Death to Semelhago!

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In the 1996 decision of the Supreme Court of Canada in Semelhago v. Paramadevan, Justice John Sopinka stated that it is no longer appropriate to assume that specific performance will issue as a matter of course to enforce a contract for the sale of land. Before performance will be ordered, it must be proven (and not assumed) that common law damages for breach of contract will not suffice to do justice. In this article, Semelhago and the case law generated in its aftermath will be reviewed, and the policy arguments pertaining to the current law addressed. In short, it will be argued that the Semelhago dictum should be rejected.

Dans l’arrêt Semelhago c. Paramadevan de 1996 de la Cour suprême du Canada, le juge John Sopinka affirmait qu’il ne convient plus de présumer que l’exécution intégrale d’un contrat pour la vente d’un bien immeuble sera accordée automatiquement. Avant que l’exécution soit ordonnée, il doit être démontré (et non présumé) que des dommages-intérêts accordés en vertu de la common law pour la rupture du contrat constitueront une réparation inadéquate. Dans cet article, l’arrêt Semelhago et la jurisprudence qui l’a suivi sont passés en revue, et les considérations de principe relatives à la loi actuelle sont examinées. Tout compte fait, l’auteur allègue que l’obiter de Semelhago doit être rejeté.

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Introduction

In 2014, over 480,000 residential properties changed hands in Canada. Most deals are completed as agreed. Yet, occasionally things go awry. At or near the closing, the vendor may indicate that the land will not be transferred. Where there is no valid reason for so doing, the reneging vendor is in breach of contract.

In response, the purchaser may accept the breach, treat the contract as having ended, and seek damages. Alternatively, that party may refuse to accept the breach and sue for specific performance. If so, the contract remains alive and is enforceable by and against either party. In effect, the contract is revived, and the vendor may avoid a finding of breach.

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1. Canadian Real Estate Association, National Statistics, online: <creastats.crea.ca/natl/index.htm>. In 2013, the figure was 457,761 according to CMHC, Canadian Housing Observer (Ottawa: CMHC, 2014) at E-6.
by tendering.² A party otherwise entitled to specific performance may abandon that claim and seek equitable damages instead.

When the purchaser prefers to obtain the land, an intuitively fair response to this scenario is easy to imagine. A lay observer might conclude that people should keep their promises. When the purchaser tenders payment, one would expect the vendor to live up to the bargain. If called upon to adjudicate, a court should then require the vendor to perform the contract to the letter or risk a finding of contempt. An award of damages would likely be seen as a consolation prize.³

On many occasions, that is precisely the way the matter is resolved. However, in Canada, an order for specific performance is only the back-up remedy in such cases. An award of damages to compensate the innocent purchaser is the presumptive response. All else being equal, the vendor will be allowed to keep the property by paying damages for the breach. In the 1996 decision of the Supreme Court of Canada in *Semelhago v. Paramadevan,*⁴ Justice John Sopinka stated that it is no longer appropriate to assume that specific performance will issue as a matter of course to enforce a contract for the sale of land. Before performance will be ordered, it must be proven (and not assumed) that common law damages for breach of contract will not suffice to do justice.

The sole point of this article is to advance the argument that the *Semelhago dictum* is bad law and should be rejected.

This is not the first time that it has been offered that the *Semelhago* principle should be abandoned. Two Canadian law reform agencies have come to the same conclusion.⁵ Commentators have cast doubt on its appropriateness from time to time.⁶ However, action has not yet been taken anywhere in Canada to go a different route. Moreover, *Semelhago*
has its supporters, and the Supreme Court of Canada implicitly reaffirmed the ruling in 2012. As a result, I offer this critique.

The discussion is organized as follows. In Part I, the doctrinal platform on which the law of remedies in land sales is based is outlined. At its core is the idea that a contract for the purchase and sale of land can be seen as creating an equitable interest in the land in any case in which equity would order performance of the agreement. In Part II, the key elements of the ruling in Semelhago are presented. In the nearly two decades since that decision, there have been dozens of reported decisions that have applied, distinguished, explained, and refined the law. This part contains a description of the current law by taking account of those developments. In Part III the principal policy considerations are canvassed.

I. Some fundamentals

1. Specific performance and equitable interests in land

An agreement for purchase and sale typically calls for the land in question to be conveyed on a designated date. The period between the time at which the agreement is signed and the closing date is used for various purposes, such as determining the validity of the vendor’s title, securing financing, and arranging for relocation. During this pre-closing period, the purchaser may choose to lodge a notice on the title to ensure that no subsequent dealings with the land will adversely affect that party’s interest.

It has long been understood that once the agreement has been executed, that is, even before legal title passes on the closing date, the purchaser has more than just a contractual right against the vendor. The purchaser is said to hold an equitable interest in the property. As a corollary, the vendor is treated as a constructive trustee; the purchaser is the cestui que trust. The trust is an unorthodox one, for during its operation the vendor is not stripped of all beneficial entitlements to the land. Absent a contractual term to the contrary, the vendor continues to have a right of possession, and is entitled to any rents and profits generated prior to closing. The principal

duties of the vendor as trustee are to preserve the property and to convey it as required.

The basis for this trust flows from the maxim that equity treats as done that which ought to be done. As there is a promise to convey the land, equity treats the purchaser as already enjoying the status of owner. However, that treatment is contingent on whether equity will order specific performance of the contract. In other words, if and only if equity would compel the transfer of title, will it conceive of the purchaser as being an owner in the interim.10

Treating the availability of specific performance as the *sine qua non* of an equitable interest creates a paradox. The purchaser’s equity (and the creation of this special constructive trust) is treated as arising the moment the contract is made. However, whether equity will compel this transfer to be completed is never certain at that point. Before equity will order performance it must be shown that damages provide an inadequate remedy. The position for a very long time was that land was regarded as unique so that an order for damages was not normally an acceptable response to a breach.11 Even so, an order for performance was not inevitable. There may be conditions and undertakings contained in the agreement that first must be satisfied. Moreover, all equitable remedies are discretionary; they cannot be demanded as of right. A purchaser guilty of delay, or who otherwise engages in inappropriate action prior to closing, may be denied specific performance.12

Some account for this paradox has been required. For example, under the Alberta *Land Titles Act*, a caveat can be filed only for an interest in land.13 An equitable interest arising from a contract of purchase qualifies. The interest in the land is premised on the willingness of equity to order specific performance, and again, at the moment of filing we do not know if that order will be made. To account for this timing problem, the legislation provides that the caveat is valid as long as the agreement has not been breached by the claiming party, and provided some other valid reason for vacating the caveat is not proven.14 In other words, a caveat is tenable because an interest in land is presumed even before it is known whether or not specific performance will issue.

11. *Adderley v Dixon* (1824), 1 Sim & St 607, 57 ER 239 (Ch).
12. See further text accompanying notes 29 to 31, *infra*.
14. *Ibid* at s 143.
Consider also a situation in which a judgment creditor tries to execute against land of a judgment debtor. It is axiomatic that a creditor may only seize that which belongs to the debtor and no more. Assume that prior to the filing of the writ of enforcement, the debtor had agreed to sell the property to a third party. That agreement can, as we have just seen, give rise to an equitable interest in the property in favour of the purchaser. If so, the judgment debtor’s interest in the land is diminished accordingly, leaving the judgment creditor without recourse to the land. However, at the time that the writ attached, the so-called prior equitable interest was dependent upon the prospect that specific performance would issue in the future, an outcome that is unknown until a court so orders.

Such a scenario occurred in Martin Commercial Fueling Inc. v. Virtanen. There, the court was called upon to consider whether or not a writ of execution had priority over an unregistered equitable entitlement that arose when the judgment debtor sold the property to a third party. The sale occurred on T1 but was not registered. The writ was lodged at T2. It was held that the sale to the third party did in fact encumber the land, and took precedence over the writ. The sale trumped the writ even though when the writ was registered, the agreement was not on title, and—of greater importance here—despite the fact that one could not be certain specific performance would ever be granted.

2. Common law and equitable damages
On breach, an innocent party may seek performance on breach of contract and/or may opt to claim for damages. When common law damages are sought, the normal reference point for quantification is the date of breach. One looks to the difference between the agreed-to-price and the market value of the property on that date. If the market has risen, the plaintiff is entitled to that increase. Measuring damages in this way is premised on the idea that the plaintiff, in the face of a breach, will (should) look for another property at that point. If it now costs more to acquire a like parcel, the defendant must make up the discrepancy in damages.

A plaintiff might also have a claim to equitable damages. Where specific performance is otherwise available, a court of equity is permitted to order damages in lieu of performance. Here the presumptive reference date for determining the quantum is the date at which the remedy of

17. For a textbook example, see Chai v Dabir, 2015 ONSC 1327, 2015 CarswellOnt 2857.
performance could have been ordered, i.e., at trial or at the point when the request for performance is abandoned or is no longer tenable.18

These two damages-based claims are, in theory, distinct, and can give rise to different awards. It must be cautioned, however, that the distinction here between law and equity is not necessarily that marked. In the modern era, the courts may determine that the fairest approach is to set common law damages in the same manner in which damages in equity might be determined.19 In other words, it is possible for a court to assess common law damages as at the date of trial where that would yield an appropriate result.

II. Semelhago and its aftermath

1. The decision

The facts in Semelhago are unremarkable. In 1986, S agreed to purchase a house under construction from P. When the closing date arrived, P reneged on the deal. Several weeks later, he transferred the house to his wife. S sued, seeking damages in lieu of specific performance. Throughout the period, S remained in his original house.

It was conceded by counsel for the defendant (P) that specific performance was an available remedy under the circumstances. But S did not seek performance. He wanted equitable damages instead. The dispute concerned the quantum of damages to be awarded to the disappointed purchaser in lieu of performance. Five years had passed between the time of breach and the trial, and during that time the purchaser’s existing home had itself appreciated in value. Given that, it was arguable that the purchaser had suffered no real loss, and that any award of damages would constitute a windfall.

The Supreme Court held that S was entitled to recover the difference between the agreed sale price of the second home and that home’s value at the time of trial. Justice Sopinka, writing for the majority, stated that the calculation of damages need not take into account the increase in value of the plaintiff’s retained home. Moreover, damages were to be measured as at the date of trial, for only then could the award be a true equivalent of an order for specific performance. In the course of this analysis, Sopinka J. reflected on the significance of the uniqueness of the subject property when performance is being sought. Those comments now form the foundation of

the law governing specific performance for real estate contracts in Canada. Here they are in full:

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. Both residential, business and industrial properties are 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._ In _Adderley v. Dixon_ (1824) … Sir John Leach, V.C., stated (at p. 240):

Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and 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. … Some courts, however, have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land. In _Chaulk v. Fairview Construction Ltd._ … the Newfoundland Court of Appeal[,]… after quoting the above passage from _Adderley v. Dixon_, stated…:

The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.
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 guideline proposed by Estey J. in Baud Corp., N.V. v. Brook... with respect to contracts involving chattels is equally applicable to real property: ...:

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.20

Since the appropriateness of specific performance in this case was not put in issue, Sopinka J.’s comments were obiter dictum. Even so, the principle has been followed consistently by lower courts in Canada.21

2. The current test for specific performance
In one sense, Semelhago changed little. Equitable remedies are always discretionary; that being so, no particular outcome is available as of right. Equity will demand, among other things, that a party seeking relief must come with clean hands and be prepared to do equity if the circumstances require as much. The old law always treated damages as the default remedy, though for land it was assumed that money would normally not do.22 However, even in the pre-Semelhago era, an order for performance was occasionally denied on the basis that the subject property was not unique and that damages would serve as a suitable remedy.23 Given this background, the change ushered in by Semelhago can be seen as one of degree, not principle.

The current law is not described uniformly in the case law. Three kinds of formulations can be found:

Statement #1 (from Semelhago): “Specific performance should... 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.”24

Statement #2: To be entitled to an order for specific performance it

20. Semelhago, supra note 2 at paras 20-22 (Sopinka J) [emphasis added].
21. “[The statement in Semelhago] is obiter of the highest order. There is obiter and there is obiter. Some have[ve] a lot more weight than others”: Corse v Ravenwood Homes Ltd (1998), 226 AR 214 at para 15 (Master Funduk).
24. Semelhago, supra note 2 at para 22 (Sopinka J).
must be shown that “(1) the subject property is unique and a substitute is not readily available; (2) the remedy of damages is comparatively inadequate to do justice; and (3) the plaintiff has established a fair, real, and substantial justification for the claim of specific performance.”

Statement #3: “The...fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties. This will [often] depend on whether money is an adequate substitute for the plaintiff’s loss and this in turn will [often] depend on whether the subject matter of the contract is generic or unique.

These three statements bear strong similarities, though they also contain important differences. In my view, the first two statements are inadequate, and the third formulation reflects a proper statement of the current law. I discount the first two formulations because they both give undue prominence to the element of uniqueness. Both suggest that proof of uniqueness is essential if performance is to be ordered. In fact, uniqueness is not a necessary basis on which to decide whether specific performance should issue. Moreover, in some cases uniqueness will not be sufficient to warrant that order.

Under the current law, uniqueness is not a necessary basis for ordering specific performance because even if the property is a purely fungible unit, damages may not serve the ends of justice. That would be so in at least three instances. First, damages may be difficult to compute. If the land in issue is not unique, it would normally be possible to ascertain its value by examining other comparable properties. Still, life is not always as accommodating. Rational disagreements can emerge about current valuations that would require considerable time and effort to resolve.

25. Canamed (Stamford) Ltd v Masterwood Doors Ltd, 2006 CarswellOnt 1183, 41 RPR (4th) 90 (SCJ) at para 103 (McMahon J). See also the three-prong test offered in 686966 BC Ltd v 686967 BC Ltd, 2007 BCSC 1137, 2007 CarswellBC 1759 at para 18 (Wilson J): (i) is there evidence that the land is especially suitable for the purchaser? (ii) is there evidence that a substitute is not “readily available”? and (iii) are damages “comparatively inadequate” to do justice? See also Hayward v Bennett, 2010 CarswellBC 1465, 2010 CarswellBC 2814.


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The market may be so volatile that fixing the value of the property may lead to significant over- or under-valuation.\textsuperscript{28}

Secondly, as already noted, specific performance is a discretionary remedy,\textsuperscript{29} and equity is attentive to the conduct of both parties whenever equitable relief is being sought. Where a defendant is guilty of inappropriate conduct (beyond a mere breach of contract), the scales of justice may tip in favour of an order of specific performance against that party.\textsuperscript{30} This discretion may be exercised in favour of a defaulting vendor even where no wrongdoing is involved, such as where denying an order for performance would have left the contracting parties as co-owners.\textsuperscript{31}

Thirdly, a damages award may not be of practical value if the vendor is unable to satisfy the judgment. It has been questioned whether a vendor’s insolvency is or is not a valid reason for concluding that damages are inadequate.\textsuperscript{32} The concern is that to order performance in that situation would give the purchaser an unfair preference over unsecured creditors of the insolvent vendor. Even if that is good law, there are other instances in which a monetary award can be a hollow victory.\textsuperscript{33} The land in issue may be the only exigible asset of an otherwise solvent vendor. Or the vendor’s principal exigible assets may be in another jurisdiction, so that execution against those properties would be difficult and expensive.\textsuperscript{34}

By the same token, uniqueness is not necessarily enough to support the granting of an order of specific performance. As already noted, equitable relief may be denied where it is the plaintiff who has engaged in improper conduct, or where the plaintiff is guilty of delay (laches)\textsuperscript{35} or acquiescence

\textsuperscript{28} Amar v Matthew, 2010 BCSC 508, 2010 CarswellBC 893; Sihota v Soo, 2010 BCSC 886, 2010 CarswellBC 1607.
\textsuperscript{29} Beier v Proper Cat Construction Ltd, 2013 CarswellAlta 141, 2013 ABQB 351 at para 80.
\textsuperscript{30} Mondino v Mondino, supra note 27. See also Landmark of Thornhill Ltd v Jacobson (1995), 25 OR (3d) 628, 1995 CarswellOnt 408 (CA).
\textsuperscript{31} Mondino v Mondino, ibid.
\textsuperscript{32} See further RJ Sharpe, Injunctions and Specific Performance, 4th ed (Aurora, ON: Canada Law Book, 2012) at para 7.260ff. See also 410675 Alberta Ltd v Trail South Developments Inc, 2001 ABCA 274, 2001 CarswellAlta 1405, leave to appeal to the SCC refused: 2002 CarswellAlta 696 on which it was argued that specific performance should be available because the defendant had no other assets apart from the land in issue to satisfy the breach. The Court of Appeal rejected the argument on the basis that the authorities cited by the plaintiff “support[ed] 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”: ibid at para 20 (per curiam). There was no suggestion that the defendant in Trail was insolvent, though that might have been true. But see Mylonas Enterprises Ltd v Foundation Place Inc, 2013 CarswellAlta 1169, 2013 ABQB 385 (vendor insolvent).
\textsuperscript{33} Sihota v Soo, supra note 28.
\textsuperscript{34} Soo v Law, 2009 BCSC 1041, 2009 CarswellBC 2063.
\textsuperscript{35} 370866 Ontario Ltd v Chizy (1987), 57 OR (2d) 587 (HC); Zalandek v De Boer, supra note 23.
that results in appreciable hardship on the defendant.\textsuperscript{36} Equity will not order performance where to do so would affect certain third parties, most prominently, the bona fide purchaser for value of a legal interest without notice of the prior equitable right of the purchaser.\textsuperscript{37} Equity will also refuse specific performance where ongoing supervision of the contract might be necessary.\textsuperscript{38}

Hence, the third formulation of the three in circulation is superior. The primary question is whether damages will suffice to meet the ends of justice. In that determination, the uniqueness of the property is one consideration among others, albeit often the most important factor.

3. \textit{The meaning of uniqueness}

Like snowflakes and fingerprints, all properties can be described as unique. No two parcels can occupy the same physical space on the globe. However, that kind of uniqueness will not suffice to render a property special in this context, for otherwise the issue would lose all significance. Yet we also know that uniqueness does not mean that the plaintiff must show that the property is one of a kind. The property need not be shown to be “incomparable.”\textsuperscript{39} Instead, the property must be unique “to the extent that its substitute would not be readily available.”\textsuperscript{40} In essence, the cases have asked whether the property possesses such qualities that finding a suitable substitute is rendered difficult (though not necessarily impossible). Uniqueness, then, is a matter of degree, about which rational disagreements can arise.

The purchaser might truly believe that the property is her or his “dream home.”\textsuperscript{41} But that is not enough. Uniqueness is regarded as

\textsuperscript{36} Bowser \textit{v} Prager, [1999] OJ No 1438 (SCJ); Zalaudek \textit{v} De Boer, supra note 23; \textit{ Cf} Cimon \textit{v} Arthur, 2006 CarswellOnt 2642 (CA) aff’d 2005 CaswellOnt 8666 (SCJ); Beier \textit{v} Proper Cat Construction Ltd, supra note 29. In general, hardship to the defendant is to be weighed against the reasonable expectations of the plaintiff that the contract be fulfilled: Zhang \textit{v} Soong, 2012 BCSC 758, 2012 CarswellBC 1495. \textit{ Cf} Cimon \textit{v} Arthur, 2006 CarswellOnt 2642 (CA) aff’d 2005 CaswellOnt 8666 (SCJ).

\textsuperscript{37} See e.g. Munn \textit{v} Worden, 1997 CarswellNB 172 (QB). In Roberge \textit{v} 1102940 Alberta Ltd, 2012 ABQB 717, 2012 CarswellAlta 2258, the court was prepared to recognise the hardship to a subsequent purchaser who acquired the property \textit{with notice} of the plaintiff’s claimed interest (via a caveat) as an additional reason to deny specific performance. (Uniqueness had not been proven.) The third party had spent money improving the property. See also Lalani \textit{v} Wenn Estate, 2011 BCCA 499, 2011 CarswellBC 3230.

\textsuperscript{38} See generally, Sharpe, supra note 32 at para 7.340ff.

\textsuperscript{39} John E Dodge Holdings Ltd \textit{v} 805062 Ontario Ltd, supra note 26 at para 60 (Lax J).

\textsuperscript{40} Semelhago, supra note 2 at para 22.

\textsuperscript{41} As in Kelly \textit{v} Dosch, 2003 CarswellOnt 330, 8 RPR (4th) 306 (SCJ) (specific performance denied).
having subjective and objective facets. The subjective element means that the purchaser actually viewed the property as unique at the time of contracting, and presumably also at trial. Of course we know intuitively that the property is special to that party because they have not only entered into a contract to acquire that very parcel, but they have also responded to a breach of contract by suing for performance. That being so, the subjective feature seems superfluous and unhelpful. Nevertheless, subjectivity serves to frame the inquiry as to objective uniqueness. External circumstances must demonstrate objectively that another property is not readily available to serve that purpose. Here the questions become (i) what features of the property mattered to the purchaser, making it particularly suitable for the purpose for which it was purchased? and (ii) can those features be found elsewhere? So, a house with a ravine lot is often viewed as especially desirable. However, should the purchaser concede that it is the home’s Tudor-style architecture that provides the special ingredient, the focus of objective uniqueness must relate solely to that feature.

The inquiry into whether a property meets the uniqueness criterion is very fact dependent. However, it does not take a real estate agent to know that three of the most important factors leading to a finding of uniqueness are—location, location, location. Turning to the case law offers some guidance. For example, the criterion has been satisfied where the subject property is situated near lands that the purchaser already owns, at least when there is a use-nexus between those parcels and the property in

43. Roberge v 1102940 Alberta Ltd, supra note 37.
44. “[T]he test is primarily an objective one”: de Franco v Khatri, 2004 CarswellOnt 9767 (SCJ) at para 3 (Lax J).
45. John E Dodge Holdings Ltd v 805062 Ontario Ltd, supra note 26; 1534818 Alberta Ltd v Tissot Management Ltd, 2011 ABQB 975.
46. United Gulf Developments Ltd v Iskandar, 2004 NSCA 35, 222 NSR (2d) 137.
47. As in Dryer v Peterson, 2010 BCSC 1221, 2010 CarswellBC 2298. See also Kyriacopoulos v Fitzgerald, 2009 CarswellOnt 3328, 82 RPR (4th) 308 (SCJ).
Uniqueness may be found when the property is close to amenities that are of considerable importance to the purchaser (such as a school or a mosque). A house on a ravine lot, especially where it was custom built, would qualify. In the right circumstances, even a vacant lot can be unique.

A property may have unique features even if its locale is quite ordinary. Such was the case where the property was a former school building, or was a beautiful rural parcel that was suitable for pasturing horses. Other circumstances have also been found to be germane, such as where a buyer lawfully enters into possession prior to the closing and undertakes work on the property, or where a purchaser acquires a house next door for the express purpose of getting rid of the neighbour who is living there. One would think that where the contract deems the property to be unique and where they have stipulated that performance may be sought, such a term should be controlling, at least if it is not unreasonable or otherwise unenforceable.

A distinction is sometimes drawn between residential and commercial properties. Hence, it has been suggested that the subjective aspect is more salient when the home—often a family’s most important purchase—


52. Siddiqui v Mir, 2005 CarswellOnt 7592, 47 RPR (4th) 137 (SCJ).


58. Bester v Proper Cat Construction Ltd, supra note 29.


is involved. At the same time, it is appreciated that some homes may lack sufficient distinctiveness. Condo unit #203 may not differ in any material way from condo units #202 and #204. The same might be true of two cookie-cutter homes in a new residential development. Likewise, some commercial properties may possess highly distinctive attributes. Accordingly, there is no bright-line distinction between residential and commercial properties.

Another dichotomy focuses on whether or not the land—residential or commercial—is being acquired for use and occupation or as an investment. Hence, a property acquired for quarrying, or lumber is a candidate for unique status, whereas a house bought with a view to a prompt re-sale is not. However, this dividing line is also imperfect. Some investments are complex and involve a long-term plan. In such instances, a court may find it very difficult to pinpoint the proper measure of damages. This might be seen as a problem of the adequacy of damages. Although little turns on this distinction, it may equally be seen as a matter of uniqueness. One asks whether another property can be found that can be plugged into the plan, as one component among many, to yield the same profit later on.

4. The onus of proof
General principles governing proof in civil matters mandate that in a contract dispute a disappointed party must demonstrate the breach of a valid agreement. If specific performance is sought, the plaintiff must also be ready, willing, and able to close the deal, and show that damages are inadequate to meet the ends of justice. As we have just seen, under Semelhago that latter issue often imposes an onus on the purchaser to prove that the property is unique, such that a replacement is not readily available. In short, the burden of proving uniqueness rests with the plaintiff. The time for that determination is at breach. At that point,
the plaintiff must decide whether to terminate the contract and sue for damages, or to keep the contract alive and seek performance. 67

It is sometimes said that the post-Semelhago law has not gone so far as to replace the presumption of uniqueness with the presumption of replaceability. 68 It has also been offered that Canadian law now treats the issue as a matter to be determined by taking account of all of the circumstances. 69 I find such statements to be unhelpful. Prior to Semelhago there was a strong presumption that real property was unique and therefore a proper subject for specific performance. However, it was a rebuttable presumption, and, as already noted, one can find cases in which specific performance was denied by reason of lack of uniqueness. 70 After Semelhago, there is a presumption of replaceability, though it too is rebuttable. We know this is so because if no evidence is tendered on the issue of uniqueness, specific performance should be denied. 71 The same result should obtain if no search is made for a suitable substitute. 72

Requiring the plaintiff to show uniqueness casts upon that party the need to prove a negative, i.e., that there is no substitute property. 73 If we were to take the requirement of proving this negative to an extreme, we would ask the plaintiff to locate and consider all relevant properties on the market, and then to discount each and every one as a viable alternative. All the while the defendant would be required to do nothing. That party need not provide a list of properties that could serve as an adequate substitute. It might point to certain locations, alleging only that the properties within that area have not been proven by the plaintiff to be unsuitable.

There is, however, a built-in limiting element to the plaintiff’s seemingly impossible task. It must be shown that a substitute was not readily available. That implies an element of practicality to the plaintiff’s burden. It has been observed that the law does not require the purchaser to look high and low for all listed and unlisted properties. 74 Rather, there is,

67. John E Dodge Holdings Ltd v 805062 Ontario Ltd, supra note 26 at para 57 (SCJ).
68. 904060 Ontario Ltd v 529566 Ontario Ltd, 1999 CarswellOnt 378 (SCJ) at para 14 (Low J).
69. Turner, supra note 9 at 604. See also Matthew Brady Self-Storage Corp v InStorage Limited Partnership, 2014 ONCA 858, 2014 CarswellOnt 16809 at para 35.
70. See supra text accompanying note 23.
71. See e.g. United Gulf Developments Ltd v Iskandal, 2003 NSCA 83, 2003 CarswellNS 300. See also Poirier v Diamond Key Homes Ltd, 2009 ABQB 139, 2009 CarswellAlta 345 (Master).
72. Li v An, 2006 BCSC 671, 2006 BCW 3420. But see Phelps Holdings Ltd v Strata Plan V15 SI4, 2010 BCSC 870, 2010 CarswellBC 1513 at para 22, where the property in issue was found to be unique even though the plaintiff provided no evidence as to other sites. See also Ali v 636527 BC Ltd, 2004 BCCA 350, 29 BCCLR (4th) 206.
it would seem, some notional requirement of due diligence. Moreover, in appropriate cases, proof of an extensive search for properties prior to the purchase in question will satisfy this requirement.75

The issue of uniqueness can arise in interlocutory proceedings, that is, before a full-blown trial of the dispute. For instance, the viability of a claim for specific performance can be challenged by a defendant in an application for summary judgment. In this setting, it is the defendant who bears the persuasive burden. Where summary judgment is sought, the defendant (as moving party) must prove that there is no genuine issue for trial.76 If there is a realistic chance that the plaintiff will succeed (in this case in obtaining an order for specific performance), summary judgment should be refused.77

Summary proceedings may also be invoked in another way to bring the issue of specific performance to the fore prior to trial. Proceedings may be brought to discharge a caveat or certificate of pending litigation. For example, as already noted,78 in Alberta a caveat may be lodged claiming, inter alia, an equitable interest under an agreement for sale.79 The Registrar cannot lawfully refuse to record the caveat on the ground that the interest claimed is not recognized as such in law, or that the caveator does not in fact hold the interest being claimed. By the same token, the filing of a caveat in no way validates the interest claimed. It serves as notice only. Alternatively, a litigant may submit a lis pendens, commonly called a certificate of pending litigation, which is designed to provide notice that a claim to an interest in land is being asserted in legal proceedings.80

Given that there is little filtering of caveats or lis pendens claims at the moment of registration, there needs to be some process to contest

77. Nisheu Enterprises Ltd v Friendly Auto Body & Repair Ltd, 2010 ABQB 8 (Master); Amnor Ltd v 923862 Alberta Ltd, 2010 ABQB 236; 29 Alta LR (5th) 57; Fairways Project Ltd v Melander, 2011 ABQB 6; 2011 CarswellAlta 148; Konjevic v Horvat, supra note 76; North America Construction (1993) Ltd v Deem Management Services Ltd, 2008 CarswellOnt 5092, 73 RPR (4th) 253 (SCI); Vend-All Marketing Inc v Silverberg Estate, 2014 MBQB 11, 2014 CarswellMan 45; 904060 Ontario Ltd v 529566 Ontario Ltd, 1999 CarswellOnt 378; de Franco v Khatri, supra note 44.
78. See supra text accompanying notes 13 and 14.
79. LTA, supra note 13, ss 130, 143.
80. Ibid at s 148.
the validity of recorded caveats. Under statute, a motion can be brought requiring the filing party to prove the interest claimed. In such proceedings the onus rests with the caveating/filing party. Summary judgment may then be sought by the contesting party. To succeed at this stage, whether there is a challenge to a caveat or a *lis pendens*, the purchaser must make out only a prima facie case supporting an interest in land. Put another way, the motion to discharge will be dismissed unless it is plain and obvious that a claim to specific performance will ultimately fail were the matter to proceed to trial.81

5. Specific performance sought by vendors

In some instances, it is the vendor who will seek specific performance, even though what is being sought by that party is a money payment (the agreed purchase price). The advantage for a vendor in asking for performance is that, if ordered, the entire purchase price can thereby be recovered (plus incidental losses). In contrast, when the claim is for damages for breach, recovery is based on a real or presumed sale of the property by the vendor, so that damages are limited to the difference between the price agreed to in the original contract, and the real or projected proceeds of a later sale. Even though in these cases the vendor is seeking money, the ultimate fungible,

81. 1244034 Alberta Ltd v Walton International Group Inc, 2007 ABCA 372, 2007 CarswellAlta 1562. See also Lamont (Town) v Jabneel Development Inc, 2014 ABQB 328, 2014 CarswellAlta 886; Festival City Holdings Ltd v Worthington Properties Inc, 2002 ABQB 543, 2002 CarswellAlta 721 (Master); De Sena v Allure Homes Ltd, 2002 ABQB 561, 2002 CarswellAlta 763 (Master); McMurray Imperial Enterprises Ltd v Brimstone Acquisitions & Asset Management Inc, 1997 CarswellAlta 862, 210 AR 97 (Master); Sandmore Antiques International Ltd v 1292770 Alberta Ltd, 2007 ABQB 664, 2007 CarswellAlta 1648. See also Yongyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd, 2014 BCCA 388; 0624708 BC Ltd v Wallace, 2011 BCSC 1383, 2011 CarswellBC 2803; Infini-T Holdings Ltd v Bell Aliant Regional Communications Inc, 2010 NLSCTD(G) 205, 2010 CarswellNfld 410; Kansun Homes (Toronto) Ltd v Transnational Plaza Corp, 2003 CarswellOnt 2815 (Master); 1376273 Ontario Inc v Woods Property Development Inc, 2001 CarswellOnt 2191, 43 RPR (3d) 19 (Master); St Onge v Willowbay Investments Inc, 2008 CarswellOnt 5133, 73 RPR (4th) 294. See also McGrath v BG Schickendanz Homes Inc (2000), 56 OR (3d) 34, 2000 CarswellOnt 3990 (SCI); Carterra Management Inc v Palm Holdings Canada Inc, 2011 ONSC 4573, 2011 CarswellOnt 7233 (order granting the right to file a certificate of pending litigation). In Klimp v Meinema, 2015 ABQB 204, 2015 CarswellAlta 540 (Master) at para 25, Master Schlosser proposed the following description of the requisite standard: “To put it in terms of numbers, the court need be satisfied that there is an eighty percent chance (or thereabouts) that the plaintiffs won’t prove an entitlement to specific performance on the balance of probabilities at trial.”
the courts continue to premise the availability of specific performance on the basis of uniqueness.\textsuperscript{82}

It has been offered that the uniqueness qua vendor does not relate to the property as such, but to the transaction as a whole.\textsuperscript{83} It might be the case, for example, that the vendor acquired and renovated the land to meet the specifications of the purchaser, under circumstances in which the vendor had no personal use for the premises as modified, and the specialized nature of the building would be of value to few other buyers. If these predicates are in place, it is reasoned, the transaction is unique and an order for specific performance is warranted.\textsuperscript{84}

6. \textit{Summary of the current law}

The decision in \textit{Semelhago} realigned the law governing the availability of specific performance. In the wake of the decision, the basic rules are as follows:

At trial, a plaintiff, whether purchaser or vendor, seeking specific performance must prove that:

1. There has been a breach of a valid contract, and that the plaintiff is ready, willing, and able to complete the transaction.
2. Damages would not be an adequate remedy. That can be shown by demonstrating any one of the following:
   (i) The property is unique to the extent that a substitute is not readily available;
   (ii) The proper measure of damages is too difficult to calculate;
   (iii) There is a reasonable prospect that an award of damages would not be satisfied; or
   (iv) Any other consideration that might motivate a court of equity to grant the order.

Even if these requirements are met, a defendant may resist an order for specific performance where it can be proven that:

1. The order would give rise to undue hardship on the defendant or to a third party; or


\textsuperscript{83} \textit{Matthew Brady Self-Storage Corp v InStorage Limited Partnership}, supra note 69.

\textsuperscript{84} Ibid.
2. The plaintiff has not come to court with clean hands; or
3. There are others considerations that motivate a court of equity to deny the order.

III. A critique

1. Introduction

*Semelhago* involves, in essence, a return to the earliest starting point in the relationship between damages and specific performance. The time-honoured principle is that the equitable remedy of performance is available only if damages at law will not suffice to do justice. Whereas at one time agreements for land were fast-tracked over this hurdle, the post-*Semelhago* position is that this prerequisite (damages are inappropriate) must be shown on the facts whenever performance is sought.

The damages-first rule is rooted in the history of the common law and equity. Equity emerged to respond to instances in which justice was not fully effectuated by the application of common law principles. Equity serves as a remedial supplement to the perceived shortcomings of the law. Again, in this context, there is no need to turn to equity when common law damages will suffice.85

Factors related to the administration of justice created a need for a rational ordering of remedies. Before the administrative fusion of courts of law and equity, these two judicial systems operated independently from each other. Different judges applied different principles, and followed different procedures. Lawyers tended to specialize in one form of practice or the other. In that institutional context there was great potential for conflict and disjuncture. Coordination of the two systems was essential. The most important mediating principle holds that whenever there is a conflict between law and equity, it is equity that prevails.86 However, there is more to the harmonization than that one principle. Equity purports to follow the law and often chooses to defer to it. For example, where a *bona fide* purchaser of the legal estate acquires title without knowledge of a prior equitable interest, the holder of the legal interest assumes priority. That result obtains because *equity* chooses to protect the legal interest in these circumstances. Likewise, the rule that damages at law is the presumptive remedy represents a way to coordinate the two systems by providing a starting point.

85. “[W]here the Common Law Courts always afforded adequate and complete relief without the aid of the Court of Chancery...and could take due care of the rights of all persons interested in the property in litigation, there Equity had no jurisdiction”: JW Smith, *A Manual of Equity Jurisprudence*, 14th ed by J Trustram (London: Stevens & Sons, 1889) at 17.
86. As codified in *Judicature Act*, RSA 2000, c J-2, s 15.
Even after the administrative fusion of law and equity in the second half of the 19th century, these two juristic sources have remained substantively distinct, and equity’s curative role continues. The presumptive remedy of damages remains good law. However, the administrative fusion has meant that the function of that presumption has lost a good deal of its significance. A court hearing a civil dispute can dispense both law and equity, so that the chance of conflicting orders is eliminated. Even so, maintaining the current ordering can be justified out of a concern that a change at such a basic level might produce unforeseen consequences. Law is like a gossamer cloth, and removing a single strand can produce results that raise problems of their own.

Even with that caution in mind, in this section I argue that the law should be reformed. In doing so, I undertake an ahistorical assessment of the current law. The question I address is whether turning first to the common law, and only then to equity, produces the most just and administratively rational outcome. In other words, I will wipe that slate clean and ask what presumptive rule for remedies is most likely to produce the fairest outcome most of the time.

The debate over the relative advantages of damages and specific performance is not new. The topic has been extensively studied, and powerful arguments, both moral and utilitarian in nature, have been marshalled on both sides of the issue.\textsuperscript{87} The case for specific performance is sometimes premised on the basic argument that parties should be expected to fulfill contractual promises. Moreover, as a matter of efficiency, it is important that parties be able to rely on contractual promises. Imagine a world in which one party could unilaterally withdraw from a contract at any time prior to performance, and how the normal flow of commerce would be altered under such a regime.

These are compelling arguments, but they are contestable. It has been argued that when damages are a true equivalent to performance, rational parties should be indifferent as to remedy: they amount to the same thing. If so, the choice of remedy should be dictated by other considerations. At a conceptual plane, this “indifference” argument is attractive. However, at the operational level, its potential flaws become apparent. Before deciding whether to base the law of remedies on a presumption of indifference we would ideally want to test the empirical validity of the underlying assumptions. To be more specific, one would want to know whether

parties are actually indifferent, and whether damages are likely to equal performance in fact. I doubt both assumptions. I also believe that policy considerations, defined broadly, support a preference for performance.

2. Most plaintiffs are probably not in fact indifferent as to remedy

In an important article in the damages-performance debate, Anthony Kronman suggested that if parties were to explicitly consider and bargain for the kind of remedy available on breach, most would agree to the remedy of performance for unique goods, but damages for fungibles. If Kronman is right, current Canadian law seems to provide the appropriate default rules. However, if we ask only what the innocent party would prefer, the result is likely different. When a party seeks specific performance, and claims damages only as an alternative, it is obvious that a preference is being asserted. Money is regarded as the consolation prize. All else being equal, one would expect that this party’s preferences should, as a matter of simple justice, trump those of the party in breach.

There is empirical evidence supporting the conclusion that a preference for in-kind compensation is the norm for plaintiffs. In a recent Israeli study, subjects were asked to choose between monetary and in-kind compensation in a series of six hypothetical breach-events. Out of about 400 lay respondents (non-business people), 69 per cent opted for in-kind compensation, and 26 per cent chose money. Only 5 per cent were indifferent as to how to be compensated for the loss. Of those who chose the in-kind order, 46 per cent maintained that preference even if there was some marginal increase in the monetary award. Those who responded that they might accept additional money to forgo the right to the object in question were asked to identify the quantum of that added premium. The researcher concluded that these surplus demands were unrealistically high.

Similar testing was done with a cohort of 126 businesspeople in an effort to see if different attitudes might be held. Here the preference for in-kind compensation was even more pronounced: 79 per cent preferred the item in issue, 19 per cent chose the money, and only 2 per cent were indifferent. Of those who preferred the item, 40 per cent were not interested in an increased money award. Those who were amenable to that resolution, as with the lay subjects, wanted unrealistically high premiums.

90. Ibid at 162.
91. Ibid at 170-171.
In the end, the author of the study found “a strong preference for in-kind remedies over monetary ones, even when the right holder is a firm and even when the remedy is related to fungible, easily replaceable assets, whose market value is ascertainable.” From a policy perspective, this led to the view that courts should be more willing to order specific performance for breach of contract. Plaintiffs are not indifferent.

3. A damages award may not provide appropriate compensation

It is not obvious why the psychological preference for in-kind relief described above is so strong. It may arise because injured parties are responding to a host of irrational motives, such as anger, frustration, a taste for revenge or retaliation, greed, etc. If such feelings explain the preference, the law should be loath to cater to it. However, where the disappointed purchaser prefers in-kind relief because of a concern that money is an imperfect remedy, that scepticism may be well-placed.

It is not new to suggest that damages offer imperfect compensation. There are a number of key variables that must be determined before one can arrive at a final dollar figure. One needs to determine the fair market value of the property at issue. Where future development of the land is planned, a number of computational variables can come into play. In a given case it may also be necessary to determine if the innocent party has acted reasonably in mitigating damages. Where these calculations are too conjectural, Canadian courts can, and do, turn to specific performance. In other instances, the prospect of error and unfairness, whether it takes the form of over- or under-compensation, remains.

However, the problems go deeper than that. Even when these factual inquiries are accurately answered, the law stops short of complete compensation. For example, it was noted above that on one view damages may be treated as adequate (or not inadequate) even if the party in default is insolvent. If these authorities are correct, to say specific performance requires proof that damages are inadequate is based, in part, on a fiction. A party with empty pockets cannot pay damages. Yet that is to be treated as an invisible fact.

Consider also a case in which the property at issue is insufficiently unique. Under the current law, an order for specific performance is

92. Ibid at 155.
93. Ibid at 182.
94. See e.g. Swan & Adamski, supra note 8, at 110. See also Da Silva, supra note 6, and the references cited there.
95. Da Silva, supra note 6.
96. See supra text accompanying notes 32 and 33.
unlikely, and damages will likely be set by reference to the land’s value at the time of breach. As we will see again below, the purchaser is at this point called upon to mitigate the loss, which means that one is now expected to seek out a substitute property.97 Let us think about these events as part of an ongoing commercial venture. Once the sale contract is signed, the investor would now be able to pass that file to the lawyers to arrange the closing. The investor’s focus can then turn to the next deal. If the first contract falls through because of a breach, that investor cannot simply instruct counsel to sue for performance. Instead, time must now be devoted not to the next purchase but rather to the previous one. The various transaction costs associated with finding a suitable replacement fall on the shoulders of the innocent purchaser. Some of the tangible costs—legal fees, searches, etc.—are amenable to recovery from the vendor in breach. However, compensation for lost opportunities is not recoverable in this context. Time spent on such tasks as searching for a substitute, obtaining financing for that purchase, and so forth, is not compensable. Here, time is not money. At the end of the day, the court will quantify some losses and not others. Moreover, for the trouble of proceeding to court for that recovery, the successful plaintiff may receive an order of compensation for most—but usually not all—of the costs of that litigation.

4. A claim for damages taxes institutional resources
In the exercise of its discretion, a court may decline to grant specific performance on the ground that the order would require ongoing supervision by the courts. The underlying assumption is that judicial supervision can impose too large a burden on scarce and costly institutional resources. It is the conventional wisdom that courts are chronically overworked.

It is difficult to know with confidence how the pre- or post-Semelhago rules affect the draw on judicial resources. It is possible that the law now deters claims for specific performance in relation to properties that a purchaser feels might not be viewed as unique by a court. We also do not know whether, under the prior law, vendors chose to complete land deals knowing that a court would likely compel the conveyance, rendering breach by a vendor futile and expensive. Amid this empirical uncertainty, one claim seems most plausible: when litigation ensues following breach, the current law places greater demands on the judicial system than was the case in the pre-Semelhago era.

Let us take stock of the number of damages-based issues that must be addressed under a Semelhago analysis. First, one must determine whether

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97. See Part III, 3, infra.
damages are inappropriate. As we know, that often (but not invariably) raises the question of whether the property is unique such that a substitute is not readily available. Second, a question may arise as to the proper time as to when damages are to be assessed. As noted, the normal time is when the breach occurred, but that rule is far from hard and fast.98 Third, the market value of the property must be ascertained. Fourth, an issue may arise as to whether the plaintiff acted in a reasonable way to mitigate the losses. On all four of the key points, expert and other evidence may be tendered.

Moreover, the resulting order is far from the end of the matter. For one thing, the more issues for adjudication, the more opportunities for appeal can emerge. However, even if the original holding is not challenged, the order is merely a staging post on the path to financial recovery. After judgment, the plaintiff must collect. That may entail judgment debtor examinations initiated to determine what assets the judgment debtor has to satisfy the order. Writs of enforcement may need to be issued against property held by the debtor, and a judicial sale might have to be conducted. These can be costly and difficult processes. And, in the end, it may turn out that the defendant does not have sufficient exigible assets to satisfy the judgment.

There are fewer contestable issues when performance is the norm. Computation questions are no longer germane.99 Moreover, even though, as mentioned, equity is reluctant to order performance if ongoing supervision is sought, one would think that would rarely be at issue in this context. A land deal requires the exchange of documents and money on a chosen day. If necessary, courts may prescribe the manner of compliance.100 Granted, a failure to abide by those terms can give rise to follow-on proceedings for contempt. However, those proceedings may also be necessary if a monetary award is flouted.

5. *The rules governing mitigation are suboptimal*

The law’s preference for damages over performance is sometimes supported by the idea that this will minimize losses arising from breach.101 Under general contract law principles, following a breach the innocent party is required to take reasonable steps to mitigate its losses. Put another
way, avoidable losses are not regarded by the law as a direct consequence of the breach, and therefore are not recoverable against the defaulting party. The failure to mitigate disrupts the chain of legal causation between breach and loss.

When a real estate purchase is involved and damages are sought, the duty to mitigate supposes the following resolution. If a vendor fails to close a sale of a property worth $1 million, the law expects the disappointed purchaser to then seek out a substitute property. The market may have risen between the time of the agreement and the date of breach (which is usually the date when the closing should have occurred). Assume the disappointed purchaser acts reasonably in pursuit of mitigation and acquires the substitute for $1.2 million. The party in breach is expected to make up the difference; damages would be $200,000. However, if the innocent party acted irresponsibly in mitigation, damages should be reduced. If the defendant can show that a prudent purchaser could have acquired a new property for $1.1 million, damages will be set accordingly.

If the law stated that damages, and only damages, are available as a remedy, then a disappointed purchaser knows that efforts to mitigate are required as soon as a breach occurs. Disputes about mitigation can arise, but only as to whether the action taken was sufficient under the circumstances. However, once the ability to obtain specific performance is introduced into the picture, it brings with it complications. When the purchaser prefers in-kind recovery, that preference can be seen as antithetical to finding an alternative property to mitigate the loss occasioned by the original breach. Indeed, buying a substitute property may work to defeat the claim for performance of the original contract. Hence, in a world in which either remedy is possible, with damages as the first option, the innocent party is placed at a crossroads. In a rising market, a purchaser who seeks, but is denied, performance, may be found to have failed to take appropriate action to mitigate. However, as just noted, acting in mitigation may ultimately undermine a claim for performance.

The prior law was helpful in guiding the innocent party as to how to respond to this fork in the remedial road. It declared to both the purchaser and the vendor that the remedy for breach will normally be recovery in specie; you need not seek to mitigate in another way. Semelhago also directs the parties following breach, but in a different and less clear-cut fashion. It declares a preference for mitigation through substitution. If the

103. See e.g. Serebrennikov v Sawyer’s Landing Investments I Ltd, 2010 BCSC 1276, 2010 CarswellBC 2415.
property is not unique, then an adequate substitute should be available. And because the subject property is not unique, pegging the measure of damages should not be difficult. One can compare the prices of properties similar to the contracted-for parcel to determine if there is a difference.

Even so, after Semelhago, a purchaser seeking performance takes a greater risk, if the wrong road is taken. If specific performance is sought but denied, the innocent party, by not acquiring a substitute, may be found to have failed to mitigate.104 Yet, to regard every purchaser who does not obtain performance as having also breached the duty to mitigate would be harsh. Fortunately, that is not the law. Rather, if a failure to mitigate is alleged, the defendant bears the burden of proving that a substitute could have been found.105 Moreover—and this is critical—a failure to mitigate is justifiable where the plaintiff had a “fair, real, and substantial justification” or “a substantial and legitimate interest” in asking for performance.106 If so, the innocent party will not be held to have failed to mitigate.

Sensible as this middle ground is, there are costs associated with it. It can result in both no in-kind recovery when the property is, at the end of the day, found not to be unique. At the same time, there might also be a finding that the duty to mitigate has not been breached because the purchaser had a valid reason to seek performance. If so, the defendant must then pay the full measure of damages. The interests of neither party are well-served by that kind of outcome.

A strong presumption in favour of performance can achieve better results on both counts. From the point of view of the purchaser, performance is perfect mitigation. That party has lost nothing because the object of the bargain is obtained. As to the vendor, the law signals that a court would very likely order the transfer of the property to the purchaser as agreed. At

105. Southcott Estates Inc v Toronto Catholic District School Bd, supra note 8 at para 45.
106. Ibid at para 36, citing N Siebrasse, “Damages in lieu of Specific Performance: Semelhago v Paramadevan” (1997) 76 Can Bar Rev 551. See also Shapiro v 1086891 Ontario Inc, 2006 CarswellOnt 217, 39 RPR (4th) 246 (SCJ). It has been offered that the upshot of Southcott is that it is now increasingly difficult for property developers and investors to obtain specific performance: J Berryman, “Mitigation, Specific Performance, and the Property Developer: Southcott Estates Inc v Toronto Catholic District School Board” (2013) 51 Alta L Rev 165 at 171. Richard Olson goes even further, maintaining that the Southcott case “may have rendered the equitable remedy of specific performance for real estate contracts, and perhaps other remedies, rare and exotic”: RJ Olson, “Who Mourns for Specific Performance?” (2013) 71 The Advocate 851. But see Youyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd, supra note 81 at para 52 (Newbury JA): “Olson may be overstating the effect of Semelhago and Southcott. In my respectful view, the Supreme Court merely recognized in those cases that in light of the advent of condominiums and other forms of interest in land, the uniqueness of real estate should no longer be presumed. As I read the two cases, the Supreme Court has not signalled that specific performance is ‘on the way out’ or that contracting parties should no longer expect to be held to their bargains.” I agree with Newbury JA.
that point the vendor will receive the purchase moneys. If there is a rising market, the vendor would be well advised to obtain that money at the earliest opportunity, i.e., on the closing. If the property is not unique—in fact, especially if the property is not unique—the vendor should be able buy a substitute property. By definition, at one point the vendor agreed to convey the land in exchange for cash. Money was the goal. If the property is not unique, the vendor is as able as the innocent purchaser to obtain a substitute.

In reading contract law case law, one is struck by how rarely there is an inquiry into the reasons for the vendor’s refusal to close. The reneging vendor is not required to explain or justify the breach. A breach is not per se considered wrongful in the eyes of law or equity. I can think of two main reasons that might move a vendor to refuse to transfer the land. Sometimes the validity of the underlying contract is called into question. The deal does not close, it is claimed, because there is no valid contract requiring compliance. Or, the vendor may resist specific performance because it is now felt that transferring the property would produce a hardship, financial or otherwise. I will deal with each in turn.

a. There is no contract When the existence of a binding contract is cast in doubt and the purchaser sues, the land can wind up in limbo for a long period. Prior to a judicial resolution, a purchaser intent on obtaining the property is well advised to place an appropriate caution on title, such as a certificate of pending litigation. From a functional perspective, this will mean that, so long as the notice is on title, neither the would-be purchaser nor the reluctant vendor holds a sellable asset. No one would buy such a pig in a poke. Yet, at the same time, the price of the subject property may fluctuate during this period. Given that there may or may not be a valid contract, it is not clear on whose shoulders the risk entailed by price changes should be placed.

Under the current law, the risk allocation in a rising market would be spread as follows. If the property is indisputably unique, the vendor bears the risk if a contract is found. Here, the purchaser would obtain the property, which now enjoys a higher market value, and the vendor will obtain the original (lower) purchase price. If, on the other hand, the property is indisputably generic and a contract is found, the purchaser would normally bear the risk. The vendor would keep the land and would likely be required to pay no more than the (presumably) lower value of the property pegged at the time of breach. Finally, if we consider the middle ground, i.e., a scenario in which there is an arguable case for performance, the allocation of risk is less easy to ascertain.
If the law is modified to provide for a virtually ironclad presumption in favour of performance, in all three of these scenarios the defaulting vendor would bear the risk of financial loss were a contract found to exist. That might appear to be unfair. In effect, the law would be declaring that a purchaser is (almost) never required to mitigate. However, it is remembered that in these disputes, the risk associated with a finding of *no* contract is always on the *purchaser* in a rising market. If at the end of the day it is resolved that no binding obligations have been assumed, the vendor retains the property with its increased value and the purchaser is entitled to nothing. Hence, under this suggested approach both parties have reason to be careful when challenging the existence of a contract. At the very least, this proposed approach can serve to dissuade the parties from engaging in wasteful strategic behaviour in a lawsuit. It can induce both parties to cut their losses (i.e., mitigate) unless they believe that they have a reasonable chance of winning.

b. *The vendor’s self-interest is best served by breach*

As mentioned above, arguments supporting specific performance can have moral or instrumental bases. In reply, it has been argued that sometimes a breach of contract is in fact a rational, efficient, and morally defensible step for a contracting party to take. Hence, it is maintained that the law should countenance what is termed “efficient breach,” a concept that has received some judicial endorsement in Canada.\(^{107}\)

A breach is described as efficient whenever it will make the party in breach better off (in financial terms), but still leave the innocent party no worse off than if the original contract had been performed. A vendor should be permitted, perhaps even encouraged, to refuse to close when it is financially the best choice, provided always that the innocent party is not thereby harmed. In law and economic terms, this kind of economic efficiency is described as a Pareto superior, or as a Pareto improvement.\(^ {109}\) The innocent party is regarded as being no worse off if damages equal to the loss are paid. We have already seen that this level of recovery is often not reached.\(^ {110}\) However, for the purposes of the present analysis that practical problem will be ignored. Assuming that there will be full compensation, if there is an efficient breach, the contract-breaker seeks to

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110. See part III, 3, *supra.*
pay damages so as to then be permitted to deal with the property in some other way. An order of specific performance that stifles efficient breach is, by definition, inefficient.

Here is a standard example. A agrees to sell a widget to B for $9,000, which happens to be $1,000 below fair market value. Prior to the transfer, A receives an offer from C for the inflated price of $12,000. It would make sense for A to sell to C. To make B whole, B would be entitled to a damages award of $1,000. Now B can buy the same kind of widget at market value (with $10,000 in hand), and so is no worse off. A will now have $11,000 (not $9,000), even after paying damages to B. A is better off; B is not harmed. C, who values the widget the most of the three parties, now owns it.

Not every breach is efficient in this way. Assume the same facts, except that the agreed price was $9,000, which at the time of contracting was its fair market value. Before the closing, the widget market heats up such that a widget now fetches $12,000. One might assume that a rational wealth-maximizing vendor will wish to breach the initial agreement with B and seek out a new buyer, such as C. That, however, is not an efficient breach as that term is defined here. Under Canadian law, to make the plaintiff whole, A must provide damages that will be equal to the replacement cost as at the time of breach. That cost is now $12,000. In this situation, A will not come out ahead. A will owe B damages in the amount of $3,000, leaving A with $9,000, the initial price. A’s breach is efficiency neutral.

When land is involved, the second scenario applies with equal force. Moreover, even in the first scenario, what I have called the standard example, when land is involved it may be rash to assume that there is an efficient breach. Imagine if, in this standard example, B could and did obtain specific performance. The order would prevent a sale by A to C. By the same token, B can now realize a profit of $3,000 by a sale to C. To put it another way, if the vendor (A) could sell the property, so could the purchaser (B). To pay a penny less in damages would mean that the purchaser is worse off by reason only of the breach, for the breach has denied B the chance of a quick profit. You will notice that when B acquired a generic property for the purpose of re-sale, specific performance is a perfectly sensible remedy.

The land situation may be different from that of the widget sale because it may be difficult for C to locate the new owner of the widget. Hence, a sale from B to C may not occur. For land, locating the new owner is a far simpler matter: one searches the title. Hence, if specific performance were ordered, A would receive the bargained-for price, B would make a quick
profit, and the land would wind up in the hands of the party valuing it most. C. This is efficient compliance.

Given this analysis, for the efficient breach reasoning to ever justify damages over performance it is necessary to show one of two things. One is that the innocent party (B) could not have reaped the increased surplus that the defendant (A) is seeking. Alternatively, it must be shown that the cost of compliance may be so great that the vendor (A) is better off by paying damages to B to cut its losses.

As to the first of these situations, consider a case where V has agreed to sell Lot #1. Before closing, three neighbouring lots come on the market. V sees an opportunity to acquire these neighbouring properties and build a development that is worth more than separate developments on each lot. Assume further that P does not have the resources to buy these adjacent properties. If the value of the parcel to V exceeds the measure of damages, V would be wise to retain the land, breach the contract, and pay damages.

The second kind of scenario concerns a situation in which breach occurs solely in order to cut losses, and not to reap a surplus. Imagine a situation in which V agrees to sell a property for $1 million and covenants to provide vacant possession. At the time of sale, there are tenants in the building upon whom V intends to serve notices to vacate. However, it is subsequently realized that certain tenants have more enduring leasehold rights than V understood to be the case, and that the cost of providing vacant possession to the purchaser as promised is estimated to be $1.2 million. In this case, it would be foolish and wasteful for the vendor to close. The prudent action is to staunch the bleeding, refuse to close and pay damages to the purchaser. The vendor would then retain the property (a $1 million asset), minus the damages that must be paid to the purchaser. By contrast, closing the deal would have left the vendor without the asset. Moreover, an amount equal to the entire sale price plus an additional $200,000 would have been needed to perform the contract. The vendor would have suffered a net loss of $200,000. Hence, unless the damages to the purchaser would exceed $1.2 million, a breach is the smartest move for the vendor to make.

Whether efficient breach is a viable concept remains a topic of debate among economists. For the sake of argument, let us accept that both kinds of efficient breach may occur and the law should tolerate that action. Even so, to treat efficient breach as supportive of a damages-first presumption would, it would seem, overvalue its importance. Not every breach is efficient, one would think that it is the exception and not the

rule. Equity, always mindful that an order may impose undue hardship on a defendant, can refuse performance on that ground. Hence, even if the law presumed in-kind relief, a defendant would be able to avoid that result where efficient breach—or any other form of hardship—is proven on the balance of probabilities.

6. It is inappropriate to require uniqueness when the vendor seeks performance

As discussed above, the rules governing the availability of specific performance apply to vendors as well as purchasers.\textsuperscript{112} Equity here is premised on a notion of mutuality: that which is available to one party must likewise be open to the other. So, there is parity of treatment, at least superficially. Even so, one can question why uniqueness matters when it is something else—money—being claimed by the innocent vendor. It was seen above that in this context, uniqueness can best be understood as referring to special features of the deal as a whole, and not the land per se.\textsuperscript{113} A property built for the sole purpose of sale to a certain purchaser is an example. When that is the case, the unique element is that the target market is only one buyer.

But is it true that such a parcel, developed to meet a highly specific niche need, has no other market? Imagine a lot that was developed to serve as an amusement park for a given purchaser, who resiled from the agreement just prior to closing. Assume also that the purchaser is in fact insolvent, so that suing for performance is a fool’s errand. In such a case, a prudent vendor would be well advised to raze the improvements and sell a vacant parcel, or deduct the cost of demolition from the new sale price, and then sue (for what it is worth) for any residual losses. In other words, mitigation is possible and is the best option here, even when a so-called unique transaction is involved.

In my view, the ability of vendors to seek specific performance should not depend on uniqueness, but rather on practicality. Consider a simple case where the purchaser, while in a position to pay, reneges on the deal at closing. If specific performance is ordered and satisfied, the vendor is made whole. If specific performance is not available, one expects that the property will be offered for sale a second time. The difference between these two means of liquidation is that the second procedure has two steps: a sale followed by a claim for any losses resulting from that sale. Streamlining the process of recovery by eliminating one step seems a valid reason to prefer performance. Uniqueness has no bearing on that analysis.

\textsuperscript{112} See Part III, § 5, supra.
\textsuperscript{113} Matthew Brady Self Storage Corp v InStorage Limited Partnership, supra note 69.
Moreover, the uniqueness of a parcel can affect the price in either direction. A property might be so special that it attracts only a select cohort of interested parties, as in the example above. However, a home with a rare and perfect view of the ocean might attract a great deal of interest. Again, from the vendor’s point of view, that is merely a matter of price. If anything, it is the lack of uniqueness that should support, not defeat, a claim for specific performance by a vendor. It seems counterintuitive for a purchaser to argue that because the property is generic and not unique, the vendor should be forced to sell it again on the open market, in competition with any number of other readily available alternatives.

**Conclusion**

In this paper, I have argued that justice is better served by a presumption in favour of specific performance as the remedy for breach of contract for the sale of land. This is not a radical claim by any means, and forms the law in many common law jurisdictions. I join the chorus of those who argue that Canadian law should, in essence, be returned to the pre-Semelhago position.

In sum, I believe the following principles should govern land-sale remedies:

1. At trial, a plaintiff, whether purchaser or vendor, seeking specific performance must prove only that there has been a breach of a valid contract, and that the plaintiff is ready, willing and able to complete the transaction.

2. A defendant may resist an order for specific performance where it can be proven that:
   - (a) the order would give rise to undue hardship on that party or to a third party; or
   - (b) the plaintiff has not come to court with clean hands; or
   - (c) there are others considerations that motivate a court of equity to deny the order.

It is difficult to be certain about which order of remedies will produce the best outcomes. In reviewing the relevant literature and case law, it is striking how little is actually known about the ways in which the rules being considered affect conduct. Instead, we make educated guesses about the impact of the law. One sees similar educated guesswork in Sopinka J.’s assertion in *Semelhago* that land, circa 1996, is no longer to be regarded as inherently unique. In effect, he took judicial notice of that very pivotal “truth.”

The legal analysis in the judgment is just as thin. It does not engage any of the policy concerns discussed above. That omission is not all that
surprising. The availability of specific performance was not put in issue and the relevant arguments and authorities were not aired and reviewed. In consequence, Sopinka J.’s statements were *obiter*, and have been understood as such.

In recent years, there has been some confusion about the status of *obiter* that emanates from the Supreme Court of Canada. Regarding *obiter dictum* as binding on lower courts is a deviation from conventional principles of *stare decisis*. In theory, only those parts of the judgment that can be said to form the *ratio decidendi* of the case are binding. Yet, some Canadian courts have hewed extremely closely to Supreme Court pronouncements, relying on statements from that court (*obiter* of course), that are read as dictating that lower courts should regard themselves as bound by such *dicta*.

In 2005, the Supreme Court addressed this issue. It was acknowledged that not all *obiter* should be accorded equal weight by lower courts. Instead, “[t]he weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative.”

Other comments, those further from the centre of the ruling, may be persuasive but not binding. The Court advised the goal of deploying *obiter* for guidance is to provide certainty while at the same time leaving room for growth and creativity. The Court also cautioned against parsing *obiter* comments as one would a statute.

It seems likely that the statements in *Semelhago* were “intended for guidance and...should be accepted as authoritative,” just as they have been treated by all subsequent reported decisions. When a related issue reached the Supreme Court in 2012, it treated *Semelhago* as an established point of departure for analysis.

There is, however, a good reason why *obiter dictum* should not be regarded as binding, especially when the critical issues were not before the court. The parties had no interest in presenting argument on the point. Nothing turned on it. There was no adversarial battle over the ordering of remedies. One could argue that in these circumstances *obiter dictum* should have reduced weight even if it is designed to serve as authoritative guidance.

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115. Ibid at para 57 (Binnie J).
116. Ibid.
The lack of argument on point is precisely why La Forest J. wrote a short and often overlooked concurring opinion in *Semelhago*. La Forest J. agreed with the outcome in the case, but refrained from endorsing the broader themes addressed by the majority. It was his view that, given the manner in which this case was argued, this dispute did not afford a suitable opportunity to consider reforming the existing law.120

La Forest J.’s reticence was well-placed, and a thorough assessment of the law governing specific performance for land deals should occur, be it at the legislative or judicial level. As argued above, I endorse a return to the law prior to *Semelhago*.

120. *Semelhago*, supra note 2 at para 1.