadevan,* [1996] 2 S.C.R. 415 [*Semelhago*].

has been determined that damages are an adequate remedy, there is no 'interest in land' capable of protection by caveat."[2]

The principal opinion advanced in this report is that the availability of specific performance should not be determined by a rule adopted for purely historical reasons without examination of the basis for the rule. The question should not be whether damages is an adequate remedy for a vendor's breach of a contract for the sale and purchase of land, but, rather, which remedy is better: damages or specific performance? The report concludes that specific performance is fairer as between the vendor and the purchaser; that it is more efficient in the sense that it avoids litigation for the assessment of damages; and that it is more effective than damages because it puts the purchaser in the precise position they would have been in if the contract had been performed, and because damages is not an effective remedy at all if the vendor is judgment-proof due to insolvency. This conclusion leads to the further conclusion that specific performance should generally be available to a purchaser under a contract for the sale and purchase of land.

A second opinion advanced in the report is that a contract for sale and purchase of land should generally confer on the purchaser an interest in the land, with the consequent right to file a caveat against the certificate of title to the land where a certificate of title exists. It should do so because such a contract grants the purchaser a right to obtain ownership of the land on payment of the purchase price and the purchaser has paid part of the price and contracted to pay the balance. If the purchaser cannot file a caveat to protect their interest under the contract, the vendor may convey the land to another party, or the vendor's creditors may attach the property, thus defeating the purchaser's claim.

The report makes three recommendations:

(1) That, for the purpose of determining whether a purchaser under a contract for the sale of land is entitled to specific performance of the contract, the

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[2] *1244034 Alberta Ltd. v. Walton International Group Inc*. (2007), 422 A.R. 189 (C.A.) leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 43 [*Walton*].

land that is the subject of the contract be conclusively deemed to be unique at all material times, and legislation should be enacted to that effect.

(2) That a contract for the sale and purchase of land should confer on the purchaser an interest in the land and, where the land is covered by a certificate of title, a right to file a caveat protecting that interest. The legislation we have recommended will have that effect, as it will restore the pre-*Semelhago* law under which the purchaser had an interest in land and a right to file a caveat.

(3) That our recommendations apply to the following, all of which we include in the term "contract for the sale and purchase of land": (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 land where the option has been exercised; (d) an offer in writing for the purchase of land which has been accepted in writing by the owner of the land; and (e) an agreement to grant a lease

RECOMMENDATIONS

CHAPTER 1. INTRODUCTION

A. History of Project

[1] In March, 2009, we published our Report for Discussion No. 21, *Contracts for the Sale and Purchase of Land: Purchasers' Remedies*, which we circulated for comment in the usual ways. The Report for Discussion included our preliminary recommendation that the law be changed to provide that a purchaser under a contract for the sale and purchase of land does not have to prove that the land was unique in order to obtain specific performance of the contract. The principal recommendation in this report is to the same effect.

[2] In addition to our usual consultation, we were fortunate in being able to appear at two joint meetings of Canadian Bar Association Alberta sections. In Edmonton, on March 24, 2009, we met 103 members of the CBA North Real Estate, Business and Creditors' Rights sections. In Calgary, on March 26, 2009, we met 37 members of the CBA South Residential, Real Estate and Foreclosure sections. With two exceptions, the members present voted in favour of the thrust of our principal recommendation, that is, that the law should be changed so that specific performance of a contract for the sale and purchase of land should be available to the purchaser whether or not the land is unique in the sense that no substitute is reasonably available. Many of the members attending the two meetings are generally involved in the area of law under consideration.

[3] In June, presentations, in which we were not involved, were made to the members attending two Update 2009 seminars of the Legal Education Society of Alberta. The presentation covered the law as described in this Report and cited our preliminary recommendations. As the seminars covered other topics as well, those attending covered a broader spectrum of practitioners. The seminars were asked whether they supported our preliminary recommendations. Again, the votes were strongly in favour of the recommendations as stated in the Report for Discussion.

[4] We received 14 specific responses. Twelve supported our principal preliminary recommendation that specific performance be generally available. One other did so as well, but conditional on a review of damages in lieu of specific

performance, which the writer thought to be excessive under *Semelhago*. The final response was a proposal for the adoption of a rebuttable presumption in favour of uniqueness rather than removing a requirement of uniqueness. While this was a thoughtful proposal, we remain of the view that the requirement of uniqueness should be removed entirely, our specific proposal in this Report being that land be conclusively deemed to be unique for the purpose of determining whether or not specific performance of a contract for the sale and purchase of land should be available to the purchaser.

[5] In sum, we have heard in one way or another from many practitioners and have found a very high degree of support for the basic proposition that there should be no requirement of uniqueness in a purchaser's action for specific performance.

B. Issues Addressed in this Report

[6] Under the present law of Alberta,

- a purchaser under a contract for the sale and purchase of land cannot claim specific performance of the contract unless the land is "unique" in the sense that there is no substitute readily available;
- in the absence of uniqueness, the purchaser's remedy for the vendor's failure to convey the land as required by the contract is a judgment for damages;
- unless the purchaser is entitled to specific performance they do not acquire an interest in the land under the contract and cannot file and maintain a caveat against the title to the land.

[7] In this statement of the law of Alberta, and throughout this report, "damages" means damages assessed according to the common law and does not include damages awarded in lieu of specific performance.

[8] The fundamental issue dealt with in this report is the first one mentioned above, whether or not a lack of uniqueness of land, in the sense that there is no substitute readily available, should be a bar to a purchaser's claim for specific performance of a contract for the sale and purchase of land that would otherwise be granted. There are two associated issues of great practical importance. One is

whether or not a contract for the sale and purchase of land should confer an interest in land on the purchaser. The second is whether or not the purchaser should be able to file and maintain a caveat against the title to the land that is the subject of the contract. For the reasons given in this Report, our conclusion is that all three issues should be answered affirmatively, and we make recommendations accordingly.

[9] In the term "contract for the sale and purchase of land," we include any of the following which meet the standard criteria for the formation of contracts:

(a) a contract for the sale and purchase of land that provides for payment of the purchase price over time,

(b) a contract for the sale and purchase of land entered into for closing at a future time,

(c) an option for the purchase of 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.

RECOMMENDATION No. 1

That our Recommendations apply to any of the following that meet the standard criteria for the formation of contracts, all of which we include in the term "contract for the sale and purchase of land":

(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 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.

[10] Our recommendations do not affect the general law and practice relating to the remedy of specific performance. Equitable and contractual requirements and defences are untouched. The only issue with respect to the remedy of specific performance itself that this report is concerned with is the present requirement, as a condition of the availability of the remedy to a purchaser, that "uniqueness" of the land, in the sense that there is no substitute readily available to the purchaser, must be proven.

CHAPTER 2. COMPARISON OF THE PRESENT AND PREVIOUS LAW OF ALBERTA

A. Requirement of "Uniqueness" of Land as a Pre-condition for Specific Performance

1. Law of Alberta before 1996

[11] Traditionally, equitable remedies were granted only if common-law remedies were considered inadequate. Another accepted proposition was that specific performance would be granted under contracts for the sale of property only if the property was unique. Despite this proposition, however, damages was considered to be an inadequate remedy for a purchaser under a contract for the sale and purchase of land. That was because, as Sopinka J. put it at paragraph 14 of *Semelhago*, "Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent."

[12] See also the judgment of Kerwin, Estey and Fauteux JJ in *Kloepfer Wholesale Hardware and Automotive Co. v. Roy*:[2]

> Finally, as to the suggestion that damages would be sufficient because it is contended that the plaintiff desired to use the property as an investment, it is sufficient to say that generally speaking, specific performance applies to agreements for the sale of lands as a matter of course.

[13] Therefore, before *Semelhago*, every parcel of land was considered to be unique. Accordingly, a lack of uniqueness of land which was the subject of a contract for the sale and purchase of land could not be, and was not, a bar to a claim for specific performance of the contract, and specific performance was generally available to purchasers of land.

2. Law of Alberta after *Semelhago*

[14] 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

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[2] *Kloepfer Wholesale Hardware and Automotive Co. v. Roy*, [1952] 2 S.C.R. 465 [*Kloepfer*].

and purchase of land. The availability of specific performance to the purchaser was not in issue, as Sopinka J., giving the majority judgment, said at paragraph 10:[3]

> [T]his appeal should be disposed of on the basis that specific performance was appropriate. The case was dealt with by the parties in both courts below and in this Court on the assumption that specific performance was an appropriate remedy.

[15] 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[4] and must be taken as establishing the present law of Alberta.

[16] Sopinka J. said at paragraph 14 of the majority judgment, by way of dictum:

> Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance.

[17] He continued at paras. 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 this 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 to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common

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[3] La Forest J., while agreeing in the result in *Semelhago*, preferred not to deal with the circumstances giving rise to entitlement to specific performance or generally the interpretation that should be given to the legislation authorizing the award of damages in lieu of specific performance. He said at paragraph 1: "In considering modification to existing law, both these interdependent factors may well require examination, and the arguments in this case were not made in those terms."

[4] See e.g. *410675 Alberta Ltd. v. Trail South Developments Inc*. (2001), 293 A.R. 181 (C.A.) leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 602 [*Trail South*]; *Walton*, note 2; *365733 Alberta Ltd. v. Tiberio* (2008), 440 A.R. 177 (C.A.); *Strategy Summit Ltd. v. Remington Development Corporation* (2009), 446 A.R. 312 (C.A.).

> law recognized that the distinction might not be valid when the land had 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 absent evidence that the property is unique to the extent that its substitute would not be readily available*. [Emphasis added]

[18] The dicta in *Semelhago* have been accepted as establishing the proposition that a purchaser under a contract for the sale and purchase of land is not entitled to specific performance of the contract if the land is not "unique to the extent that its substitute would not be readily available."[5] If the land is not unique, the purchaser's only remedy is in damages.

B. Purchaser's Right to an Interest in Land and to File a Caveat

1. Law of Alberta before 1996

[19] Under the pre-*Semelhago* law of Alberta, a purchaser under a contract for the sale and purchase of land was generally regarded as the equitable owner of the land, with a right to file a caveat against the certificate of title to the land where a certificate of title existed.[6] Uniqueness of the land was presumed, so that proof of uniqueness was not required. The purchaser's interest was not said to be dependent on the availability of specific performance; no linkage was made between the right to file a caveat and the right to specific performance. The purchaser thus had a right to the land that was entitled to priority over the rights of creditors of the vendor and the rights of a third party who acquired a subsequent disposition of the same land from the vendor, and the purchaser could protect that priority by filing a caveat. A purchaser could thus order their affairs with reasonable assurance that,

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[5] See e.g. *Trail South*, note 4; *Walton*, note 2; *365733 Alberta Ltd. v. Tiberio* (2008), 440 A.R. 177 (C.A.); and *Strategy Summit Ltd. v. Remington Development Corporation* (2009), 446 A.R. 312 (C.A.).

[6] See, for example, a statement in the judgment of Locke and Cartwright JJ in *Kloepfer*, note 2 at 477:

> If, in fact, there was at that time a binding and enforceable agreement for the sale of the land, the respondent was as between himself and the appellant in the eyes of a court of equity the real beneficial owner (*Shaw v. Foster* [(1872) L.R. 5 H.L. 321.], at 338 per Lord Cairns, at p. 349 per Lord O'Hagan: *Lysaght v. Edwards* [(1876) 2 Ch. D. 499.], Jessel M.R. at 505; *McKillop v. Alexander* [(1912) 45 Can. S.C.R. 551.], Anglin J. at 578. In *Rose v. Watson* [(1864) 10 H.L.C. 672 at 678.], Lord Westbury said that when the owner of an estate contracts for the immediate sale of land the ownership of the estate is in equity transferred by that contract.

See also paragraph 71 of this report.

upon performance of their obligations under the contract, they would get the land. A contract right does not give the same assurance.

2. The present law of Alberta

[20] The conclusion that damages is an adequate remedy unless the land is unique has had follow-on consequences. These consequences are exemplified by a statement in the majority judgment of the Court of Appeal in *Walton*: "Once it has been determined that damages are an adequate remedy, there is no 'interest in land' capable of protection by caveat."[7] That is, a purchaser under a contract for the sale and purchase of non-unique land, though having paid part, or even all, of the purchase price, has no claim to, or interest in, the land itself, but only a contract right against the vendor. The interest in land and, where the land is subject to a certificate of title, the consequent right to file a caveat had been important protections to purchasers.

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[7] *Walton*, note 2, at para. 17.

CHAPTER 3. SHOULD LACK OF "UNIQUENESS" CONTINUE TO BE A BAR TO A GRANT OF SPECIFIC PERFORMANCE?

A. Reasons for the Requirement of Uniqueness

[21] The legal foundations for the proposition that specific performance of a contract for the sale and purchase of land will not be granted to a purchaser in Alberta unless the land is "unique" are the statements made by the Supreme Court in *Semelhago* and the acceptance and application of those statements by the Court of Appeal.

[22] The reasoning in the statements in *Semelhago* relating to when specific performance should not be granted, as accepted by the Court of Appeal decisions cited above may be summarized as follows:

1. Specific performance of a contract for the sale of land should not be granted to the purchaser unless damages would be an inadequate remedy.
2. Damages will not be an inadequate remedy unless the land is unique in the sense that no substitute that will meet the purchaser's needs is readily available.
3. Therefore, specific performance will not be granted to a purchaser unless the land is unique in the sense that no substitute is readily available.[8]

[23] The ultimate legal foundation for the propositions enunciated in *Semelhago* and in the decisions of the Court of Appeal cited is the first of the three propositions set out above, that is, that specific performance of a contract for the sale of land should not be granted to the purchaser unless damages would be an inadequate remedy.[9] Those decisions do not give any reason why that basic proposition should apply in Alberta today. They treat the proposition as a given and do not examine it or give consideration to the relative merits of damages and specific performance.

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[8] We do not propose to discuss the question of whether the time at which uniqueness must be established under the present law is the time of the contract, the time of the breach or the time of the trial.

[9] "Damages" in this discussion means damages assessed on common-law principles, not damages in lieu of specific performance.

[24] The reasons for the initial adoption of the first proposition are historical: in the early days of equity in England it was used to demarcate the boundary of jurisdiction between the court of chancery and the common law courts. The history is set out by Justice Sharpe:[10]

> The framework of rules determining the availability of specific performance has been shaped largely by historical factors. The common law courts ordered actual performance of the defaulting party's obligations in a very narrow range of cases. As Fry put it, 'the same spirit of commerce which led to the enforcement of contracts also brought in the notion that money is an equivalent of everything' and, as a practical matter, common law remedies were virtually confined to damages. The courts of chancery, however, provided an alternative to the money remedies in the form of specific performance and injunction. But the equity administered by the courts of chancery was only a gloss on the common law and could relieve only cautiously against certain of its strictures and inadequacies. Hence, history determined that the presumptive remedy was that of the common law and that equity could extend its special form of relief only where the common law remedy was inadequate.

[25] The proposition that specific performance of a contract for the sale of land should not be granted to the purchaser unless damages would be an inadequate remedy was supplemented by a rule that damages was an adequate remedy for a purchaser for a breach of a contract for the sale and purchase of property generally unless the property was unique. However, in the case of contracts for the sale and purchase of land, the requirement of uniqueness was cancelled out as equity considered that every parcel of land was unique, so that specific performance was generally available to purchasers of land in the event of breach of contract by vendors. This was the law of Alberta until 1996.

[26] *Semelhago* and the Court of Appeal decisions cited have reversed that assumption of uniqueness in land contracts. They hold that, because times have changed, the exception allowing for specific enforcement of contracts for the sale and purchase of land on grounds of assumed uniqueness is no longer available unless it can be shown that the land in question is unique in the sense that there is no substitute that will meet the purchaser's needs. Therefore, the proposition that specific performance should not be granted unless damages is an inadequate

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[10] Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book, 2008) at para. 7.10 [Sharpe].

remedy comes into play: specific performance will not be granted if damages is an adequate remedy, and damages will be assumed to be an adequate remedy unless the land is shown to be unique in the *Semelhago* sense.

[27] We pause here to note that, whether or not land is unique in the sense that there is no readily available substitute, it is unique in a number of ways. These aspects of uniqueness are as follows:

- no other land has the same boundaries and precisely the same physical characteristics;
- the parcel is immovable and indestructible;
- the land has been uniquely identified by the parties in a contract.

Where the land is covered by a certificate of title, which is the usual case, the land has further aspects of uniqueness as follows:

- ownership of the land is determined by a public record;
- ownership of the land can be changed by an entry in a public record by a public official at the instance of the court.

The cumulative effect of these aspects of uniqueness is to make specific performance peculiarly effective with relation to land as enforcement of an order of specific performance is simple and does not require extensive supervision by the court. They also help to justify the former assumption of uniqueness.

[28] In our opinion, an historical rule determining the relatively early functions of the common law and equity in England, without more, should not govern the choice of remedy under a fused system of law and equity and under modern conditions. In our opinion, a more appropriate question to ask than whether or not an award of damages would be an adequate remedy is: which of the two remedies will better serve the ends of justice as between vendors and purchasers generally, damages or specific performance?

[29] We think that this question should be approached without preconceptions and that the answer to it should determine when specific performance of a contract for the sale and purchase of land should be available to a purchaser. Among the preconceptions to be avoided, unless they are tested and found to be sound under present conditions, are the notions that specific performance should be awarded only when damages is not an adequate remedy and that damages is an adequate

remedy for a purchaser under an agreement for the sale and purchase of land unless the land is unique.

[30] We therefore turn to a comparison of the two remedies, damages and specific performance, on their respective merits. We make the comparison without reference to the historical demarcation of the boundary established between the common law, on the one hand, and equity, on the other.

B. Comparison of the Remedies of Damages and Specific Performance

1. Introduction

[31] Under this heading, we will make comparisons between various effects of the remedies of specific performance and damages awards insofar as they relate to purchasers under contracts for the sale and purchase of land.

[32] First, we think that the general comparison made by Sharpe is accurate:[11]

> However, where a practical choice between damages and specific performance remains, the latter has certain distinct advantages. The assessment of damages the innocent party has suffered can be a difficult, expensive and time-consuming task. Specific performance has the advantage of avoiding the problems and costs the parties and the judicial system must incur if damages are to be assessed. Perhaps more significant is the very real element of risk that the translation into money terms of the effect of the breach on the plaintiff may be inaccurate. Some cases will present more risk than others but it cannot be denied that the element of risk is virtually swept away if the court is able to make an order of specific performance. The innocent party receives the very thing bargained for rather than a monetary estimate of its worth.

[33] We will now proceed to compare in more detail specific aspects of the two remedies. The aspects that we consider are: fairness to the parties, remedial efficiency and effectiveness. Protection of the rights of purchasers is discussed later in this Report.

[34] We do not suggest in this discussion that the law relating to specific performance be changed in any way except for the specific recommendation we will later make, to the effect that the law, including equity, should be changed so that the lack of "uniqueness" of land will not be a bar to a purchaser's claim for

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[11] Sharpe, note 10, at para. 7.50.

specific performance. Under our recommendations, specific performance will generally be available to purchasers under contracts for the sale and purchase of land on the same basis as that which prevailed before *Semelhago*. In deciding whether or not to grant specific performance, the court will not, under our recommendations, be required to apply any test that it did not apply in making such a decision before *Semelhago*. The grounds for awarding specific performance will remain the same as they were before *Semelhago*. The equitable and contractual defences available before *Semelhago* will continue to be available. The only change will be that there will no longer be a requirement that the land be unique in order that specific performance may be available.

2. Fairness or justice between the parties

a. Fairness to the purchaser

[35] In *Semelhago*, Sopinka J. quoted the following passage from the judgment of Estey J. in *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.*:[12]

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

[36] In *Asamera* the plaintiff was not entitled to specific performance of an agreement to return shares because the shares were not unique. Estey J.'s remark was directed towards a situation in which the plaintiff's failed claim to specific performance caused delay which the plaintiff claimed justified its failure to purchase other shares and thus mitigate damages. The paragraph containing the remark quoted by Sopinka J. opened with a statement that:[13]

> On principle it is clear that a plaintiff may not merely by instituting proceedings in which a request is made for specific performance and/or damages, thereby shield himself and block the court from taking into account the accumulation of losses which the plaintiff by acting with reasonable promptness in processing his claim could have avoided.

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[12] *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.,* [1979] 1 S.C.R. 633 at 668 [*Asamera*].

[13] *Asamera*, note 12, at 667-668.

[37] Estey J. concluded the paragraph by saying:[14]

> Otherwise its effect will be to cast upon the defendant all the risk of aggravated loss by reason of delay in bringing the issue to trial. The appellant in this case contends that it ought to be allowed to rely on its claim for specific performance and the injunction issued in support of it, and thus recover avoidable losses. After serious consideration, I have concluded that this argument must fail.

[38] Thus, Estey J. was not laying down a special requirement for granting specific performance, but rather was saying that delay caused by an unjustified claim for specific performance should not be allowed to affect the quantum of damages.

[39] Be that as it may, however, a vendor under a contract for the sale and purchase of land has entered into a contract with the purchaser under the contract. They have named a price and agreed to accept that price in exchange for the land. Before immediate specific performance can be decreed, the purchaser must have paid the entire contract price or demonstrated that they are, or, in the case of anticipatory breach that they will be, ready, willing and able to do so in exchange for the decree. That is, the purchaser must have put up their money, or put themselves into a position to put it up, on the strength of the vendor's promise and the vendor must have received, or have available to them, the entire price that they agreed to accept in exchange for the land.[15]

[40] In our opinion, a promise by the vendor to convey the lands plus payment by the purchaser of the price that the vendor agreed to accept constitute "a fair, real and substantial justification" for the purchaser's claim to specific performance under a contract for the sale and purchase of land. Whether or not the land is

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[14] *Asamera*, note 12, at 668.

[15] In the case of an anticipatory breach by the vendor, the court may declare that the contract is binding and should be specifically performed, but this would require performance by the purchaser as well as the vendor. See the statement in the judgment of Kerwin J. in *Kloepfer*, note 2, at 471, speaking for himself and two other judges:

> If these extracts mean merely that at the time of the issue of the writ the Court could not have ordered that specific performance be carried out immediately, no objection may be found with them; but if they mean that the plaintiff did not have a complete cause of action for a declaration that the agreement was a binding contract and that it ought to be specifically enforced, we are unable to agree. The plaintiff having that right, the agreement would be carried out when the time for completion had expired.

"unique in the sense that no substitute is readily available," in our opinion, makes no difference to the relationship between the vendor and the purchaser; we do not see any reason why the commercial motivation of a purchaser should make a difference in the remedies available to them, as *Semelhago* and the Court of Appeal decisions suggest. Furthermore, there is no "fair, real and substantial justification" for a vendor's claim to retain the land on payment of damages.

[41] Giving a purchaser precisely what the purchaser contracted for and the vendor agreed to convey is fairer to the purchaser than giving them a substitute amount of money.

b. Fairness to the vendor

[42] A vendor under a contract for the sale and purchase of land has freely given their promise to convey the land to the purchaser on performance of the purchaser's obligations under the contract. The vendor has exacted a promise to pay a purchase price in an amount to which they have agreed. The vendor has received the whole price or it is available to them, as specific performance would not otherwise be granted. Specific performance merely adopts the bargain freely entered into by the parties. It is entirely fair to hold the vendor to their promise to convey the land upon being paid in full. Fairness does not require that the vendor be entitled to resell the land or otherwise turn it to profit exceeding the damages the vendor will have to pay to the purchaser.

c. Conclusion as to fairness

[43] In our opinion, for the reasons we have given:

1. subject to the availability of contractual and equitable defences, specific performance is a remedy that is fairer to a purchaser under a contract for the sale and purchase of land than is damages and is to be preferred for that reason;
2. specific performance is fair to a vendor even though less advantageous to them in a given case than having to pay damages would be, as it merely holds them to their contractual promise.

3. Effectiveness

a. Achieving the governing purpose of judicial remedies

[44] As stated by the Supreme Court of Canada in *Asamera*, subject to a requirement of foreseeability,[16]

> It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed....

[45] The assessment of damages is not an exact science. It is a judgment call that is usually made on conflicting evidence and arguments. Different judges might well come up with different assessments of damages on the same evidence, either of which assessments would have to be considered an "adequate" remedy. On the other hand, an order for specific performance automatically puts a purchaser in the same position as if their rights under the contract had been observed. There may be subsidiary questions involving assessments of damages, but an order for specific performance achieves the governing purpose.

[46] The proposition in *Asamera* includes a qualification: damages, being assessed in terms of money, can put the plaintiff in the same position only "so far as money can do so." This qualification recognizes that damages cannot compensate a plaintiff for things that cannot be effectively measured in money terms. Specific performance does not suffer from that kind of a limitation: by giving the purchaser what the purchaser bargained for it puts the purchaser in the same position as if their rights had been observed, whether or not a detrimental effect suffered by the purchaser because of the vendor's failure to perform their contract is measurable in money terms.

[47] Specific performance is therefore more effective than damages at achieving the basic purpose of damages, that is, it is more effective than damages at putting the purchaser in the same position as if their rights had been observed. It also puts the vendor in the same position as if they had performed their obligations.

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[16] *Asamera*, note 12, at 645.

b. If payment cannot be enforced

[48] If the amount of a damages award is indeed sufficient to put a purchaser in as good a position as if the agreement had been performed, that sufficiency will be of little comfort to the purchaser if they cannot collect the amount of the judgment. However, under the post-*Semelhago* law, the possibility that the amount of the award may not be capable of being collected is not to be considered in deciding whether or not to grant specific performance. The judgment of the Alberta Court of Appeal in *Trail South* makes this clear:[17]

> 410675 next argues that the land in question is Trail South's only asset, and hence realization of an award of damages will be unlikely if the caveat is removed from title. It contends that the issue of irreparable harm is relevant to the question of the availability of specific performance.
>
> *None of the authorities cited by 410675 support the proposition that a plaintiff's potential inability to collect damages from a defendant is an adequate basis for specific performance*. Such an argument confuses the remedy of specific performance with interlocutory injunctive relief, or pre-judgment execution, neither of which are being sought. (Emphasis added).

[49] The possibility that an award of damages will be uncollectible is, to a purchaser, a significant disadvantage of a damages award in comparison with a decree of specific performance. The fruits of a judgment for damages may not be capable of recovery at all, while the fruits of an order for specific performance will, in the absence of exceptional circumstances, be capable of realization with little cost and delay. To say to a purchaser that an uncollectible judgment for damages puts them in the same position as if the contract had been carried out does not do adequate justice, and will tend to bring the administration of justice into disrepute. A judgment for damages against an insolvent judgment debtor does not put a purchaser in as good a position as if the agreement had been performed and is not an adequate or effective remedy.

c. Conclusion as to comparative effectiveness of damages and specific performance

[50] In our opinion, specific performance is a more effective remedy than damages for a purchaser under a contract for the sale of land because

- specific performance gives the purchaser precisely what they would have got if the contract had been carried out, thus putting the purchaser in the

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[17] *Trail South*, note 4, at paras. 19-20.

same position as if the contract had been performed, while damages is usually an imprecise estimate of the purchaser's loss;

- specific performance puts the land into the power of the purchaser, while damages under a judgment have to be collected, which may not be possible.

4. Remedial efficiency

[51] In order to obtain either an award of damages or specific performance, the purchaser must prove the contract, the breach, and that they have performed or are ready, willing and able to perform, their obligations under the contract, including payment of the agreed price. Specific performance will then generally require, in addition, only an order to the vendor to convey the land or, where the land is subject to a certificate of title, an order to the Registrar of Land Titles to register the purchaser as owner of the land. In contrast, obtaining a damages award will require additional litigation to determine the amount of the award, often involving contested evidence and argument, and will add materially to the costs of the purchaser as well as the costs of the vendor. The assessment of damages is also likely to require the application of extensive judicial resources in addition to those required if specific performance is granted. Specific performance therefore provides a remedy more efficiently than damages insofar as the parties and the courts are concerned.

[52] If the achievement of fairness or justice as between the parties were to require them, particularly the purchaser, to incur the costs in time and money that are involved in an assessment of damages, then the additional expenditures of resources, including judicial resources, would have to be suffered. However, resolving the issues between the parties without the need for those additional expenditures is a significant consideration in favour of making specific performance generally available.

[53] The uncertainty caused by the uniqueness test will lead to inefficiency in disposing of litigation between vendors and purchasers. It is important that there be a clear rule as to when specific performance will be available. The uniqueness test as laid down in *Semelhago* and other cases is likely to require an assessment of uniqueness that, because of the complexity of the circumstances, can be made only by a court, leaving a vendor and purchaser in a state of uncertainty about the

availability of specific performance. The purchaser will be put to expense to prove their case for uniqueness. Additional judicial resources will be required to hear the case and make the determination.

C. Economic Approach

[54] We pause here to consider a line of thought that was not referred to in *Semelhago* but is sometimes advanced. Its objective may variously be described as economic efficiency, efficient breach, satisfying the injured party's expectation interest, or maximization of profit and commercial activity. A decision of the Ontario Court (General Division), *Domowicz v. Orsa Investments Ltd.* reflects this approach:[18]

> Thus, the law does not hold promisors accountable for all loss arising from their conduct. Rather, a pragmatic combination of limited monetary relief and substitute transactions has been devised to achieve contract's policy goals. Subject to the inadequacy of money damages in a case of unique goods where there may be no readily available substitute transaction that can meet all the subjective reasons for the promisee entering a contract, money damages will ordinarily be adequate in a market economy to enable an aggrieved promisee to obtain an acceptable substitute. Instead of locking unwilling parties into their failed relationships by requiring specific performance, they are encouraged to do their business with others thereby maximizing economic activity and minimizing economic waste: see A. Kronman, "Specific Performance" (1977), 45 U. Chi. L. Rev. 351. In this respect Robert J. Sharpe has written at pp. 7-7 and 7-8, Injunctions and Specific Performance, supra:
>
> > The limiting aspects of contract remedies and the desire to protect the plaintiff's expectation as cheaply as possible is sometimes described as the theory of efficient breach. Where the innocent party's expectation interest can be fully protected by a damages award, damages are to be preferred on this theory. The innocent party is protected and at the same time the party in breach is able to pursue a more profitable or desirable venture. A rule which forced the latter to perform in such circumstances, it is argued by some, would needlessly waste an opportunity for profit.
> >
> > Granting the plaintiff specific performance in such cases will often go farther than achieving the goal of putting plaintiffs in the position they would have been in had their contracts been performed and may well impose on defendants substantial costs or burdens which might otherwise be avoided. This point turns on the distinction between the plaintiffs' and the defendants' relative costs and advantages of contract breach. By putting plaintiffs in the position

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[18] *Domowicz v. Orsa Investments Ltd* (1993), 15 O.R. (3d) 661 at para. 51 (Ct. J. (Gen. Div.)). The quoted passage is from Sharpe, note 10, at paras. 7.120 and 7.130.

> they would have been in we mean to ensure that they receive the value to them of the defendant's performance. Where a defendant defaults, it may be assumed that this has been done to gain an advantage or to avoid some hardship in performance. Fulfilling the obligation to the plaintiff may have become a losing proposition. A more attractive and more profitable arrangement with another party may be available. The plaintiff's loss arising on breach is not always a mirror image of the advantage the defendant gains by failing to perform. The accepted view is that contract remedies are not designed to punish the contract breaker and the proper measure for contract damages is compensation for the plaintiff's loss rather than lifting the benefits of breach from the defendant. As it was put in an English case, "[t]he question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff.... [I]t by no means necessarily follows that what the defendant has saved the plaintiff has lost."

[55] Given that specific performance gives the purchaser what the purchaser would have received had their contract been performed and does not give them anything more, we do not think it can correctly be said that specific performance will go further than achieving the goal of putting plaintiffs in the position they have been in had their contracts been performed. The explanation that "by putting plaintiffs in the position they would have been in we mean to ensure that they receive the value to them of the defendant's performance" does not seem to assist in this respect.

[56] It does not seem to us that, in the usual case, requiring a vendor under a contract for the sale and purchase of land to convey the land for which they have been paid locks "unwilling parties into their failed relationships": usually the purchaser's claim for immediate specific performance arises only when the purchaser has performed their obligations under the contract or is ready, willing and able to do so, and specific performance merely involves preparing and signing a conveyance or the granting of an order for revision of the title to the land, either of which terminates the relationship. It is true that in the occasional case of anticipatory breach a purchaser may get a declaration that the contract is binding and ought to be specifically performed a some future time,[19] but where the "relationship" consists of an obligation to pay money, on the one hand, and an obligation to convey property when the money is paid, on the other, we do not

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[19] See e.g. *Kloepfer*, note 2.

think that the law should adjust its remedies to avoid the continuance of that relationship.

[57] If maximization of economic activity and minimization of economic waste were the objectives of the law, we doubt that denying specific performance to purchasers would achieve them. Unless contract-breaking vendors, as a class, are better able than specific-performance-seeking purchasers, as a class, to maximize economic activity and minimize economic waste through ownership of a parcel of land, as to which no evidence is provided, favouring contract-breaking vendors will not maximize overall profits. Further, there seems to be no reason to think that a contract-breaking vendor is likely to be less able to find a suitable substitute parcel than a specific-performance-seeking purchaser, so that there is no apparent economic reason to leave the land with the contract-breaking vendor.

[58] But, in any event, as we have said above, we think that, in deciding upon the remedies available to a purchaser of a parcel of land under a contract for the sale and purchase of the land, the objectives should be fairness, efficiency in obtaining a remedy, and effectiveness as between vendors and purchasers generally, and that the question that should be addressed, without preconceptions, is: which of damages and specific performance will better achieve these objectives? Again, the decision should not be dictated, on merely historical grounds, by the notion that specific performance should be awarded only when damages is not an adequate remedy or the notion that damages is an adequate remedy unless the land is unique.

D. Recommendation

[59] We have given our reasons for our opinion that specific performance of a contract for the sale and purchase of land should generally be available to the purchaser under the contract whether or not the land is "unique to the extent that its substitute would not be readily available," though subject to all other contractual and equitable defences. We will now proceed to make a formal recommendation for the enactment of legislation to that effect.

[60] There are more ways than one to achieve the desired purpose. Legislation could provide, for example, that a lack of uniqueness of land is not a bar to

specific performance of a contract for the sale and purchase of the land, but we are concerned that such a provision would not fit in with the general law of specific performance. We have concluded that the best way to achieve the objective is for the legislation to provide that land that is the subject of a contract for the sale and purchase of land is conclusively deemed to be unique at all material times for the purpose of determining whether or not the purchaser under the contract is entitled to an order of specific performance of the contract. The effect of such a provision would be strictly limited to its objective, that is, to the removal of the lack of uniqueness as a bar to specific performance; it would fit in well with the surrounding law and would indeed replicate the law as it stood before *Semelhago*. The effect of this recommendation would be to cause the law to revert to its pre-*Semelhago* position for all contracts for the sale and purchase of land as broadly defined in paragraph 9 of this Report.

[61] While the use of the word "deemed" might be sufficient, we think that the word "conclusively" should be added in order to remove any argument that the statutory deeming is rebuttable. For example, in *R. v. Capozzi Enterprises Ltd.*[20] Lambert J. held that, in the absence of the word "conclusive," the word "deem" merely changed the onus of proof, and in *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.,*[21] Wallace J. held that "deemed" meant "rebuttably presumed" rather than "conclusively deemed" as the majority held. Both judgments were in dissent, but they do suggest that the word "deemed" by itself is subject to divergent interpretations.

RECOMMENDATION No. 2
That for the purpose of determining whether a purchaser under a contract for the sale and purchase of land is entitled to specific performance of the contract, the land that is the subject of the contract be conclusively deemed to be unique at all material times. Legislation should be enacted to provide for the conclusive deeming.

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[20] *R. v. Capozzi Enterprises Ltd.* (1981), 60 C.C.C. (2d) 385 (B.C.C.A.).

[21] *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 60 D.L.R. (4th) 43 (B.C.C.A.).

REVISED RECOMMENDATION No. 2

That for the purpose of determining whether a purchaser under a contract for the sale and purchase of land is entitled to specific performance of the contract, the land that is the subject of the contract be conclusively deemed to be unique and specially suited to the purchaser at all material times. Legislation should be enacted to provide for the conclusive deeming.

CHAPTER 4. PROTECTION OF PURCHASERS' RIGHTS

A. Where Land Is Subject to a Certificate of Title

[62] Where the ownership of land is recorded and conferred by a certificate of title, which is the usual case, the question whether a purchaser under a contract for the sale of land has an interest in the land and the question whether the purchaser is entitled to file a caveat under the contract are closely related. We will discuss this class of cases first.

[63] In *Walton,* the majority of the Court of Appeal said: "Once it has been determined that damages are an adequate remedy, there is no 'interest in land' capable of protection by caveat."[22]

[64] That is, it is only if specific performance is available that a purchaser under a contract for the sale and purchase of land has an interest in the land. If specific performance is not available, the purchaser has only a contract right against the vendor.

[65] The passage from the judgment speaks from the time at which it is determined that damages are an adequate remedy. However, the most likely conclusion from *Walton* is that a purchaser will acquire an interest in land and will be able to file and maintain a caveat at any time only if they can show that they will, upon performance of their obligations, be entitled to call for specific performance of the contract.

[66] As noted above[23], under the pre-*Semelhago* law of Alberta a purchaser under a contract for the sale and purchase of land was generally regarded as the equitable owner of the land without proof of uniqueness of the land and without demonstrating a right to specific performance of the contract; was entitled to priority over the rights of creditors of the vendor and the rights of a third party who acquired a subsequent disposition of the land; and, where there was a certificate of

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[22] *Walton*, note 2, at para.17.

[23] See paragraph 19 of this report.

title to the land, had a right to file a caveat to protect that priority. A purchaser could thus order their affairs with reasonable assurance that, upon performance of their obligations under the contract, they would get the land. A contract right does not give the same assurance.

[67] Even if specific performance is likely to be an available remedy, the reasoning in *Walton*, if correct, gives rise to a logical problem in saying that this likelihood is in itself enough to confer an interest in land that will support a caveat. The problem here is that specific performance is a discretionary remedy that is subject to a number of defences that may or may not apply in a given case: it cannot be said that specific performance is available until a court has made an order. If the *Walton* logic were applied, even a purchaser of a parcel of land that has the appropriate uniqueness would not, until specific performance is decreed, have an interest in land that would support a caveat.

[68] In our opinion, a purchaser under a contract for the sale and purchase of land should be entitled to an interest in the land from the time of the contract and should be entitled to file a caveat protecting that interest. The parties have identified the specific land; the vendor has granted the purchaser the right to receive ownership on payment of the purchase price; and the purchaser has paid part of the purchase price and has undertaken a contractual obligation to pay the balance. If the purchaser is not allowed to protect their rights under the contract by a caveat, the vendor may transfer the land to someone else, thus defeating the purchaser's claim to specific performance of the contract. These facts are sufficient to give the purchaser a legitimate claim against the land.

[69] We do not see a need to define the purchaser's interest as it will include the totality of the rights conferred on the purchaser by the contract insofar as those rights relate to the land, including the right to a conveyance of the title to the land at the time of completion of the contract.

[70] The right to file a caveat flows automatically from the acquisition of an interest in the land and need not be specifically provided for by legislation. The interest will continue to exist until terminated under the general law.

B. Where Land Is Not Subject to a Certificate of Title

[71] The reasoning that says that a purchaser under a contract for the sale and purchase of land should be entitled to an interest in the land from the time of the contract applies equally where there is no certificate of title: the parties have identified the specific land; the vendor has granted the purchaser the right to receive ownership on payment of the purchase price; and the purchaser has paid part of the purchase price and has undertaken a contractual obligation to pay the balance. If the land is not subject to a certificate of title, the purchaser cannot file a caveat, because the caveat is a creature of the *Land Titles Act*, which does not apply to the land if there is no certificate of title. However, the purchaser is still entitled to such protection as the common law provides to owners of interests in land, including legal and equitable priorities.[24]

> **RECOMMENDATION No. 3**
> **That a contract for the sale and purchase of land should confer on the purchaser an interest in the land and, if the land is subject to a certificate of title, a right to file a caveat protecting that interest. The legislation provided for in Recommendation No. 2 will restore the law as it existed before *Semelhago* and will thus confer on the purchaser an interest in land and the right to file a caveat protecting the interest.**

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[24] While this may not be a common situation, recall that a certificate of title is generally not issued for lands owned by the Crown and that s. 202 of the *Land Titles Act*, R.S.A. 2000, c. L-4, precludes any person from filing a caveat against Crown owned minerals.

CHAPTER 5. CONCLUSION AND DRAFT LEGISLATION

[72] For the reasons given in this Report, it is our opinion :

1. that an order for specific performance of a contract for the sale and purchase of land in favour of the purchaser under the contract is generally fairer to both parties, more efficiently obtained, and more effective in achieving the objectives of the law than is an award of damages;
2. that specific performance should not be denied on the grounds that the land is not "unique," in the sense that no substitute is readily available;
3. that otherwise the law relating to specific performance of such contracts, including its equitable defences, should remain the same as it was before *Semelhago*;
4. that a contract for the sale and purchase of land should confer on the purchaser an interest in the land and, if there is a certificate of title to the land, the consequent right to file a caveat protecting the interest.

[73] In our opinion, the objectives listed in the preceding paragraph will all be accomplished by a legislative provision that, for the purpose of determining whether or not the purchaser under a contract for the sale and purchase of land is entitled to an order of specific performance of the contract, land that is the subject of the contract is conclusively deemed to be unique at all material times. Such a provision would restore the pre-*Semelhago* law under which a contract for the sale and purchase of land conferred on the purchaser an interest in the land and, if there was a certificate of title to the land, the consequent right to file a caveat protecting the interest. We accordingly recommend the enactment of legislation along the following lines:

Amends R.S.A. 2000 c. L-7

1. The *Law of Property Act* is amended by this Act.

2. The following Part is inserted after Part 4:

Part 4.1
Rights and Remedies of Purchasers under Agreements for Sale of Land

Note on Part 4.1

As Part 5 of the *Law of Property Act* deals with the enforcement of mortgages and agreements for sale of land, it seems to us that it would be appropriate to insert provisions relating to purchasers' rights and interests under contracts for the sale and purchase of land immediately before Part 5. An alternative would be to insert the provisions immediately after Part 1, Transfer and Descent of Land.

36.1 In this part, "agreement for sale" means a contract for the sale and purchase of land and includes any of the following which meet the standard criteria for the formation of contracts.

(a) a contract for the sale and purchase of land that provides for payment of the purchase price over time,

(b) a contract for the sale and purchase of land entered into for closing at a future time,

(c) an option for the purchase of 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.

Note on Section 36.1

As we think that the term "agreement for sale" in general usage may not include all "contracts for the sale and purchase of land," we have been careful to use the latter term throughout this report to avoid ambiguity. However, the *Law of Property Act* uses the term "agreement for sale." In *Greschuk v. Bizon*,[25] the Appellate Division applied a restrictive meaning to "agreement for sale" in sec. 19 of the *Judicature Act*, now sec. 38 of the *Law of Property Act*. The Court recognized that a case in which a deposit is made to hold land until the sale crystallizes is an agreement for sale in a broad sense, but held that the section did not include such a case. As the term "agreement for sale" is used elsewhere in the *Law of Property Act*, with a restricted meaning, our suggestion is that it be given a specific definition for the purposes of the proposed new part if it is adopted. An alternative would be to use the term "contract for the sale and purchase of land" in the proposed new part instead of "agreement for sale."

36.2 For the purpose of determining whether or not the purchaser under an agreement for sale is entitled to an order of specific performance of the agreement for sale, land that is the subject of the agreement for sale is conclusively deemed to be unique at all material times .

Note on Section 36.2

For reasons given above, this draft does not define the interest that is conferred on the purchaser.

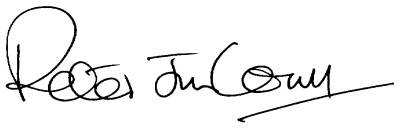
[25] *Greschuk v. Bizon*, [1977] 2 W.W.R. 262 (Alta. S.C. (A.D.)).

HON. N.C. WITTMANN, Chief Justice, Chairman
C.G. AMRHEIN
N.D. BANKES
A.S. de VILLARS, Q.C.
HON. N.A. FLATTERS
W.H. HURLBURT, Q.C.
P.J.M. LOWN, Q.C., Director
HON. A.D. MACLEOD
J.S. PEACOCK, Q.C.
HON. B.L. RAWLINS
W.N. RENKE
N.D. STEED, Q.C.
D.R. STOLLERY, Q.C.

CHAIRMAN

DIRECTOR

October 2009



APPENDIX

Revision of Report No. 97, Recommendation No. 2

In Report 97, we made the following Recommendation at page 22:

> **RECOMMENDATION No. 2**
> That for the purpose of determining whether a purchaser under a contract for the sale and purchase of land is entitled to specific performance of the contract, the land that is the subject of the contract be conclusively deemed to be unique at all material times. Legislation should be enacted to provide for the conclusive deeming.

For reasons given below, we substitute for Recommendation No. 2 the following Revised Recommendation No. 2, the words which constitute the revision being underlined for the convenience of readers:

> **REVISED RECOMMENDATION No. 2**
> That for the purpose of determining whether a purchaser under a contract for the sale and purchase of land is entitled to specific performance of the contract, the land that is the subject of the contract be conclusively deemed to be unique and specially suited to the purchaser at all material times. Legislation should be enacted to provide for the conclusive deeming.

We would add the same words to the draft section 36.2 of the *Law of Property Act* which appears at page 29 of Report 97.

Reasons for Recommending our Revision of Recommendation No. 2.

Report 97 sets out a statement of our reasons for making Recommendation No. 2. We will, however, give a brief summary here.

Before 1996, a parcel of land that was the subject of a contract of sale and purchase was deemed to be unique for the purpose of determining whether the purchaser was entitled to an order of specific performance against a defaulting vendor. The consequence of that deeming was that a purchaser who had completed the performance of their obligations under the contract, or was ready, willing and able to complete, was generally able to obtain an order of specific performance against the defaulting vendor. However, the Supreme Court of Canada, by way of

obiter dictum in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 [*Semelhago*] said, in effect, that specific performance should not be granted without evidence that the property dealt with in such a contract "is unique to the extent that its substitute would not be readily available". Alberta courts have adopted this dictum as part of the law of Alberta, so that a purchaser seeking specific performance of a contract for the sale and purchase of land must prove that the property is unique in the *Semelhago* sense. These decisions have reversed the traditional law of Alberta. They have had the further consequence that, where damages is an adequate remedy, a purchaser has no interest in the land that can be protected by caveat.

In Report 97, we gave reasons for concluding that specific performance in favour of a purchaser is to be preferred over damages. These reasons are summarized below. We therefore made Recommendation No. 2, which was intended to restore the pre-*Semelhago* law so that lack of uniqueness of the land covered by an agreement for sale and purchase of land would not preclude the making of an order for specific performance in favour of the purchaser.

Effect of *Raymond v. Anderson*

As noted, the dicta in *Semelhago* as applied in subsequent decisions of Alberta courts, are to the effect that specific performance of a contract for the sale and purchase of land should not be granted to a purchaser unless the land "is unique to the extent that its substitute would not be readily available". However, in *Raymond v. Anderson*, 2011 SKCA 58, the Saskatchewan Court of Appeal has added a second requirement. That requirement is that the purchaser seeking specific performance, in addition to adducing evidence that the land is unique, must adduce evidence that the land is specially suited to the purchaser. Presumably that evidence must be strong enough to prove the special suitability.

In our opinion, the requirement that the purchaser must adduce evidence that the land is specially suited to the purchaser was not part of the law of Alberta before the Saskatchewan Court of Appeal spoke. Nor do we think that the requirement is part of the law of Alberta today. We give our reasons for this opinion further in this document.

However, *Raymond* is a decision of a provincial court of appeal which could be accepted as a persuasive precedent by Alberta courts. There is therefore a risk that Alberta courts may decide that the requirement of proving special suitability, in order that specific performance may grant to a purchaser under a contract for the sale and purchase of land, is part of the law of Alberta.

The existence of that risk raises a question: would the imposition of a requirement of special suitability be an appropriate change to the law of Alberta, and, if no, should steps be taken to ensure that the change is not made?

Comparison Between Remedies

In Report 97, we discussed at some length, particularly at pages 12 to 19, the relative advantages and disadvantages of the remedies of damages and specific performance in order to determine which is the more suitable remedy. As a failure to meet the requirement of special suitability would have the same effect as a failure to meet the requirement of uniqueness, that is, relegation of the purchaser to damages as a remedy, that discussion is fully applicable to a discussion as to whether the special suitability requirement should be part of Alberta law, and we refer readers to that discussion.

However, we will give a very brief summary of the relevant considerations:

i. Fairness to the Purchaser

Specific performance is fairer to the purchaser than damages as it gives the purchaser precisely what they have bargained for, provided that they have either performed their part of the bargain or demonstrated their readiness, willingness and ability to perform. While damages is intended to put the purchaser in the same position as if the contract had been performed, insofar as a money award can do so, it is necessarily a judgment call on the part of the court which may not achieve that purpose.

ii. Fairness to the Vendor

Specific performance merely requires the vendor to do what they promised to do, upon receiving the full sale price they bargained for. Requiring a vendor who has received what they bargained for to do what they promised to do is fair to the vendor.

iii. Effectiveness

Specific performance comes closer than damages to achieving the oft-stated purpose of judicial remedies, that is, to put the parties in the same position as if the contract had been carried out. A judgment for damages may not be collectible, and therefore of no value to the purchaser, while specific performance, through court and official action, gives the purchaser what they bargained for and what they have paid for.

iv. Remedial Efficiency

Once a contract for the sale and purchase of land and breach thereof have been proven, specific performance requires only an order by the court and revision of registrations by the Land Titles system. The assessment of damages requires what is really an additional trial to assess the amount, with resulting cost and delay to the parties and expenditure of judicial resources. In many cases, the question of uniqueness will also have to be determined, with additional demands on the parties and the courts.

In our opinion, specific performance should be generally available to performing purchasers under contracts of sale and purchase of land against defaulting vendors, without proof of either uniqueness or special suitability of land.

Proposed Revision of Recommendation No. 2

If it is accepted that the requirement of special suitability should not apply in Alberta, the next question is: is it necessary or desirable to take steps to ensure that result?

In our opinion, Recommendation No. 2, by providing for a conclusive deeming that land that is subject to a contract for the sale and purchase of land, if implemented, will effectively preclude any requirement that uniqueness be proved as a condition precedent to the granting of an order of specific performance to the purchaser. The requirement of proof of special suitability, if such a requirement exists or comes to exist in Alberta law, is on precisely the same footing as the requirement of uniqueness. It can therefore be precluded by a mechanism precisely the same as the mechanism that precludes the requirement of uniqueness. That being so, we think that adding to our Revised Recommendation No. 2, the words "and specially suited to the purchaser" will ensure that there will be no requirement of proving special suitability in Alberta. This, of course, depends upon the implementation of the Recommendation and the inclusion of the same words, or words having the same effect, in the resulting legislation.

Conclusion

For the reasons we have given, we recommend that legislation be enacted that will make it clear that a purchaser under a contract of sale and purchase of land does not have to prove that the land is specially suitable to the purchaser in order to obtain an order for specific performance against a defaulting vendor. This recommendation is included in the Revised Recommendation No. 2 set forth above.

Analysis of *Raymond v. Anderson*

In *Raymond v. Anderson*, 2011 SKCA 58 (CanLII) [*Raymond*], the Saskatchewan Court of Appeal held that a purchaser who wishes to obtain specific performance of a contract for the sale and purchase of the land must show, not only that the land was unique, but also that the land was specially suited to the purchaser. This is part of the *ratio decidendi* of the decision. The Court went on to grant specific performance because the purchaser had shown both uniqueness and special suitability. This Appendix is not concerned with the question of what is necessary to prove special suitability. It is concerned only with the legal question of whether it is necessary for a purchaser to prove special suitability in order to obtain an order for specific performance in Alberta.

The Court's basic reasoning is as follows:

> [10] The general approach of courts faced with a breach of contract claim has been to assess the adequacy of damages before resorting to the remedy of specific performance, but then only if compensatory damages proved inadequate. However, prior to *Semelhago*, courts recognized a general exception to this approach when the contract in question involved land and courts understood specific performance to be the primary and accepted remedy in that circumstance. For example, in *Kloepfer Wholesale Hardware and Automotive Company Limited v. Roy*, 1952 CanLII 8 (SCC), [1952] 2 S.C.R. 465, Kerwin J. summarily dismissed an argument akin to Sopinka J.'s *obiter* in *Semelhago* when he wrote (at p. 472):
>
> > Finally, as to the suggestion that damages would be sufficient because it is contended that the plaintiff desired to use the property as an investment, it is sufficient to say that generally speaking, specific performance applies to agreements for the sale of lands as a matter of course. [emphasis added]
>
> [11] Similarly, in *Flint v. Corby* (1853), 4 Gr. 45, Esten V.C. succinctly set out this presumption as to remedy as follows (at p. 52):
>
> > ... The specific performance of an agreement respecting land, is enforced because the court intends in every particular instance that the estate, which forms the subject matter of the contract, possesses a peculiar value for the purchaser, and that pecuniary damages will furnish no adequate equivalent for the loss of his bargain. In this case, the peculiar value, which attracts the jurisdiction of the court, is implied and needs not be proved.... [emphasis added]
>
> [12] Yet, as these passages indicate, even though specific performance was the presumed remedy, underlying that presumption was an acceptance of the general inadequacy of damages as a remedy in the circumstances of breach of contract for the transfer of land.

It appears to us that what *Kloepfer* says is that "generally speaking, specific performance applies to agreements for the sale of lands as a matter of course", with no reference to the plaintiff purchaser's intention, and that what Esten V.C. says is that "in every particular case" the court intends that the land possesses a peculiar value for the purchaser, so that, again, the effect of each quotation is that it is not necessary to show the "peculiar value", including special suitability. This was the law before *Semelhago*.

The Court deals with *Semelhago* as follows:

> [14] … The only change wrought by *Semelhago* is in the approach of the courts to determining the appropriate remedy; judges must no longer presume the inadequacy of damages as a remedy whenever real property is involved. But, this assessment is not a search for uniqueness. Rather, it is appropriate to characterize a judge's assessment in cases of this nature as an inquiry into whether, in the circumstances, damages would be an inadequate remedy. As Lax J. said in *Dodge*:
>
> > [55] … The danger in framing the issue as one of uniqueness (a term that carries with it a pre-*Semelhago* antediluvian aroma) is that the real point of *Semelhago* will be lost. It is obviously important to identify the factors or characteristics that make a particular property unique to a particular plaintiff. The more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties. This will depend on whether money is an adequate substitute for the plaintiff's loss and this in turn will depend on whether the subject matter of the contract is generic or unique.
>
> [15] In practical terms, this means the prospective purchaser bears the burden of adducing evidence that the subject property is specially suited to the purchaser and that a comparable substitute property is not readily available. These evidentiary points are necessarily intertwined because, on the basis of the evidence, the prospective purchaser must discharge the overall burden of persuading the judge that the subject property is so different from others that damages is an inadequate remedy and that justice dictates the purchaser should have the subject property. The judge, in turn, must conduct a critical inquiry on the evidence as to the nature and function of the subject property in relation to the prospective purchaser. The evidence and analyses will necessarily overlap, but the overall question the judge must answer is whether the justice of the matter calls for an award of specific performance because damages would be inadequate.

"Uniqueness" no doubt carries with it an aroma that existed before the *Semelhago* flood, and the proposition that uniqueness of a parcel of land was to be presumed was indeed a salient feature of the antediluvian law. But it appears to us that *Semelhago* is all about a search for uniqueness. Some passages from what Sopinka J. said are as follows:

> **14** Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance. Given the flexibility of the rule at common law as to the date for the assessment of damages, it would not be appropriate to insist on applying the date of breach as the assessment date when the purchaser of a unique asset has a legitimate claim to specific performance and elects to take damages instead (see Wroth v. Tyler; Johnson v. Agnew; and Mavretic v. Bowman, [1993] 4 W.W.R. 329). The rationale that the innocent purchaser is fully compensated, if provided with the amount of money that would purchase an asset of the same value on the date of the breach, no longer applies. This disposition would not be a substitute for an order of specific performance. The order for specific performance may issue many months or even years after the breach. The value of the asset may have changed.

He continued at paras. 20-22:

> 20 This approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique. While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this 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.
>
> 21 It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of 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 had no peculiar or special value.
>
> 22 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 absent evidence that the property is unique to the extent that its substitute would not be readily available.* [Emphasis added]

We do not see anything in *Semelhago* that includes a discussion of anything but uniqueness or that extends a post-diluvian requirement of uniqueness to include also a requirement of special suitability.

We note that in *1244034 Alberta Ltd. v. Walton International Group Inc.* (2007), 422 A.R. 189 (C.A.), 2007 ABCA 372 (CanLII), the majority judgment of the Alberta Court of Appeal said this [Emphasis added]:

> [2] The decision of the Supreme Court of Canada in ***Semelhago v. Paramadevan***, 1996 CanLII 209 (S.C.C.), [1996] 2 S.C.R. 415 held that it should no longer be presumed that specific performance should always be granted in the case of contracts dealing with the sale of land. The Court did not conclude that specific performance will never be available in the case of property acquired for investment purposes. Rather, the relevant inquiry will be whether the property is "unique" or whether damages are an adequate remedy. It follows that specific performance remains a matter of discretion for the trial judge. The following passages (at paras. 21 and 22 of *Semelhago*) make that clear:
>
> > "It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.
> > ...
> > Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available."

This summary is in accordance with our understanding of *Semelhago*. It is focussed on an inquiry into uniqueness.

It should also be noted that in the antediluvian days before *Semelhago*, the presumption of uniqueness was sufficient to remove any obstacle to specific performance based on usefulness or suitability: specific performance was regularly granted to purchasers without proof of special suitability of the land. *Semelhago* did not add a requirement of proof of special suitability.

For these reasons, we do not think that evidence of special suitability of land was ever necessary, or is now necessary, to obtain an order of specific performance in favour of a purchaser in an Alberta court, though there is some risk that an Alberta court might follow *Raymond*.

There is, we think, an additional point: it is difficult to see any logical room for a requirement of special suitability once uniqueness has been demonstrated. The evidence needed to establish *Semelhago* uniqueness is "evidence that the property is unique to the extent that its substitute would not be readily available". "Substitute" implies that the substituted thing will take the place of the first thing for the purpose of the first thing, which must be the purchaser's subjective purpose in purchasing the property affected by the agreement of sale and purchase. If no other thing suitable to the purchaser is readily available, and the first thing is the only thing suited to the purchaser, it follows that the first thing, being uniquely

suited, no other thing is suitable, so that first thing is specially suited in the strongest of terms. So, in our opinion, satisfying the “uniqueness” test in *Semelhago*, as well as a “uniqueness” test in common parlance, will result, without more, in satisfying the “specially suited” test.

For all these reasons, we do not think that the law of Alberta requires a purchaser of land under a contract for sale and purchase, contract, in order to obtain an order of specific performance against a defaulting vendor, to adduce evidence that the land is specially suited to the purchaser.