

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

**CONTRACTS FOR THE SALE AND PURCHASE
OF LAND: PURCHASERS' REMEDIES**

Report for Discussion No. 21

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INVITATION TO COMMENT

This Report for Discussion by the Alberta Law Reform Institute [ALRI] raises issues relating to the rights and remedies of a purchaser under a contract for the sale and purchase of land.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

**The deadline for comments on the issues
raised in this Report for Discussion is
May 31, 2009.**

You can reach us with your comments by mail, fax or e-mail to:

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Law reform is a public process. ALRI assumes that comments on this Report for Discussion are not confidential. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or may submit comments anonymously.

Table of Contents

ALBERTA LAW REFORM INSTITUTE	I
ACKNOWLEDGMENTS	iii
EXECUTIVE SUMMARY	v
QUESTIONS FOR COMMENT	vii
REPORT FOR DISCUSSION	1
A. Introduction	1
B. Present Law	1
1. Effect of the present law.....	1
2. Reasons for judgment in <i>Semelhago</i> and <i>Walton</i>	2
3. Some consequences of denial of specific performance.....	4
4. Legal foundation for the present restrictions on availability of specific performance.....	5
5. Conclusion from discussion of present law.....	6
C. Economic Approach	7
D. Comparison of Damages with Specific Performance	9
1. Fairness as between vendor and purchaser.....	9
2. Efficiency.....	11
3. Effectiveness.....	11
4. Conclusion and preliminary opinions.....	12
E. Protection of Purchaser's Rights	13
F. Conclusion	16
G. Request for Comment	18
APPENDIX — SOME INCIDENTAL QUESTIONS UNDER THE EXISTING LAW	21
1. Insurable interest of purchaser.....	21
2. <i>Law of Property Act</i> , ss. 40, 41 and 43.....	21
3. <i>Law of Property Act</i> , s. 63.....	21
4. <i>Dower Act</i> , s. 2.....	22

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute [ALRI] was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of ALRI's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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EXECUTIVE SUMMARY

Under the present law, as stated in the decision of the Supreme Court of Canada in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 and the decision of the Alberta Court of Appeal in *1244034 Alberta Ltd. v. Walton International Group Inc.* (2007), 422 A.R. 177 (C.A.) a purchaser under a contract for the sale and purchase of land who has completed the performance of their obligations under the contract is not entitled to an order for specific performance of the contract by the vendor if damages would be an adequate remedy. Damages will be an adequate remedy unless the land is unique in the sense that no parcel of land other than the parcel described in the contract would meet the needs of the purchaser. If a purchaser will not be entitled to specific performance they will not acquire an interest in land under the contract and will not be entitled to file a caveat against the title to the land.

In this Report for Discussion, we note that the propositions stated above that determine when specific performance is available come from the early history of the development of equitable remedies. We suggest that a more appropriate question would be as to which remedy, damages or specific performance, will generally better achieve the ends of justice (principally fairness, efficiency and effectiveness) as between vendor and purchaser. We compare the effects of the two remedies and express a preliminary opinion that specific performance will generally be fairer, more efficiently obtained and more effective than a damages award. We therefore express a preliminary opinion that a purchaser under a contract for the sale and purchase of land should generally be entitled to specific performance of the contract (subject to the same discretion and equitable defences that applied before *Semelhago*). We express a further opinion that a purchaser under a contract for the sale and purchase of land should acquire an interest in the land that may be protected by caveat.

These opinions are set out so that they may be tested and, if they are wrong, corrected. After considering the results of the consultation process, ALRI will issue a final report and recommendations.

QUESTIONS FOR COMMENT

QUESTION NO. 1

Should a purchaser of land under a contract for the sale and purchase of land who has performed their obligations under the contract, or is ready, willing and able to do so, be entitled to specific performance of the contract

- a. generally
- b. only when damages is an inadequate remedy or
- c. only when the parcel of land is unique in the sense that there is no substitute parcel that would meet the purchaser's needs? 18

QUESTION NO. 2

If purchasers who have performed or are ready, willing and able to perform their obligations should generally be entitled to specific performance, should the general entitlement be assured by

- a. a provision that lack of uniqueness of a parcel of land is not a defence to an action for specific performance, or
- b. a provision that a parcel of land is conclusively deemed to be unique, or
- c. some other provision? 18

QUESTION NO. 3

Should the purchaser under a contract for the sale and purchase of land acquire an interest in the land by virtue of the contract? 18

QUESTION NO. 4

Should the purchaser be entitled to file a caveat against the title to the land and, if so, should the caveat give the purchaser priority over later registered and caveated interests? 18

QUESTION NO. 5

If the purchaser should acquire an interest in land by virtue of the contract and should be entitled to file a caveat, should those rights be terminated by a refusal of specific performance without more? 19

REPORT FOR DISCUSSION

A. Introduction

[1] This Report for Discussion considers whether a purchaser under a contract for the sale and purchase of land who has discharged their obligations under the contract, or is ready, willing and able to do so, should generally be entitled to specific performance, whether or not the land is unique. In the term “contract for sale and purchase of land” we include both contracts providing for payment of the purchase price over time and contracts entered into for closing at a future time, so long as they meet the standard criteria for the formation of contracts.

[2] We accept that the present law of Alberta is the law as stated in the decision of the Supreme Court of Canada in *Semelhago*¹ and the decision of the Alberta Court of Appeal in *Walton*.² Our aim is to raise discussion on whether the policy underlying the present law is best suited for the present day or whether different policies would better serve the ends of justice. The principal question that we discuss in this Report for Discussion is whether the present law as stated in the two cases is more suitable than the law as it was understood in Alberta before *Semelhago*.

B. Present Law

1. Effect of the present law

[3] The present law reflects a shift established by the decision of the Supreme Court of Canada in *Semelhago* and the decision of the Court of Appeal in *Walton*.³ These decisions are based on two propositions. The first is that a purchaser under a contract for the sale and purchase of land who has completed their obligations under the agreement is not entitled to an order for specific performance of the

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

² *1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABCA 372 [*Walton*].

³ Other relevant decisions include *410675 Alberta Ltd. v. Trail South Developments Inc.* (2001), 293 A.R. 181(C.A.) and *365733 Alberta Ltd. v. Tiberio* (2008), 440 A.R. 177 (C.A.) [*Tiberio*]. The most recent is *Strategy Summit Ltd. v. Remington Development Corporation*, 2009 ABCA 30.

contract if damages will be an adequate remedy. The second proposition is that damages will be an adequate remedy unless the land is unique: *Semelhago* and *Walton* have narrowed the concept of uniqueness to circumstances where no other parcel of land would meet the purchaser's needs. The law as stated reverses the previous presumption of Alberta law that, in general, all land was unique and the assumption that specific performance was generally available to a purchaser.

2. Reasons for judgment in *Semelhago* and *Walton*

[4] In *Semelhago*, the availability of specific performance to the purchaser was not in issue, as the parties had conducted the case on the basis that it was available. However, the Supreme Court made statements by way of *dictum* that are the basis of the later decisions of the Alberta Court of Appeal.

[5] Sopinka J. gave the majority judgment in *Semelhago*. He said at para. 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.

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 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.... 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.

[6] In each of *Walton* and *Tiberio*, the majority of the Court of Appeal applied the reasoning set out in the passages from *Semelhago* quoted above. In *Walton*, the majority decision of the Court pointed out, at para. 13, that

On the facts of this case, the purchaser had every intention to flip the property and/or to acquire it for the purchase price and then sub-divide to home builders. The purchaser was interested in other properties in the same area for the same purpose.

The Court also said at para. 6:

The author [of Anger and Honsberger, *Law of Real Property*, 3rd ed. looseleaf, (Aurora: Canada Law Book, 2007)] adds that the Court must determine the true intentions of the plaintiff so as to avoid a speculative lawsuit for profit.

These passages suggest that, unless the land being sold under contract is unique, a purchaser who is motivated by a desire for profit is not likely to be entitled to the remedies available to a purchaser who is looking for a place to live. The decisions do not give reasons why a purchaser who has every intention to flip the property or who is engaged in a speculative lawsuit for profit should be denied a remedy that is available to purchasers of “unique” properties.

[7] Although the decisions of the Court of Appeal in *Walton* and *Tiberio* appear to rely on the commercial motivation of the purchasers for the denial of specific performance in those cases, the same reasoning may apply to a residential property, as the following strong *dictum* in *Semelhago* at para. 20, which has already been quoted above, suggests:

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.

[8] Every parcel of land is unique in the sense that there is no other parcel in the same location and within the same boundaries. A parcel of land that is the subject of a contract for the sale and purchase of land is also unique in the sense that the vendor and purchaser have identified the specific parcel to the exclusion of all others and have contracted for its sale and purchase. As stated in *Semelhago* at para 14, grounds such as these underpin the former state of the common law under which “every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent.”

[9] The Supreme Court recognized that the uniqueness test propounded in *Semelhago* was a change in the law; see the quotations from paragraphs 14 and 21 above. So did the Court of Appeal in *Walton*. Slatter J.A., in dissent, said at para. 31: “Traditionally, specific performance was available as a matter of course in cases involving land.” Berger JA, speaking for the majority, implicitly recognized that this was so, saying at para. 2:

The decision of the Supreme Court of Canada in *Semelhago v. Paramadevan* ... 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.
[Emphasis added.]

Semelhago and *Walton* have changed that general understanding so that “uniqueness” is now tested against the purchaser’s needs at the time of the contract for sale and purchase: if another parcel could have met those needs the parcel of land that is the subject of the contract was not “unique”.

3. Some consequences of denial of specific performance

[10] The conclusion that damages is an adequate remedy unless the land is unique has follow-on consequences. As noted in *Walton* 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 the sale and purchase of non-unique land, though having paid part, or even all, of the purchase price, has no claim to the land itself but only a contract right against the vendor. Under the previous law, the purchaser not only had an equitable interest in the land but was considered to be the equitable owner, which gave them a claim to the land that was superior to the claims of the vendor’s execution creditors and to the claims of a subsequent purchaser or transferee of the land from the vendor.⁴ That interest gave the purchaser the right to file a caveat that would ensure that the priority of the interest would be recognized by law. The interest in land and the consequent right to file a caveat were important protections to a purchaser.

⁴ See, e.g., *McDougall v. MacKay* (1922), 64 S.C.R. 1 and *Brownscombe v. Public Trustee*, [1969] S.C.R. 658. See also Lord Parker in *Howard v. Miller*, [1915] A.C. 318 (P.C.) at 326 (cited by Slatter J.A. in *Walton* para 34) and *Roy v. Kloepter Wholesale Hardware & Automotive Co.*, [1952] 2.S.C.R. 465.

4. Legal foundation for the present restrictions on availability of specific performance

[11] The reasoning in *Semelhago* 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 be an adequate remedy unless the land is unique, meaning that no substitute that will meet the purchaser's needs is readily available at the time of the contract.
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 at the time of the contract.

[12] The foundation for the decisions in *Semelhago* and *Walton* is the first 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. That proposition is treated as a given. The decisions do not give any reasons in support of it.

[13] The proposition that specific performance of a contract should not be granted if damages is an adequate remedy is traditional: that is, damages is the traditional default remedy, and specific performance has traditionally been awarded only if the default remedy does not provide adequate relief. The tradition goes back at least to the early days of the Chancery Court and equity.

[14] As succinctly put by Jones and Goodhart:

The origin of this limiting principle [that specific performance will not be granted if the plaintiff's remedy at law, an action for damages, is an 'adequate remedy'] is to be found in the history and development of equity. Equitable remedies were thought to be exceptional and were, moreover, discretionary. They supplemented those of the common law which could be demanded as of right.⁵

That is, equity would provide an equitable remedy only when the remedy was needed to “supplement”, i.e., make up for the deficiencies of, the common law remedies.

⁵ Gareth Jones and William Goodhart, *Specific Performance*, 2d. (1996: Butterworths, London) at 31. See also Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (2008: Canada Law Book, Aurora) at para. 7.10 [Sharpe] where equity is discussed as a “gloss” on the common law.

[15] According to Holdsworth, “[i]t was not till the eighteenth century that it was settled that equity would only grant specific relief if damages were not an adequate remedy – a restriction which has led to the application of this relief chiefly in the case of contracts for the sale of interests in land.”⁶ This rule has been accepted because “[h]istorically the basis for the grant of specific performance by courts of equity has been the inadequacy of legal remedies, and particularly of damages, in the material circumstances.”⁷

[16] However, in the case of land, there has traditionally been an assumption that land is unique, so that damages would not be an adequate remedy and so that specific performance would be generally available (*Semelhago* at para. 14). *Semelhago* and *Walton* hold, in effect, that, because times have changed, the exception allowing for specific enforcement of contracts for the sale and purchase of land 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. With the removal of the exception for land contracts, the main traditional proposition thus applies, that is, that specific performance will not be granted if damages is an adequate remedy.

5. Conclusion from discussion of present law

[17] It does not seem to us to be appropriate that an historical consideration of the relative early functions of the common law and equity, without more, should govern the choice of remedy under a fused system of law and equity and under modern conditions. A more appropriate question than whether or not an award of damages would be an adequate remedy is: which is likely to be the more appropriate remedy in serving the ends of justice as between vendors and purchasers generally, damages or specific performance? 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 are the notion that specific performance should be awarded only when

⁶ Sir William Holdsworth, *A History of English Law*, v. I (1956: Sweet and Maxwell, London) at 457.

⁷ I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 5th. (1997: Carswell, Canada) at 59.

damages is not an adequate remedy and that damages is an adequate remedy unless the land is unique.

C. Economic Approach

[18] 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:

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 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".⁸

[19] It does not seem to us that 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": the purchaser's claim for 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.

[20] 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 there is no evidence, 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.

[21] 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 and effectiveness as between vendors and purchasers generally, and that the question that should be addressed, without preconceptions, is which of damages and

⁸ *Domowicz v. Orsa Investments Ltd* (1993), 15 O.R. (3d) 661 (G.D.). The quoted passage is from Sharpe, note 5, at paras. 7.120 and 7.130.

specific performance will achieve this objective. Again, the decision should not be dictated 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. Comparison of Damages with Specific Performance

[22] 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. The aspects considered are: fairness, efficiency and effectiveness. Protection of the rights of purchasers is discussed below.

[23] This is a general analysis only. The discussion does not suggest that the law relating to specific performance be changed in any way except for the specific preliminary recommendation we will later make, to the effect that the law should be changed so that specific performance will generally be available to purchasers under contracts for the sale and purchase of land on the same basis that prevailed before *Semelhago*. In deciding whether or not to grant specific performance, the court will not, under this preliminary recommendation, 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 defences available before *Semelhago* will continue to be available.

1. Fairness as between vendor and purchaser

[24] An award of damages to a purchaser under a contract for the sale and purchase of land is intended to put the purchaser in the same position as if the vendor had performed their duty to convey the land. The amount awarded depends on the assessment of evidence, which may be in conflict, and is at best an approximation of what will put the purchaser in the same position as if they had received the land. Specific performance, on the other hand, gives the purchaser the land and thus puts them in precisely the same position as if the vendor had conveyed the land in accordance with the contract. It is therefore the remedy that is fairer to the purchaser.

[25] The stringency of the “uniqueness” test may militate against fairness. Suppose that a husband and wife who have been renters, agree to buy a house in the same neighbourhood so that they may be near friends and so that their children can walk to the same neighbourhood school. Suppose further that at the time of the agreement there was another suitable house which they could have bought but which is no longer for sale. Suppose further that they have given notice of termination of their tenancy and have nowhere else to live. They have incurred expenses: they have had the property surveyed and the house inspected; they have made arrangements for a mortgage. Suppose further that they had had to scrape to save the down payment and will not be able to mitigate their damages by buying another house, if one is available. They would have to go to court and take their chances on being able to prove uniqueness or establishing recoverable damages, all with considerable delay. Specific performance would be much fairer. Or suppose that a developer who has assembled for integrated development a group of parcels that were not unique at the time of the contract may not, at the time of breach, be able to find a replacement that will serve the developer’s purposes.

[26] It is true that specific performance does not give the purchaser the land at the time it should have been conveyed, which may be a detriment if the purchaser is not in possession of the land, while a damages award is likely to include an allowance for pre-judgment interest. Equitable defences to specific performance may have to be tested. If the vendor has conveyed the land to a third party, litigation may be required to assert the purchaser’s rights as against the third party (though the filing of a caveat by the purchaser will usually protect their position as against third parties). Nevertheless, we have no doubt that conferring ownership on a purchaser will usually come closer than a damages award to putting them into the same position as if the vendor had performed their obligations under the contract.

[27] Specific performance is fair to a vendor under a contract for the sale and purchase of land who has failed to perform. It adopts the bargain freely entered into by the vendor and purchaser. It merely requires the vendor to perform their part of the bargain. The vendor will have received a price that represented at least the value of the land to the vendor at the contract time. It does not involve the vendor in cost other than the cost of a conveyance which was in the vendor’s contemplation at the time of the contract.

2. Efficiency

[28] In order to obtain either an award of damages or specific performance, the purchaser must prove the contract, the breach, and their own performance. Specific performance will then generally require, in addition, only an order to the vendor to convey the land or 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, 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 likely to require the application of extensive judicial resources in addition to those required if specific performance is granted. Specific performance is therefore generally the more efficient remedy insofar as the parties and the courts are concerned.

[29] 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 complex circumstances that can effectively 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. The uncertainty caused by the uniqueness test will lead to inefficiency in disposing of litigation between vendors and purchasers.

3. Effectiveness

[30] 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, the possibility that the amount of the award may not be collectible is not to be considered in deciding whether or not to grant specific performance. The judgment of the Alberta Court of Appeal in *410675 Alberta Ltd. v. Trail South Developments Inc.* makes this clear:

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.⁹

[31] The possibility that an award of damages will be uncollectible is, to a purchaser, a significant disadvantage of a damages award in comparison with specific performance. The fruits of a judgment for damages may not be capable of realization 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.

4. Conclusion and preliminary opinions

[32] For the reasons of fairness, efficiency and effectiveness that we have given, our preliminary opinion is that specific performance should be available to a purchaser under a contract for the sale and purchase of land if the vendor has failed to convey title to the land as required by the contract. Of course, the purchaser must have performed their obligations under the contract or be ready, willing and able to do so. Specific performance would remain subject to the same discretions and defences as applied before *Semelhago* and *Walton*.

[33] This preliminary opinion is held by all members of ALRI's Board. However, there is a division of opinion as to the precise way in which the objective of making specific performance available to purchasers in all land cases should be achieved. The two options, either of which would achieve the objective, are as follows:

Option No. 1: there should be a statutory provision that the lack of uniqueness of a parcel of land should not be a defence to a purchaser's claim for specific performance.

Option No. 2: there should be a statutory provision that, for the purpose of a purchaser's claim for specific performance under a contract for the sale and purchase of land, the land should be conclusively deemed to be unique.

⁹ *410675 Alberta Ltd. v. Trail South Developments Inc.* (2001), 293 A.R. 181 (C.A.) at paras. 19, 20.

[34] The argument for Option No. 1 is that it would be a simple way of achieving the objective. The argument against Option No. 1 is that the remedy of specific performance applies both to land and to chattels; that the requirement of uniqueness has always been considered applicable to both (though, until *Semelhago* land was almost always considered unique); and that saying that lack of uniqueness is not a defence in land cases may raise problems with specific performance in chattel cases.

[35] The argument for Option No. 2 is that it would merely restore the state of the law before *Semelhago*, as land was generally regarded as unique, and that it would achieve the purpose without raising questions and problems with respect to specific performance generally. The argument against Option No. 2 is that it would essentially legislate a fiction, as there are cases in which land is not “unique”, no matter how uniqueness is defined.

[36] Comments on the main question (should specific performance be generally available to purchasers?) and on the subsidiary question (should the statutory provision to achieve the objective be that lack of uniqueness is not a defence to a claim for specific performance or that land should be conclusively deemed to be unique?) will be welcomed.

E. Protection of Purchaser's Rights

[37] As noted above, *Walton* at para. 7 holds that “Once it has been determined that damages are an adequate remedy, there is no ‘interest in land’ capable of protection by caveat”. 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.

[38] The judgment speaks from the time at which it is determined that damages are an adequate remedy. However, it would be unsafe to think that a purchaser under a contract for the sale and purchase of land might have an interest in the land until that determination is made. The most likely conclusion from *Walton* is that a purchaser will be able to file and maintain a caveat only if they can show that they will, upon performance, be entitled to call for specific performance.

[39] 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 title to the land.¹⁰ The purchaser's interest was not said to be dependent on the availability of specific performance: the linkage of the right to file a caveat to a right to specific performance was not made. The purchaser thus had a right 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, upon performance of their obligations under the contract, they would get the land. A contract right does not give the same assurance.

[40] Even if specific performance is likely to be an available remedy, there is a logical problem in saying that this likelihood is enough to confer an interest in land that will support a caveat. The problem 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 this 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.

[41] Our preliminary opinion is that a purchaser under a contract for the sale and purchase of land should be entitled to an interest in the land 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

¹⁰ See for example, a statement in the judgment of Locke and Cartwright JJ in *Kloepfer Wholesale Hardware and Automotive Co. v. Roy*, [1952] 2 S.C.R. 465 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.

price and has undertaken a contractual obligation to pay the balance. If the purchaser is not allowed to protect that claim 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.

[42] 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.

[43] A question arises as to whether the purchaser's interest should survive a refusal of specific performance. There is a division of opinion on this question on ALRI's Board. The two opinions are as follows:

Opinion 1. If the purchaser's interest in land continues to exist and the purchaser's caveat remains valid after a court determines that the purchaser is not entitled to specific performance, the purchaser and vendor will be left in a stalemate. The purchaser will not be entitled to a transfer of the land, but the purchaser's caveat will effectively preclude the vendor from transferring the land to anyone else. Absent termination of the agreement of purchase and sale, the purchaser's interest in land will continue notwithstanding the award of damages for breach of the agreement and notwithstanding even payment of that award of damages by the vendor. However, there will be no identifiable interest by the purchaser in the land, other than the fact that the existence of such an interest is decreed by legislation. To avoid these results, the legislation that creates the interest in land should further provide that except for the purchaser's lien for payments made under an agreement of purchase and sale, the purchaser's interest in land will cease to exist, and the purchaser's caveat will cease to be valid, if a court determines that the purchaser is not entitled to specific performance.

Opinion 2. Specific performance may be denied for reasons that do not justify the termination of the purchaser's interest, for example because the purchaser committed a remediable default in performance; because the pleadings were not sufficient; because of laches; or for some other more or less technical reason. If the purchaser's caveat is removed they will not

have any protection for the return of money paid toward the purchase price. Unless there has been a breach sufficiently serious to justify terminating the contract and the purchaser's interest in the land, there is no reason to choose to favour the vendor.

We invite comment as to which opinion should be implemented.

[44] We have considered whether to include a general provision governing the validity or duration of a caveat filed to protect a purchaser's interest. However, we think it clear enough that the termination of the contract by party action or by a judgment of the court will terminate the interest conferred by the contract interest and make the caveat invalid to the extent that it protects that interest. Again, nothing in this discussion would affect the existence of a purchaser's lien or of a caveat to the extent that it protects a purchaser's lien.

F. Conclusion

[45] Our preliminary views, which are subject to change through consultation in response to this Report for Discussion, are as follows:

- the law as laid down in *Semelhago* and *Walton* is that a purchaser of land under a contract for sale and purchase of the land, unless the land is unique, does not acquire an interest in the land; is not entitled to register a caveat protecting their rights under the contract; and is not entitled to specific performance of the contract. This represents a serious deprivation of rights previously enjoyed by purchasers, who were generally entitled under the law of Alberta to all of these rights.
- an order for specific performance of a contract for the sale and purchase of land is generally fairer, more efficient and more effective than an award of damages, so that a purchaser should generally be entitled to specific performance without showing that the land is "unique". Otherwise the law relating to specific performance of such contracts, including its equitable defences, should remain the same as before *Semelhago*.
- a purchaser, by entering into a contract for the sale and purchase of land, should acquire an interest in the land. The interest should continue to exist until the purchaser's right to obtain ownership of the land is terminated according to law.

- the purchaser should be entitled to file a caveat against the title to the land protecting that interest and the caveat should remain valid while the interest continues to exist.

[46] These measures are necessary to give a purchaser under a contract for the sale and purchase of land a reasonable assurance that, if they perform their obligations under the contract, they will be able to obtain ownership of the land.

PRELIMINARY RECOMMENDATION

For all the reasons stated in this Report for Discussion, ALRI's preliminary opinions are:

- (a) The law should 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. Whether this objective should be achieved by a statutory provision that lack of uniqueness is not a defence against a claim for specific performance or by a statutory provision that, for the purposes of specific performance land is conclusively deemed to be unique, remains to be decided.**
- (b) A purchaser under a contract for the sale and purchase of land acquires an interest in land under the contract.**
- (c) The purchaser has a right to file a caveat protecting that interest.**

[47] We have set out our reasoning in this Report for Discussion so that our preliminary opinion may be tested and, if it is wrong, corrected. Following the consultation process we will issue a final report and recommendations.

G. Request for Comment

[48] We invite comment on the following questions:

QUESTION NO. 1

Should a purchaser of land under a contract for the sale and purchase of land who has performed their obligations under the contract, or is ready, willing and able to do so, be entitled to specific performance of the contract

- a. **generally,**
- b. **only when damages is an inadequate remedy, or**
- c. **only when the parcel of land is unique in the sense that there is no substitute parcel that would meet the purchaser's needs?**

QUESTION NO. 2

If purchasers who have performed or are ready, willing and able to perform their obligations should generally be entitled to specific performance, should the general entitlement be assured by

- a. **a provision that lack of uniqueness of a parcel of land is not a defence to an action for specific performance, or**
- b. **a provision that a parcel of land is conclusively deemed to be unique, or**
- c. **some other provision?**

QUESTION NO. 3

Should the purchaser under a contract for the sale and purchase of land acquire an interest in the land by virtue of the contract?

QUESTION NO. 4

Should the purchaser be entitled to file a caveat against the title to the land and, if so, should the caveat give the purchaser priority over later registered and caveated interests?

QUESTION NO. 5

If the purchaser should acquire an interest in land by virtue of the contract and should be entitled to file a caveat, should those rights be terminated by a refusal of specific performance without more?

APPENDIX — SOME INCIDENTAL QUESTIONS UNDER THE EXISTING LAW

This Appendix lists four instances in which it is not clear how the law in *Semelhago* and *Walton* fits in with other provisions of the law. These points do not form part of ALRI's project and are mentioned here for information only.

1. Insurable interest of purchaser

If a purchaser of a non-unique parcel of land does not have an interest in land under *Semelhago* and *Walton*, the question will arise whether they have an insurable interest in the land, that is, whether they are entitled to insure either improvements on the property or a purchaser's lien for payments made towards the purchase price, or whether any insurance they place will be void.

2. Law of Property Act, ss. 40, 41 and 43

The effect of ss. 40, 41 and 43 of the *Law of Property Act*¹¹ is that a vendor under a contract for the sale of land to a non-corporate purchaser has no claim on a covenant in the agreement for sale, and that in an action by the vendor the order for specific performance must direct that if the purchaser fails to comply with the terms of the order the land will be offered for sale and, if not sold, will be vested in the vendor. The sections would not make much sense if a purchaser does not have an interest in land, but such cases are not excluded from the operation of the sections. Questions therefore arise as to whether and to what extent ss. 40, 41 and 43 apply if the purchaser does not have an interest in the land.

3. Law of Property Act, s. 63

Section 63 of the *Law of Property Act* provides that a right of first refusal to acquire an interest in land is an equitable interest in the land and may be protected by caveat which takes priority in accordance with s. 14 of the *Land Titles Act*¹² and runs with the land. A court would likely hold that upon the exercise of the right of first refusal a contract for the sale and purchase of the land arises. If so, there

¹¹ *Law of Property Act*, R.S.A. 2000, c. L-17.

¹² *Land Titles Act*, R.S.A. 2000, c. L-4.

would then be a question as to whether the exercising party would acquire an interest in land, on the grounds that the exercise of the right of refusal did not downgrade the interest in land or whether the law as declared in *Semelhago* and *Walton* would apply to deny the exercising party an interest in the land.

4. *Dower Act*, s. 2

Section 2 of the *Dower Act* prohibits a married person from making a disposition of the homestead whereby any interest of the married person will vest or may vest in another person, without the consent of the married person's spouse.¹³

"Disposition" is defined to include any instrument intended to convey or transfer an interest in land. If a contract for the sale and purchase of land does not convey an interest in land, the *Dower Act* provisions, literally interpreted, do not appear to require the consent of the vendor's spouse to a contract for the sale and purchase of the homestead. The consequent conveyance would require consent. If the purchaser goes into possession, a question might arise as to whether the vendor's spouse's consent to the contract is required and as to whether the purchaser's spouse's consent is required to an assignment of the purchaser's interest (though it is unlikely that the land will qualify as the purchaser's homestead).

¹³ *Dower Act*, R.S.A. 2000, c. D-15.