

Manitoba Law Reform Commission

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September 1, 2011

Hon. Andrew Swan
Minister of Justice and Attorney General of Manitoba
104 Legislative Building
Winnipeg, MB R3C 0V8

Dear Minister:

**RE: THE REMEDY OF SPECIFIC PERFORMANCE AND THE UNIQUENESS OF
LAND IN MANITOBA – REVISED RECOMMENDATION
REVISION TO INFORMAL REPORT NO. 26**

On October 26, 2010, the Manitoba Law Reform Commission submitted an informal report regarding the availability of the remedy of specific performance to a purchaser for a breach of a contract for the sale and purchase of land in Manitoba. Based on recent developments in the case-law, the Commission is now writing to revise one of the recommendations contained in the October 26, 2010 report.

The October 26, 2010 report proposed four recommendations. At issue in this supplement to the informal report is Recommendation 2 which calls for legislation to be enacted which would deem land to be unique for the purpose of determining the availability of the remedy of specific performance.

On May 18, 2011, The Court of Appeal for Saskatchewan issued its decision in *Raymond v. Anderson*.¹ In considering the availability of specific performance, the Court made some significant comments about the meaning of the Supreme Court's decision in *Semelhago v. Paramadevan*.² As noted in the Commission's October 26, 2010 report, the Court in *Semelhago* remarked that it was no longer appropriate to assume that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.³ The Court

¹ 2011 SKCA 58.

² [1996] 2 S.C.R. 415.

³ *Supra* note 2 at para. 21.

commented that specific performance should therefore not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.⁴ These comments, and subsequent case-law, provided the impetus for Recommendation 2 in the Commission's October 26, 2010 report. The Commission's goal in recommending a provision deeming land to be unique was to establish some certainty around the availability of specific performance in the event of breaches of real estate contracts.

In *Raymond*, the Saskatchewan Court of Appeal relied on *Semelhago* in finding that a judge's role in cases of breach of a real estate contract is to determine whether damages would be an inadequate remedy. In arriving at this determination, the judge must consider both objective factors concerning the real property involved, and subjective factors concerning the plaintiff's intentions vis à vis the real property. In this regard, the Court remarked as follows:

In practical terms, this means the prospective purchaser bears the burden of adducing evidence that the subject property is specially suited to the purchaser and that a comparable substitute property is not readily available.⁵

As noted in the Commission's October 26, 2010 report, courts have increasingly applied both an objective and subjective test in determining the availability of specific performance in respect of commercial properties. Until the decision in *Raymond*, however, courts had tended to distinguish between commercial and residential properties in this regard. In the consultation phase leading to last year's informal report, some Manitoba practitioners submitted that the application of a subjective test to this issue in respect of commercial properties has imposed an unreasonably high standard on prospective purchasers to prove uniqueness.

In the Commission's view, importing into the law a subjective consideration of the plaintiff's particular needs and intentions in every case adds to the uncertainty surrounding the availability of specific performance. The Commission believes that the application of the Saskatchewan Court of Appeal's finding in *Raymond* to the law in Manitoba could lead to uneven and unpredictable results.

Recommendation 2 in the October 26, 2010 informal report proposes a legislative enactment that would deem land to be unique for the purpose of determining the availability of specific performance in cases of breaches of real estate contracts. If the Saskatchewan Court of Appeal's interpretation of *Semelhago* is correct, such an amendment may not be sufficient to guarantee the availability of specific performance in cases of breach of real estate contracts. Arguably, deemed uniqueness may only satisfy the objective branch of the test articulated by the Court in *Raymond*. A plaintiff may still be required to satisfy a subjective test concerning his or her intentions with respect to the real property.

The Commission therefore revises Recommendation 2 in the October 26, 2010 Report.⁶ Revised Recommendation 2 is as follows, with the revised portion underlined:

⁴ *Supra* note 2 at para. 22.

⁵ *Supra* note 1 at para. 15.

⁶ The Alberta Law Reform Institute has similarly revised Recommendation 2 in its Final Report No. 97 (2009) *Contracts for the Sale and Purchase of Land: Purchasers' Remedies*, online: <<http://www.law.ualberta.ca/alri/>>.

REVISED RECOMMENDATION #2

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

This letter is submitted as a revision to informal report no. 26.

Yours Truly,

Cameron Harvey, Q.C.
President, Manitoba Law Reform Commission