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# SALES AND CONTRACT LAW FOR THE CONSUMER PROTECTION TABLEAU

Prepared by
James Hendry

For the
Consumer Research and Evaluation Branch,
Consumer and Corporate Affairs Canada.

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# SALES AND CONTRACT LAW

The source of many consumer rights and obligations is contract. The rights the consumer gets here are exercised against the seller only because only the buyer and seller are parties to the bargain that creates legal obligations. Sales law is the comprehensive term that encompasses these consumer rights and obligations and is composed of legislation and common law. It is this body of law that governs contracts for sales of goods and sales of services. These two kinds of contract are treated differently because of the way in which they are governed by the rules of sales laws. First, sales of goods are covered by the provincial Sale of Goods Acts and the judicial interpretation of that legislation. Second, sales of services and sales of goods and services are governed largely by the common law. For both kinds of contracts, sales of goods and sales of services, consumer rights are created and existing rights extended by a growing body of consumer legislation. The end result is that the consumer has largely the same rights whether the contract of sale be one for sales of goods or sales of services, it is just the way these rights are found and interpreted that differs. But the distinction remains necessary for the reason, one being that it is easier for a seller to decrease the number of rights a buyer has against him by adding terms to the contract in sales of services and some sales of goods and services than it is in the case of sales of goods.

The contract, the source of consumer rights and obligations, is created by accepting an offer made by the other party. The idea is that both offer and acceptance, whether made expressly in definite words, or impliedly by conduct or otherwise, are made by the parties in such a way that they show a definite intention to accept the duties and confer the rights on the other party that arise from the terms of the contract and from the operation of law.

The terms of the contract, in other words the rights and obligations arising from making that agreement, must be agreed on for otherwise it may be assumed that the parties did not really intend to make binding obligations. The terms of the contract will define subject matter of the contract, price and the way in which the goods will be delivered and the buyer will become the owner.

The law also requires certain things to prove a contract was made where the subject matter of the contract is of a certain value. These requirements vary depending on the nature of the contract.

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## RIGHTS IN SALES LAW ARE BETWEEN BUYER AND SELLER ONLY

The rights created by the contract are restricted to the parties to the contract themselves. This means that the remedies afforded the consumer under sales law are to be exercised by the buyer against the seller only. This is because of an old legal doctrine called privity.[1]

Despite this rule, guarantees given directly to the consumer by the manufacturer are sometimes enforceable against him. These will be dealt with later. However, this does not change the basic rule in sales law that rights of the consumer are exercised against the seller and not the manufacturer.

So if a stove that you have purchased at a store does not cook your food, you seek your remedy from the seller and not the manufacturer unless you have a guarantee from him that you knew about when you entered the contract.

1. Tweddle v. Atkinson (1861), 121 E.R. 762; Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co., Ltd., [1915] A.C. 79 (H.C.)

## THE CONTRACT

A contract for the sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price. This contract includes a sale when ownership is transferred to the buyer immediately and also an agreement to sell where the actual transfer of property in the goods is to take place at some future time or where such transfer is subject to some condition that will be fulfilled later.[1]

So the sale of a toaster which you have taken off the store shelf and paid for is as much a contract of sale as the situation where you buy a ten-speed bicycle that has not been received yet by the store.

1. Sale of Goods Act (SGA) Alta., S. 3; B.C., S.8; Man., S.3; N.B., S. 2; Nfld., S. 3; N.S., S.3; Ont., S.3; P.E.I., S. 3; Sask., S. 3.

## WHEN IS A CONTRACT FORMED?

A contract is formed when the parties intend to create a valid, binding contract, by the express or implied acceptance by one party of an express or implied offer made to him by the other party.[1] "...In the case of the ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until the customer has indicated the article which he needs and the shopkeeper or someone on his behalf accepts the offer."[2] The judges dismissed the possibility that the sale was formed when the item was selected and placed in a shopping cart. However, that the offer is made by the store and is accepted by the customer is a more realistic way of characterizing the transaction has been accepted by some judges. But the former way of looking at the transaction is probably the law now. This means that when you select what you want to buy, the cashier has the power to refuse to sell you the thing or may change the price and you have no legal right to object. However, legislation prevents deceptive advertising and misleading representations and it is unlikely a store will permit this because it is bad public relations.

1. G.H.L. Fridman, Sale of Goods in Canada (1973), 29,30.

2. Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern), Ltd., [1953] 1 All. E.R. 482, 483 per Somerwell, L.J.

3. R. v. Darwood (1975), 27 C.C.C. (2d) 300 (Alta. S.C.A.D.) per Clement, J.A. dissenting and also accepted by an Ontario provincial court judge in R. v. Malhotra (1975), 28 C.C.C. (2d) 551 (Ont. Prov. Ct. Crim. Div.)

## GOODS OFFERED FOR SALE

If goods are displayed on the premises of a seller with price tags attached, this is not an offer for sale but what is called an "invitation to treat" and probably remains so even if the seller or his employer or agent says such goods are for sale.[1] So you cannot demand a car displayed like this be sold to you at the price marked on this, subject of course to misleading advertising legislation.

1. R. v. Bermuda Holdings Ltd. (1969), 9 D.L.R. (3d) 595 (B.C.S.C.).

Example

Cars were on the front and side of a car lot. An employee said that the cars in front and four or six at the side were for sale. This was not an offer for sale according to a British Columbia court.[1] It was an "invitation to treat".

1. R. v. Bermuda Holdings Ltd. (1969), 9 D.L.R. (3d) 595 (B.C.S.C.).

## GOODS ON SHELVES

In a drugstore where articles were arranged on shelves with their prices marked on the outside of the packages, the customer selected what he wanted to purchase, took them to the check-out counter and presented them to the cashier. The cashier then "accepted" the offer made to him by the would-be buyer and accepted the money given him corresponding to the price.[1]

It is assumed that the same would apply in sales at a supermarket.

1. Pharmaceutical Society of Great Britain v. Boots Cash Chemists Southern) Ltd., (1957) 1 All. E.R. 982 (C.A.)

## QUOTATIONS OF PRICES

Example

The seller of flour wrote to some bakers and said that they wished to have them as their customers. The letter said, "We quote you..." and named prices for a couple of kinds of flour and suggested that the bakers use telegraph to make their order. It was held by the court that this was not an offer that could be accepted by simply making the order. So when the buyer tried to make such an acceptance, the seller could refuse to fill the order or quote a new price with impunity.[1]

1. Johnston Brothers v. Rogers Brothers (1899), 30 O.R. 150 (Ont. C.A.).

## THE SUBJECT MATTER OF SALES LAW: GOODS: "WHAT ARE GOODS?"

The sales legislation considered in this part of the Consumer Protection Tableau deals with contracts for the sale of goods. Goods are basically all property that is not land and things attached to the land like buildings and trees.[1]; they must be attendant or annexable to the person of the owner.[2] Such intangible things as debts, negotiable instruments and shares are not covered by sale of goods law.[3] Money is not covered either.[4] Things attached to the land or that actually form part of the land and are agreed to be severed before the dale or under the contract of sale, are covered by sales legislation.[5]

Services are regulated by rules that have been developed by judges and not by judicial interpretation of the Sale of Goods Acts.

1. SGA Alta., S. 2(h); B.C., S. 2; Man., S. 2(1)(h); N.B., S. 1(1); Nfld., S. 2(1); N.S., S. 1(h); Ont., S. 1(1)(g); P.E.I., S. 1(h); Sask., S. 2(1)(h).

2. G.H.L. Fridman, Sale of Goods in Canada (1973), 10.

3. Ibid.

4. See footnote 1.

5. See footnote 1.

The goods that we are talking about as the subject matter of the contract of sale may be either goods that are existing now owned or in the possession of the seller, or goods which are not manufactured, owned or possessed by the seller by the time the contract is made. The last kind of goods are called "future goods" and a contract selling them is called an "agreement to sell" the goods[1] which is a kind of contract of sale.

1. SGA, Alta., S. 8; B.C., S. 11; Man., S. 7; N.B., S. 6; Nfld., S. 7; N.S., S. 7; Ont., S. 6; P.E.I., S. 7; Sask., S. 7.

## THE PRICE

The price of the goods may be fixed by the contract or can be left to be fixed in a manner agreed upon by the parties. But if the price is not determined in these ways, it is to be a reasonable price and what is a reasonable price depends on the circumstances.[1]

But if no price has been fixed, then this may show that the parties have not yet concluded their contract.[2] However, even if the parties have left the price to be agreed by the parties, courts have found that there was a contract because the parties clearly intended to be bound by that contract.[3]

1. SGA, Alta., S. 11; B.C., S. 14; Man., S. 10; N.B., S. 9; Nfld., S. 10; N.S., S. 10; Ont., S. 9; P.E.I., s. 10; Sask., S. 10.

2. Atiyah, The Sale of Goods (5th ed., 1975), 18

3. Foley v. Classique Coaches, Ltd., [1934] 2 K.B. 1 (C.A.).

## THE PRICE MUST BE IN MONEY

Contract law requires an exchange of value in order to make a bargain for the sale of a thing a contract enforceable by both parties.[1] In order to enforce the promise of the other party to perform his side of the bargain, something inherent in the concept of contract, you must give him something for it. This is called the consideration for the contractual promise. In a sale of goods, consideration for the promise to transfer property in the goods is to be money, specifically, the price.[2]

1. Waddams, The Law of Contracts (1977), 76.

2. See above.

## SALE NOT BARTER

When goods are exchanged for goods, the contract formed for this purpose is one of barter and because of the basic definition of what is a contract of sale,[1] the Sale of Goods Acts do not apply. But in some cases where goods are exchanged for goods and money, courts have found a contract for sale of goods.[2]

1. Olympic Stove Const. Co. v. Momser & Rowe (1915), 8 W.W.R. 79 (B.C.C.A.) $1000 and $1300 in machinery as consideration was a sale. And Mussinger v. Green, (1937) 2 O.L.R. 26 (N.S.C.A. where goods were partly paid for in pulpwood.

2. See above.

Example - "Trade-Ins"

When you trade-in your old car under a contract of sale for a new one and even if you got almost the price of the new car for it, it is unlikely that the courts would find the transaction as other than a contract of sale. And the transfer of property in the old car is probably a sale of goods too.[1]

1. P.S. Atiyah, The Sale of Goods (5th ed., 1975), 6. Miller & Covell, Product Liability (1977), 117. G.J. Dawson (Claham) Ltd. v. H. and G. Dutfield, (1936) 2 All E.R.; Davey v. Paine Brothers Ltd., (1959) N.Z.L.R. 1122.

## WHERE A MANUFACTURER AGREES TO REPLACE DEFECTIVE GOODS FREE OF CHARGE

Even though this kind of contract is one of exchange, it is assumed that the implied conditions and warranties of the Sale of Goods Acts will apply here.[1]

1. Miller and Covell, Product Liability (1977), 117.

## SALE

The courts sometimes expand the concept of sale to enable a consumer to receive remedy for some problem with the goods.[1]

1. S.M. Waddams, Products Liability (1974), 89.

Example

A woman answered a newspaper advertisement by clipping it out and mailing it with fifty cents to get some plastic clothespins offered by a soap manufacturer. After normal use, one of the pins broke and the plastic caused an injury to her eye. The court found that this was a sale and gave to the woman the rights available under the Sale of Goods Act.[1]

1. Buckley v. Gwen Brothers, [(1953] 4 D.L.R. 16

Example

Where a manufacturer of weed killer supplied some to a prospective purchaser to find the effects of its use and the company got the benefit of this information, the court found that this was a sale of goods. The judge in that case went further and said that he found that the arrangement was one where the manufacturer supplied a certain amount of weed killer for the price of a smaller amount. Then he said that if a clothier advertised a suit for $100 and an extra pair of trousers for a free gift, that was a sale of goods as well.[1]

1. Fillmore's Valley Nurseries Ltd. v. North American Cyanamid Ltd. (1958), 14 D.L.R. (2d) 297 (N.S.). Waddams, Product Liability (1974), 89.

## WHEN YOU RECEIVE GOODS WITH THE GOODS WHICH HAVE BEEN SOLD WHERE THOSE GOODS ARE NOT THEMSELVES SOLD

In a situation like the one where you buy a product in returnable containers, courts have held that the implied warranties giving consumers rights against the seller under the Sale of Goods Acts apply despite the fact that these things are not sold.[1]

1. Geddling v. Marsh, [1920] 1 K.B. 668 (returnable bottles);
   Wilson v. Richett Cockerell & Co., [1954] 1 Q.B. 598 (bad goods mixed with the goods that were sold).
   Waddams, Products Liability (1974), 90.

## CONTRACTS FOR SERVICES AND GOODS

When your contract involves both goods and labour, in some cases it is not governed by sale of goods law.

## CONTRACTS TO HAVE SOMETHING MADE

When you have something made for you, the contract is likely one for sale of goods[1] unless the dominant purpose is the performance of certain services, and the transfer of property is only a small part of the deal.[2] If it is a contract of sale, then, of course, the Sale of Goods Acts apply.

1. Pieload Co. of Canada Ltd. v. City of Regina (1958), 24 W.W.R. 443, aff'd. [1959] S.C.R. 801 (manufacture of pre-stressed concrete a sale of goods);
   Ferguson v. Reed (1896), 33 N.B.R. 580 (C.A.) (making clothing was a sale);
   Wolfenden v. Wilson (1873), 33 U.C.Q.B. 442 (C.A.) (making and erecting a tombstone was a sale);
   Ross v. Sodofshy, [1943] 1 D.L.R. 334 (N.S.C.A.) (making a refrigerator box for a truck chassis was a sale);
   Samuel v. Davis, [1943] 2 All E.R. 3(C.A.) (dentist supplying false teeth);
   Lockett v. A. & M. Charles Ltd., [1938] 4 All E.R. 170;
   Cammell Laird 7 Co., ltd. v. Manganese Bronze 7 Brass Co. Ltd., (1934) A.C. 402 (construction of two ships' propellers);
   Lee v. Crizzen (1861), 1 B. & S. 272 (false teeth were made for someone);
   J. matane Design & Construction Ltd. v. Bendel (1970), 17 D.L.R. 268 (Ont. c.a.) custom furniture.

2. Fridman, Sale of Goods in Canada (1973), 14; Robinson v. Graves, [1935] 1 K.B. %&( (where an artist was commissioned to paint someone's portrait, the court said that the materials used were insignificant in value to that of the skill and labour).

## GOODS FOR INSTALLATION

When goods are supplied and installed, there is a sale of goods where the suply of goods is much more important than the work of installation.[1] However, there is no definite test for this.

Eg., Agreements to fit brake linings to cars[2], correcting rods to cars[3], to install a built-in cocktail cabinet[4], elevator[5], custom-made electric doors for a retail store under construction[6], burglar-proof doors[7], and tiles installed on houses[8] have been found not to be sales of goods but contracts for work and materials.

But on the other hand, a contract for the sale and installation of carpets[9] and an oil heater[10] for the home have been found sales of goods.

Even if the contract is not one of sale, courts will often given the consumer the same rights of expectation of quality as in a contract of sale.[11]

1. Miller and Lovell, Product Liability (1977), 118.

2. Stewart v. Reavell's Garage, [1952] 2Q.B. 545.

3. G.H. Meyers and Co. v. Brent C Service Co., [1934] 1K.B. 46.

4. Brooks Robinson Ptg. Ltd. v. Rothfield, [1951] kV.L.R. 405 (S.C.).

5. Sydney Hydraulic and General Engineering Co. v. Blackwood and Son, (1908), 8 S.R.N.S. 10 (C.A.).

6. Brunswick Glass Ltd. v. United Contractors Ltd., (1975), 12 N.B.R. (2d) 631 (Co. Ct.).

7. Reg. Glass Pty., Ltd. v. Rivers Locking System Pty., Ltd., (1968), 42 A.L.J.R. (H.Ct.).

8. Young and Montlen, Ltd. v. McMannis Childs, Ltd., [1968] 2 All E.R. 1169 (H.C.).

9. Philip Head and Sons Ltd. v. Showfronts Ltd., [1970] 1 Lloyds L.R. 140.

10. Collins Trading Co. Pty. Ltd. v. Maher, [1969] V.R. 20 (S.C.).

11. Young and Marten, Ltd. v. McMannis Childs, Ltd., [1968] 2 All E.R. 1169 (H.C.), Laminated Structures and Holdings Ltd. v. Eastern Woodworkers [1962] S.C.R. 160.

## WHERE PERSONS USE GOODS WHEN PERFORMING A SERVICE FOR YOU

Though again the contract is not one for sale of goods but rather one for services, courts will give the consumer much the same rights respecting the quality of the goods as in a contract of sale.[1]

Eg., a person went into a beauty salon for a hair treatment. The hairdresser used some dye on the client's hair. The court gave the consumer the protection of her right to expect the dye to be of a merchantable quality just as if it had been a contract of sale.[2]

Eg., where a veterinarian was hired to give cattle some shots and he did so using vaccine bought from a supplier, the court found that despite the fact it was not a contract of sale, the consumer had the right to expect the goods to be fit for the purpose for which they were supplied.[3]

1. Miller and Lovell, Product Liability (1977), 119-120.

2. Watson v. Buckley, Osborne, Garrett and Co., Ltd. [1940] 1 All E.R. 174.

3. Dodd v. Wilson, [1946] 2 All E.R. 691.

## WHEN YOU RENT OR RECEIVE GOODS ON LOAN (Bailment)

These goods are not sales of goods yet courts will also accord certain rights to the consumer that are normally found in contracts of sale respecting the quality of the goods. It may be that this is for situations where you are dealing with a person who rents things as part of the ordinary course of its business.[2]

Eg., some people rented a motor boat for a holiday on the waterways. A short while after they left there was a fire and the extinguisher failed to work. The people suffered injury both to themselves and their personal property. The judge said that where a vessel or other thing is rented, the consumer has a right to have the thing as fit for the purpose as reasonable care and skill can make it.[3]

1. Waddams, Product Liability (1974), 93-96.

2. Miller and Lovell, Product Liability (1977), 122.

3. Reed v. Dean, [1949] 1 K.B. 188.

4. Delaney v. Tow Motor

## OCCUPIER'S LIABILITY IN COURT

A paying guest of a hotel enters into a contract with the innkeeper to enjoy the privileges offered by the hotel as long as he is prudent himself. And there is an implied warranty that the premises were as safe as reasonable care and skill could make them.[1]

Eg., a guest of a hotel was going to use the pool and the entrance to the pool was through a dark, empty room and a temporary plastic tunnel. After he had swum in the cold pool, he went back into the building and fell through a glass window that had no visible markings. The court said the hotel was liable not only in tort, but also for breach of contract.[1]

1. Pajot v. Commonwealth Holiday Inns of Canada Ltd. (1978), 20 O.R. (2d) 76 (H. Ct.)

## THE RIGHT OF THE CONSUMER NOT TO BE MISLED INTO MAKING THE CONTRACT

The consumer has a right not to be misled into making a contract which will be the source of legal obligations, usually to pay a price, as well as rights. For many years, the purchaser was let alone to make the best bargain he could as summarized in the slogal "let the buyer beware". Recently, there has been a realization that it is not right to have the consumer alone without at least some protection with the advent of a consumer culture, the law making institutions have tried to alleviate some of the possibilities for exploitation through the media by prohibiting misleading advertising and other practices calculated to induce the consumer into making an otherwise undesirable contract. Some of this law is broad in effect, other parts of it are more specific such as the law protecting consumers from high pressure door to door sales.

Often in the negotiations preceding a contract, statements are made by the seller to the potential buyer in an effort to promote a sale. They are often descrptions of the qualities of the product or other things that might convince someone that he should buy that article such as the fact that service was readily available or that the price was exceptionally low. The common law has developed rules to make sure the consumer is not misled into an undesirable contract by such statements. The way in which the consumer is protected depends on how important the statement was in the formation of the contract. In some cases, the statement will be found by the judge to be a harmless exaggeration. If the judge determines that an important fact was stated that induced the consumer into the sale, he may say that there was a misrepresentation. If what was said to the buyer by the seller sounded like a promise, the judge may say that the statement was actually part of the contract. Each of these characterizations, except the first, offer certain remedies for having been induced into the contract by overzealous salesmen or advertising.

Legislation has supplemented these common law protections by actually prohibiting certain of these statements. This is found in "Business Practices" legislation of four of the provinces (with another almost ready to do the same). Misleading advertising, another source of inducement is prohibited both by

federal and provincial legislation. Other legislation regulates door to door and other high pressure sales techniques to make them less likely to infringe the consumer's right not to be misled or otherwise wrongly pressured into buying goods or services.

## FEDERAL PROTECTION OF THE RIGHT TO TO BE MISLED INTO A CONTRACT: MISLEADING ADVERTISING AND UNFAIR TRADE PRACTICES

The federal government has sought to protect the right of a consumer not to be misled into a contract of sale by enacting general prohibitions against misleading or false advertising and certain unfair trade practices in the Combines Investigation Act.[1] In the interests of increasing the accuracy of statements made by sellers for the purpose of inducing consumers to buy their products, the Act creates offences for which a seller can be fined or imprisoned for a breach. The consumer can now recover loss or damage suffered as a result of the misleading advertising or deceptive trade practice.[2] The legislation governs transactions for servides and articles (including money, deeds or instruments evidencing a right to property or interest in a company, deeds or instruments of property, tickets, energy and property generally).[3]

So the idea is that a consumer should be able to go out to buy land, houses, goods or services without being misled by representations in any form. The law requires a high degree of honesty and accuracy from those who make representations about their products on pain of being charged with an offence with penal consequences. Even those who resort to those commendatory but traditionally vague descriptions of their goods like "top condition", "A-1" and "excellent buy" must apply them carefully and quite truthfully.[4] However, the offences do not apply to someone who publishes or distributes a representation on behalf of someone else in Canada where he can show that he has the name and address of the other person and that he accepted the representation in good faith

1. R.S.C. 1970, c. C-23 as an.

2. Ibid., s. 31.1.

3. Ibid, s.2.

4. B. v. Park Realty Ltd. and Funk (1978), 2 C.R. (3d) 336, 342 (Man. Prov. Ct.).

for publishing or distribution in the ordinary course of his business.[5] This would probably include advertising firms and newspapers who acted more or less as a conduite for the representation.

This discussion will focus on consumer redress rather than administrative penalties such as prohibition orders and the like.

5. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 37.3(1).

## MISLEADING ADVERTISING

A person cannot by any means make a representation to the public that is false or misleading in a material respect for the purpose of promoting a business interest or the supply or use of a product.[1] This would include representations made by salespersons orally, in displays, on labels, by newspapers, in warranties, in television or radio advertisements.

A material representation is one which is calculated to and does lead a person to do something because he believes the information put before him indicates that this would be advantageous.[2]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36(1)(a).

2. R. v. Patton's Place Ltd. (1968), 57 C.P.R. 12, 16 (Ont. Mag. Ct.).

36(1)(a)

Eg., giftwares Wholesale Co. Ltd. sold jewellry among other things. It published a catalogue with 150,000 copies distributed to the public. One ring was pictured and described as "Genuine Garnet or Rubies C9805 167.50... $135.00. An investigator of Consumer and Corporate Affairs bought one and upon analysis by an expert found that it was synthetic. Intention to mislead was not required to prove the offence according to the court. The accused company was convicted of the offence.[1]

1. Giftwares Wholesale Co. Ltd. v. Rodger, [1977] W.W.R. 326 (Man. Co. Ct.)

Eg., An advertisement appeared in a newspaper saying "Stuff envelopes, $500.00 per thousand immediately. Free suplies. Send self stamped long envelope to Michaud Enterprises". In return for answering the advertisement, the accused stated in a circular that he would distribute their names to companies who might need envelopes stuffed or that they could advertise the same thing themselves. The court held that the general impression left by the advertisement was false ormisleading in a material respect. The accused was convicted.[1]

1. B. Michaud (1978), 41 C.C.C. (2d) 139 (Ont. D.C.)

Eg., a consumer and his family went ot the mountains of British Columbia for a ski holiday. He read the sigh with prices on it saying $7 for adults and $3 for children. He and his wife and two children would have to pay $20. for the weekend. The ticket seller said that holiday rates were in effect and the aggregate price for the family would be $24. He asked about the increase and was told that the sigh he had read earlier was in error and that everyone was charged the holiday rate. The consumer paid the money and skied but lodged a complaint with Consumer and Corporate Affairs when he got back. The judge said that the sign was misleading. But the judge said that the Crown had to establish that the purpose of the sign was to promote directly or indirectly the use or sale of its product or to promote the business interest of the person who made the representation. However, the judge concluded that the sign was not an advertisement but an informational sign. The judge said that because the purpose of the accused was not proved to be for the promotion of product and business interest, the accused was not guilty.[1]

1. R. v. Garibaldi Lifts Ltd. (1977), 35 C.C.C. (2d) 190 (B.C. Co. Ct.).

Eg., a consumer wanted a house and purchased an old house through a real estate agent. Before making the offer to purchase, he was shown a listing card which said "... this house is in top condition... four year old new wiring... upstairs carpet thru-out... new gas furnace with humid". The court said the effect of the wiring claim was that the affect of the claim on the consumer was that all the wiring was replaced four years before which was not true. This was false or misleading in a material respect. The "new" furnace was nine years old and so not actually new. This too was false or misleading in a material respect. The judge said that the courts have a duty to caution those using phrases like "top condition", "A-1", "excellent buy" to make sure that they convey the truth. The representation that the house was in top condition was not true as some things were wrong with the house and so this was a false or misleading statement because the average reader or viewer would expect everything of substance to be in excellent condition which was not the case here. The court found that the representations were made to potential customers and so to the public.[1]

1. R. v. Park Realty Ltd. and Funk (1978), 2 C.R. (3d) 336 (Man. Prov. Ct.)

Eg., a company owned a number of stores. The company placed an ad in The Moncton Times saying "After Christmas Special, ½ Price Sale All Merchandise in the Store, Effective Dec. 27-28 only, Highfield Square". On Dec. 21 a consumer went to take advantage of the advertised sale. The towels she picked were priced at $9.00 and she offered $6.00. It was refused. There happened to be two sections in the store and she was told that the sale did not apply in the half of the store from which the merchandise came. She complained to Consumer and Corporate Affairs. Another similar complaint was made. An inspector for the department made a purchase. The store later reduced prices in the store rather than correct the advertisements. The judge said that the fact that the company did not intend to deceive or that it was actually believed by the company that the false statement was true did not matter. He ordered a new trial.[1]

1. R. v. The Gaman Group Ltd. (1976), 28 C.P.R. (2d) 152 (N.B.S.C.A.O.).

Eg., a company sent out advertising notices saying "we are holding your 1976 license plates and Autopac". The judge found that this indicated to the individual who received the notice that this was the place you had to go to get his plates. This was held to be misleading. It was done for the purpose of promoting a business interest and though it was unintentionally false or accidentally false, it is an offence. The firm was convicted.[1]

1. R. v. Impala Agencies Ltd. (1976), 28 C.P.R. (2d) 42 (Man. Prov. Judge's Ct.).

Eg., a seller of china and glassware advertised a clearance sale "50-70% off" and that it was held over by popular demand. There was no saving to anyone who bought at that store as he was selling at the same price or in the general range of most of the other stores in terms of retail price. The judge found that the advertisement would certainly mislead the average person into thinking that there was 50% to 70% off the price that the consumer would normally pay for the article in the store. Along with other inducements like "Gigantic spring sale", the court found that this was an offence and fined the store owner and prohibited him from advertising like this again.[1]

1. R. v. Universal China, Lamp and Glass Co. Ltd. (1976), 35 C.P.R. (2d) 286 (Ont. Prov. Ct., Crim. Div.).

Further, representations in statements, warranties or guaranttes of the performance, efficacy or length of life of a product, not based on as adequate and proper test of it, cannot be made to the public for the purpose of promoting a business interest or the supply or use of a product by any means. What is more, the person who made the representation must prove that the tests used were adequate and proper.[1]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36(1)(6)

Eg., a seller advertised an electronic T.V. antenna as having a certain performance efore he made a proper or adequate test. The accused was not properly trained to carry out an adequate and proper test. The accused made arrangements for a test by experts only after the change was laid. He had simply plugged it into the proper outlet. He was convicted of advertising the performance of the antenna before having made an adequate or proper test.[1]

1. R. v. Kachuk (1973), 12 C.P.R. (2d) 45 (Alta. Prov. Judge's Ct.)

Also, no one is to make a representation to the public for the purpose of promoting a business interest or the supply or use of an article where the representation is supposed to be a warranty or guarantee of a product or a promise to replace, maintain or repair an article or any parts of it or repeat or continue a service until it ha achieved a specified result, if the form of the purported warranty or whatever is materially misleading or if there is no reasonable prospect that it will be carried out.[1]

1. Combines Investigation Act, R.S.C. 1970, c. C-23, as am., S. 36(1)(c).

Also, no one is to make a representation to the public for the purpose of promoting a business interest or the supply or use of a product by any means at all where it is a materially misleading representation to the public about the price at which the product or products like it have been sold, are sold or will be sold ordinarily. Regular price is to be determined in the "relevant market" unless it is clearly specified to be the price at which the product has been sold by the person who made the representation.[1] The federal government responsible for the legislation has in mind the ordinary price charged by other merchants in the business in the area[2] and supported by some of the case law on the basis that the seller is trying to represent that he is making the best offer in the area.[3] This view seems to be accepted now.[4]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36(1)(d).

2. Misleading Advertising Bulletin, January 1976, Consumer and Corporate Affairs.

3. R. v. J. Pascal Hardware (1972), 8 C.P.R. (2d) 155 t.); R. v. Ben Moss Jewellers Ltd. (1972), 7 C.P.R. (2d) 184 (Man. Mag. Ct.); R. v. Allied Towers Merchants Ltd., [1968] O.R. 346 (Mag. Ct.).

(Ont. Co. C

4. R. v. Sars's Ltd. (1978), 43 C.C.C. (2d) 310 (Ont. Prov. Ct., Crim. Div.).

Eg., Ben Moss Jewellers Ltd. advertised a .54 carat diamond referring to a "special purchase", at a price of $295. The court said that this would imply a special purchase or that the potential customers would be receiving the benefit of a special deal. The advertisement was interpreted to indicate that this regular selling price was $469 and that the so-called sale price would mean - saving of $165. However, it was proved that such diamonds were sold ordinarily in Winnipeg, where the seller was located by dealers carrying on the same business, for between $255 and $325. The court held that the representations made were materially misleading because it contained untrue allegations about the price on which such diamonds were ordinarily sold in Winnipeg: the "sale price" was the price at which they were ordinarily sold. The seller was convicted and made to pay a fine.[1]

1. R. v. Ben Moss Jewellers Ltd. (1972), 7 C.P.R. (2d) 184 (Man. Mag. Ct.), R. v. Simpsons-Sears Ltd., [1972] 3 O.R. 186 (C.A.) dist'd.

Eg., in its "Summer Sale 1968" catalogue, distributed by Simpsons-Sears Ltd. to its potential customers in a large merchandising area it described a refrigerator as having a value of $149.95 to be sold by them for $129.95. The court held that ordinary price was to be the price at which the person making the representation ordinarily sold the product for. The "public" to which the representation was directed was the community to which the catalogue was directed. The judge found that it was sold at $149.95 for only a few months, the rest of the time it was sold at $129.95. Thus this was a materially misleading advertisement and the accused was convicted.[1]

1. R. v. Simpsons-Sears Ltd., [1972] 3 O.R. 186 (C.A.)

Eg., a jeweller advertised a sale at 50% off. The Crown produced experts to establish the regular retail price of the article. The experts said that the regular retail price of the ring that was subject of the charge should be much less than the $2600 the seller would ordinarily charge for the ring. So at the sale, the price of the ring was higher than the average market price. But the judge said that the ring was sold at 50% off his regular retail price though it was very high. The charge was dismissed because the judge felt that a seller should be free to set his own price.[1]

1. R. v. Williams of Burlington Ltd. (1977), 32 C.P.R. (2d) 214 (Ont. Prov. Ct., Crim. Div.).

The test for what is a materially misleading representation is the general impression it conveys as well as the literal meaning of it.[1] The court may test it by considering what the impression on the average person to whom the representation is directed.[2] It is unnecessary to prove that anyone was misled by the misrepresentation, the courts have said that the offence is proved upon proof of the publication of the advertisement containing the untrue statement.[3] There is a need to prove that the person who made the representation intended to mislead anyone or actually knew that it was misleading.[4] A court said that "the public should be protected irrespective of the guilt on innocence of the maker.[5]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36(4)

2. R. v. Viceroy Construction Co. Ltd. (1975), 29 C.C.C. (2d) 299 (Ont. C.A.).

3. Ibid. and R. v. Imperial Tobacco Products Ltd. (1971), 220 C.R. (3d) 51 (Alta. S.C.A.D.).

4. R. v. IOmperial Tobacco Products Ltd. (1971), 220 C.R. (3d) 51 (Alta. S.C.A.D.); R. v. Allied Towers Merchants Ltd. [1966] 1 C.C.C. 220 (Ont. H.C.); R. v. Grottoli (1978), 43 C.C.C. (2d) 158 (Ont. C.A.) similar statute consideration applicable here.

5. R. v. Allied Towers Merchants Ltd., [1966] 1 C.C.C. 220, 224 (Ont. H.C.) by Mr. Justice Jessup

No one is allowed to make a representation for the purpose of promoting a business interest or the supply or use of a product that a test of the product's performance, efficacy or length of life was made by someone nor can they publish a testimonial about the product unless he can prove that the person who made the test or testimonial has already made or published it or that the person who made or published the testimonial gave written permission for its use before it was used. Also, the testimonial or representation made must accord with what was previously made, published or approved.[1] The idea here is to prohibit unauthorized use of tests and testimonials and authorized use of these things where the person who is making the representations distorts the results of the test or the scope of the testimonial.[2]

Eg., where a lab report is published and makes some favourable comments about a product, but these are qualified extensively. If the person who wants to sell the product publishes only the favourable comments without those significant qualifications, he may be guilty of an offence under this section.[3]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36.1.

2. Misleading Advertising Bulletin, January 1976, Consumer and Corporate Affairs Canada

3. Ibid.

To the above kinds of offences, a representation on an article for sale, its wrapper or container, anything accompanying the article, a display in the store or place of purchase, anything sent or made available to a member of the public or made in a sales pitch in the store, over the phone or door-to-door are considered made to the public by the person who had the representation made. If the person who had it made is outside Canada, then the importer, or person importing the display is liable for the consequences of the representation being made.[1]

However, there are defences to the charges. No one shall be convicted of the offences above if he shows that what gave rise to the offence was the result of error, that he took reasonable precautions and excercised due diligence to prevent the occurrence of such errors, that he or someone else took reasonable measures to bring the error to the attention of the class of people who were probably reached by the representation or testimonial and that those measures (except in cases of securities) were taken immediately.[2] These differences do not apply to a person who makes a representation or publishes a testimonial in Canada on behalf of someone outside Canada.

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36(2).

2. Ibid., s. 37.3(2).

## UNFAIR TRADE PRACTICES: TWO PRICES ON AN ARTICLE

If there are two or more prices on a product, its wrapper or container, on anything accompanying the product or anything on which the product is found or displayed or on an in-store display or advertisement then the product must be supplied at the lowest price.[1] But a grocer can revaluate shelf stock as long as when he puts on the new, higher price, he removes or obscures the old one.[2]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36.2.

2. Misleading Advertising Bulletin, January 1976, Consumer and Corporate Affairs Canada

## BAIT AND SWITCH SELLING

The federal legislation says that a seller cannot advertise a product at bargain price when he does not have it in reasonable quantitites. Reasonable quantities is determined by the nature of the market in which he carries on business, the size and nature of his business and the nature of the advertisement. And a bargain price is one represented to be a bargain by comparison with ordinary price or otherwise as a price that is reasonably understood to be a bargain from hearing or seeing the advertisement because of the price at which the product is advertised or like products are ordinarily sold. However, if the person shows that he tried but could not get reasonable quantities because of things beyond his control (such as strikes), if he shows he could not reasonably have anticipated the demand over what he obtained or gave "rain-checks" for what he could not supply.[1] If the person who made the advertisement indicates clearly the approximate number of items for sale, no offence will have been committed.[2]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 37.

2. Misleading Advertising Bulletin, January 1976, Consumer and Corporate Affairs Canada.

## NO SALE ABOVE ADVERTISED PRICE

No one is allowed to sell a product at a price higher than the one he had advertised for it in the market to which the advertisement would reasonably be expected to reach. However, liability under the section can be avoided if the advertisement defines the market more narrowly by referring to a geographical area, store, department of a store, sales by catalogue or otherwise. No offence is committed where, if the advertisement is in a catalogue, there is a statement that prices in it are subject to error and it is established that the price is an error as advertised. Also, no offence is committed where another advertisement follows the one containing the wrong price correcting the error immediately.[1]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 37.1.

## CONTESTS

No one can promote a business interest or the supply or use of a product by a contest, lottery, or game of chance or skill unless there is adequate and fair disclosure of the number and approximate value of the prizes, of the areas to which they relate and any fact known to the advertiser that may affect the chances of winning. Also, the distribution of prizes cannot be unduly delayed and the selection of participants or distribution of prizes must be made on the basis of skill or randomly in any area to which prizes have been allocated.[1]

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 37.2.

Eg., Kraft Foods advertised an advertising campaign called "Explore Canada '70". and offered 15 prizes being an air ticket to fly to anywhere in Canada, a rented car for their use, $1500 spending money and a set of luggage. It was advertised on T.V., newspaper, magazines and store displays. Prizes were to be awarded on a regional basis. Some of the provinces had two prizes while others only one. By a certain time, all the provinces with only one prize had been drawn and to residents there no longer had a chance of winning. The contest continued despite the fact that the residents of some provinces were effectively eliminated because the prize for that region was already gone. This was never advertised as the contest continued. Though the statement in small print that the prizes would be awarded regionally might have warned some, the court considers the public. The court concluded that the statement was misleading and was done to promote sales or business interests. Kraft Foods was guilty of the charge.[1]

1. R. v. Kraft Foods Ltd. (1972), 11 C.C.C. (2d) 406 (Que. Q.B.).

## COMPENSATION FOR THE CONSUMER'S LOSS BECAUSE OF MISLEADING ADVERTISING OR UNFAIR TRADE PRACTICES

If a consumer suffered some loss or damage as a result of the commission of an offence under the Combines Investigation Act (Part V) which includes the consumer misleading advertising offences which will be discussed, he may sue the person who committed the offence for the loss he sustained in an amount to compensate him. The consumer must prove the loss or damage and that it resulted from the conduct of the person who committed the offence. The action must be taken within two years of the date of the conduct or the conviction for the offence whichever is later.[1]

1. S. 31.1

Example

Midwest Motors of Regina, Saskatchewan had been convicted under the Combines Investigation Act for failing to supply Mr. Graff with a television set for $1.00 upon purchase of a car for more than $1,000. This was a deal set out in an advertisement in May, 1975. Mr. Graff had bought a car and paid more than the regular amount for it but did not get his television set. Mr. Graff sued the car dealer which had advertised this and won the retail price of the television set he was supposed to get along with some legal costs.[1]

1. Graff v. Midwest Motors (1966) Ltd., unreported, noted in Misleading Advertising Bulletin, #3, 1978 (April/June), p. 6, Consumer and Corporate Affairs.

## MISLEADING ADVERTISING WHEN BUYING FOODS AND DRUGS

The Food and Drugs Act states that no one shall label, package, treat, process, sell or advertise any food in a manner than is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.[1] Someone who misleads the consumer in this way has committed an offence.[2] But the prosecution for the offence must be started within twelve months from the time the offence was committed.[3] If the seller shows that he purchased the article from another in packaged form and sold it in the same package and same condition the article was in when he purchased it and that he could not have ascertained that the sale of the article would be in breach of this law with reasonable diligence, he will be acquitted.[4]

The same prohibition applies to the labelling, packaging, treating, processing, selling or advertising of drugs[5] and things for diagnosis, treatment or prevention of disease, for correcting bodily functions, for diagnosing pregnancy or for the care of persons or animals before and after pregnancy and includes contraceptive devices.[6]

1. Food and Drugs Act, R.S.C. 1970, c. F-27 as am., s. 5(1).

2. Ibid., s. 26.

3. Ibid., s. 27.

4. Ibid., s. 29.

5. Ibid., s. 9(1) and see definition of "drug" in s. 2.

6. Ibid., s. 20 and see definition of "device" in s. 2.

Examgle

An inspector for Consumer and Corporate Affairs went to a meat market after seeing an advertisement in a Sudbury newspaper. Later, he came back and ordered an A-1 side of beef specifying the way he wanted it cut. He was assured that he had gotten everything when he picked up his order and paid for it. When checked after purchase some of the better cuts off the side of beef were missing and extra bone and fat were included. The butcher testified that sometimes mistakes are made and are rectified when discovered by hi. The court found the butcher guilty as charged. Knowledge of the misleading effect of the sale or intention to mislead did not have to be proved by the Crown.[1]

1. R. v. Grottoli (1978), 43 C.C.C. (2d) 158 (Ont. C.A.).

Examgle

An inspector of the Department of Consumer and Corporate Affairs went into the seller's store and saw 21 packages of chicken legs on display. They were marked "chicken legs". He picked up three packages randomly and paid for them. He had a package analyzed. The package contained two legs, tail and part of the back of the chicken. The chicken had been prepared in the store. Only two-thirds of the contents of the package was legs. It could be easily seen through the the package that it had more than chicken legs in it. The seller argued that it was up to the consumer to make sure it contained what it is said to contain on the label as the container was clear plastic. The judge found that the package's contents included less expensive parts of the chicken namely tail and back. He said that the method of selling the chicken was false and was likely to create an erroneous impression regarding the contents of the package. He went on to say that it did not matter that the particular purchaser was not misled or decieved by the package's label. The seller was convicted of an offence.[1]

1. R. v. Dominion Sotres Ltd. (1975), 21 N.S.R. (2d) 283 (N.S. Co. Ct.).

## WHEN BUYING TEXTILES OR TEXTILE PRODUCTS

No manufacturer or seller of textiles in Canada can label or sell, import or advertise textile fibres or finished products for consumer use (not to be processed or manufactured further) with a label that contains any false or misleading representations relating to the article.[1] No dealer can make a false or misleading representation relating to a textile fibre product (including articles for consumer use and yarn or fabrics to be used to make these articles for consumers) by a label, advertisement or otherwise.[2] A "false or misleading representation" includes representations in any form that are likely to deceive someone about the textile fibre content, a representation that reasonably may imply that the textile fibre product contains a fibre that it does not contain and any description of the attributes of the textile fibre product that may reasonably be regarded as likely to deceive anyone about what is described.[3] The textile fabric, yarn or product for consumer use must have a label containing a representation about the textile fibre content if it is to be sold, imported into Canada or advertised here.[4] It is an offence not to comply with these rules.[5] However, the person accused of the offence can show that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.[6]

1. Textile Labelling Act, R.S.C. 1970, 1st Supp., c. 46, s. 5(1).
2. Ibid., s. 5(2).
3. Ibid., s. 5(3).
4. Ibid., s. 3(1).
5. Ibid., s. 12.
6. Ibid., s. 13(1).

Example

Woolworth's advertised "Ladies' Fashionable Acrylic Pullovers... Ladies' Shell, 100% texturized nylon, zipper at back" in the St. John's Evening Telegram. An inspector with Consumer and Corporate Affairs bought two of these. It turned out that the sweaters were 100% nylon textile fibre. This meant that it was not acrylic. The company demonstrated that a mistake had been made in the preparation of the advertisement; there was no intention to mislead. Nor was anyone misled. The advertisement was found to be false and misleading because of the confusion arising from a glance at it. The court was not persuaded that the company exercised all due diligence and convicted of the offence. The fact that there was no intention to mislead was unimportant.[1]

1. R. v. F.W. Woolworth Co. Ltd. (1977), 13 Nfld. & P.E.I. R. 276 (Nfld. Prov. Ct.).

## WHEN BUYING PACKAGED GOODS THAT ARE SOLD TO THE CONSUMER WITHOUT BEING RE-PACKAGED

No dealer is tö apply to a prepackaged product, sell, import into Canada or advertise any prepackaged product that has a label with a false or misleading representation relating to the product.[1] False or misleading representation includes something that would mislead the consumer about the net quantity of the prepackaged product, something that would imply that the product contains something it does not or a description of the attributes of the product that may deceive him about what was described.[2] And a dealer cannot sell, import or advertise any prepackaged product packaged in a container that is seen by the consumer that has been made or displayed in such a way that a consumer might be misled about the quality or quantity of the product unless the container was filled in accordance with a recognized production practice reasonably necessary for packaging the product.[3] It is an offence to breach these rules.[4] However, it is possible to establish that the offence was committed without the knowledge or consent of the person accused ot it and that he executed all due diligence to prevent its commission.[5] This is the situation where an employee or agent of the accused committed the offence.

1. Consumer Packaging and Labelling Act, S.C. 1970-71-72, c. 41 as am., s. 7.

2. Ibid., s. 7(2).

3. Ibid., s. 9.

4. Ibid., s. 20.

5. Ibid., s. 21.

Example

Steinberg's was accused of having sold prepackaged products that had applied to them labels containing a false representation relating to that product. In one case, a package containing a portion of Bottom Round meat labelled "Sirloin Tip" and another package containing Shoulder Steak labelled "Beef Sirloin". The labels were applied by employees. The employee who labelled these prepackaged products made an inadvertent error in setting the machine that made the labels. The company proved that the offence was committed without its knowledge or consent and that the accused exercised all due diligence to prevent its commission. The store trained its personnel in this labelling and inspected it regularly. There was a simple mistake made here. The accused was acquitted.[1]

1. R. v. Steinberg's Ltd. (1977), 37 C.C.C. (2d) 417 (Ont. Prov. Ct., Crim. Div.).

## WHERE YOU WERE LED TO BELIEVE SOMETHING ABOUT THE GOODS OR SERVICES YOU BOUGHT, BUT AFTER THE CONTRACT WAS MADE YOU FIND THAT YOU WERE MISLED

If a statement made by the seller to the buyer has misled him into making a contract of sale, the buyer will usually have a right to some kind of relief. The kind of relief the consumer will get depends on the way a court will construe the statement. If the court considers it a term of the contract, the buyer will have a right for breach of his contract with the seller. If the statement is found to be a representation, the buyer may have a right to damages or cancellation (rescission) of the contract depending on the kind of representation it is.

However, in Alberta[1], British Columbia[2], Ontario[3] and Prince Edward Island[4], false, misleading or deceptive representations made to consumers give a special, statutory right to relief. Newfoundland[5] has such an Act but it is as yet not in force (but reference will be made to this statute too). Manitoba's unique legislation will be considered separately.

In the provinces where such legislation applies, it would probably be best to assert these rights to relief for being misled into the contract. As a

1. Alta., The Unfair Trade Practices Act, S.A. 1975, c. 33.

2. B.C., Trade Practices Act, S.B.C. 1974, c. 96, as am.

3. Ont., The Business Practices Act, 1974, S.O. 1974, c. 131.

4. P.E.I., Business Practices Act, S.P.E.I. 1977, c. 31.

5. Nfld., The Trade Practices Act, S. Nfld. 1978, c. 10 (not in force).

6. Man., The Trade Practices Inquiry Act, R.S.M. 1970, c. T110, as am.

second argument, assert the rights in the common law, though these are less certain to provide results than the statutory provisions. Of course, where so such statute applies, recourse can only be had to the common law discussed here after the statutes.

To illustrate the way the law of representation works to prevent the consumer from being misled into a contract, an example would be helpful.

A buyer wanted a particular kind of Bentley car. A seller thought he had found the right car for his prospective customer and told him about it and that he could find out all about the car's history, it being such an unusual car. The future purchaser came over and looked at the car and the seller said to him that the car had done only twenty thousand miles after the engine had been replaced. The buyer purchased the car. But it was later found out that the mileage was much greater than it was stated, in fact about four times more.[1]

If the car was bought in Ontario, and the car was bought for personal use only, the statement would probably be "a false, misleading or deceptive consumer representation"[2] and more specifically "a representation that the goods have been used to an extent that is materially different from the fact".[3] It may even fit under some of the other examples of deceptive consumer representations. For this, the consumer might have the contract cancelled, he would restore the car to the seller and get his money back and he might even get damages, a money compensation for the loss of what he expected to get from his bargain.[4] If the consumer had sold the car to someone else

1. Dick Bentley Productions, Ltd. v. Harold Smith (Motors), Ltd., [1965] 2 All E.R. 65 (C.A.).

2. The Business Practices Act, 1974, S.O. 1974, c. 131, s. 2(a).

3. Ibid., s. 2(a)(v).

4. Ibid., s. 4(a).

before he found out about the discrepancy, the consumer might get from the seller whatever he paid to the seller over the actual value of the car.[5]

In addition to this, or if he had not qualified for protection under the business practices legislation or if the transaction took place in a province without such legislation, his primary protection, the consumer might get a remedy based on the representation made to him that the car had only twenty thousand miles on it after the engine was replaced. The statement is more than an inducement to the contract; it is more than a statement of fact made with the intention and effect of inducing him to enter into the contract in reliance on that statement which is the definition of a "mere" representation. It is a term of the contract, a stipulation of sufficient importance that the parties intended it to be a part of the agreement. It is a warranty in this situation and the consumer would have a right to damages which would probably represent the difference between what he paid for it and what it was actually worth because of its much higher mileage.[6]

5. Ibid., s. 4(b).

6. Dick Bentley Productions, Ltd., as above.

WARN AND SUPPLEMENTARY

The consumer who is protected by this legislation is the ordinary individual who is contracting to receive goods or services and who is not doing so for business purposes. In Alberta and British Columbia, a person who receives goods or services as a gift from the person who obtained them originally and someone who has guaranteed payment of the price of the goods and services is also protected by the legislation of those provinces. The idea is that consumers have a right to be free from pressures and influences that might mislead them into making a contract for goods (which are articles for personal or family use even if you might later attach them to the land other than money, securities like stocks and bonds or things to which are a special future right like a cheque or insurance policy) or services (which are services for the repair and maintenance of your property, your home and personal possessions, services provided in social, recreational or physical fitness facilities, services provided for moving your personal possessions and services that are educational). In Alberta, British Columbia and Newfoundland (eventually) your rights can be exercised not only against the person from whom you buy the goods or services but also others who are responsible for representations to the consumer about the product.[1]

In addition to remedies that the consumer can get for the breach of his right not to be misled into a contract, administrative remedies against the person engaging in unfair practices are initiated by a complaint by the consumer made to the Director of

1. Alta., s. 1.
   B.C., s. 1.
   Nfld., s. 2 (not in force).
   Ont. s. 1.
   P.E.I., s. 2.

the Provincial Government department dealing with these persons.[2]

2. Alta., s. 5 and following (Director of Trade Practices).
B.C., s. 4 and following (Director of Trade Practices).
Nfld., s. 8 and following (not in force) (Director of Trade Practices)
Ont., s. 5 and following (Director of Consumer Protection Division, Consumer and Commercial Relations).
P.E.I., s. 6 and following (Director of Consumer Services).

A right to relief in the provinces that have the legislation flows from a representation made to a consumer which would have the effect of misleading a consumer into a contract. Each province gives examples of the kind of representations that give rise to relief. So if someone makes a false, misleading or deceptive statement to you before you buy goods or services and you find that you have been misled, you have a right to relief.

Except in Alberta, you may prove what was said or shown to you before the contract was signed in order to show that there was a deceptive practice.[1] At common law, the words of a contract were assumed to express the whole agreemnt and in only a limited number of circumstances was anything outside what was contained in the document heard by the court.[2]

1. Alampi v. Swartz (1964), 43 D.L.R. (2d) 11 (Ont. C.A.).

2. Alta.,
   B.C., s. 27.
   Nfld., s. 19 (not in force).
   Ont. s. 4(7).
   P.E.I., s. 5(7).

Example

An encyclopedia salesperson who vaguely describes a couple of instalment plans without revealing a budget change and also fails to give the total price is engaged in a deceptive practice. When combined with sales talk about a comparison with the cost of daily newspapers, the statements might have deceived a potential purchaser. A person hearing the sales pitch would get the impression that the cost was almost nominal and because he was not told of the actual price the judge felt that he would be "lulled into a receptive state of mindë and might easily succumb once the true price was revealed.

1. Stubbe v. P.F. Collier & Son, Ltd. (1977), 74 D.L.R. (3d) 605 (B.C.S.C.).

Example

A furniture and appliance store had too much merchandise on hand because of the failure of some business ventures. The owner and a friend decided to stage a phony "bailiff's sale". The sale was advertised as a "bailiff's sale" by newspapers, radio and posters. The court found this a deceptive practice, though because of some problems with the charging of the owner and his friend neither the company nor they were convicted.[1]

1. R. v. Sunner and Sihota (1977), 4 B.C.L.R. 272 (B.C. Prov. Ct.).

Example

The British Columbia Court of Appeal said that the test to determine whether an act has the tendency to deceive or mislead is one that tends to lead that person astray into making an error of judgment whether detrimental or beneficial. But the non-disclosure of financing arrangements between a merchant and his bank (in the assignment of conditional sales contracts) is not a deceptive practice because a practice of non-disclosure does not tend to lead and is not capable of leading a consumer into an error of judgment.[1]

1. Director of Trade Practices v. Household Finance Corp. of Can., [1977] 3 W.W.R. 390 (B.C.C.A.).

Example

A statement that a set of encyclopedia was a "brand new major home and school graduated reference libraryö was a deceptive representation when made by a door-to-dor encyclopedia salesperson to a potential customer who had opened the door to him. The encyclopedia had been published in 1950 with only some annual revisions.[1]

1. Stubbe v. P.F. Collier & Son Ltd. (1977), 74 D.L.R. (3d) 605 (B.C.S.C.).

## SUBJECT OF CONSUMER TRANSACTION IN B.C.

A representation that the goods or services häve sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have.[1]

Example

Where an advertisement gives "mileage per gallon" for a car but the results given in the representation could only be achieved under special test conditions by a highly skilled driver.[2]

1. Alta., s. 4(1)(d)(i).
   B.C., s. 2(3)(a).
   Nfld., s. 5(1)(a) (not in force).
   Ont., s. 2(a)(i)
   P.E.I., s. 3(a)(i)

2. Belobaba, "Unfair Trade Practices Legislation", 15 O.H.L.J. 1, 21, n. 148.

Example

A car salesman advised some potential buyers that the car they were looking at was a good little highway car, economic and reliable and tht he had had the car checked out completely by the company mechanic who had run tests on it and had found the engine to be "A-1". On hearing this the potential customers decided tht they would not have their mechanic inspect the car as they had originally planned. They bought the car. Five days later the engine blew up. The judge said that they could succeed at common law because the contract fundamental obligation was not performed: the buyer did not get a car that performed as a car. Also, the representation was deceptive trade practice because it misled the consumer into a disadvantageous contract and more specifically, there was a representation that the car had performance characteristics tht it did not have and exaggeration was used by the salesman when it was deceptive or misleading.

1. Findlay v. Couldwell and Beywood Motors, [1976] 5 W.W.R. 340 (B.C.S.C.).

A representation that the person who is to supply the goods or services had sponsorship, approval, status, affiliation or connection he does not have.[1]

Example

Where the supplier of goods or services claims to be a ëfactory outlet" or ëapproved dealer" when this is not true.[2]

1. Alta., s. 4(1)(d)(ii)
   B.C., s. 2(3)(b).
   Nfld., s. 5(1)(b) (not in force).
   Ont., s. 2(a)(ii).
   P.E.I., s. 3(a)(ii)

2. Belobaba, p. 22, n. 149.

A representation that the goods are of a particular standard, quality, grade, style or model, if they are not.[1]

Example

CSA approved electrical goods if they have not bee.
Teflon II instead of Teflon I.

1. Alta., s. 4(1)(d)(iii).
   B.C., s. 2(3)(c).
   Nfld., s. 5(1)(c)(d) (includes services) (not in force).
   Ont., s. 2(a)(iii).
   P.E.I., s. 3(a)(iii).

A representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, provided that the reasonable use of goods to enable the seller to service, prepare, test and deliver the goods for the purpose of sale shall not be deemed to make the goods used for the purposes of this kind of deceptive practice.[1]

In Alberta, British Columbia and Newfoundland, a representation that the goods have a particular prior history of usage if they do not is also an unfair practice.[2]

1. Alta., s. 4(1)(d)(v)(vi).
   B.C., s. 2(3)(e).
   Nfld., s. 5(1)(f) (not in force).
   Ont., s. 2(a)(iv).
   P.E.I., s. 3(a)(iv).
2. Alta., s. 4(1)(d)(vii), B.C., s. 2(3)(f), Nfld., s. 5(1)(g) (not in force).

A representation that the goods have been used to an extent that is materially different from the fact.[1]

Example

When a car salesman tells you that the car that you are looking at was driven by a little old lady only to church on Sundays but in fact the car was used as a taxi for a couple of years, this kind of misrepresentation has been made.

1. Alta., s. 4(1)(d)(iv).
   B.C., s. 2(3)(d).
   Nfld., s. 5(1)(e) (not in force).
   Ont., s. 2(a)(v).
   P.E.I., s. 3(a)(v).

A representation that the goods or services are available for a reason that does not exist or otherwise.[1]

1. Alta., s. 4(1)(d)(viii).
   B.C., s. 2(3)(g).
   Nfld., s. 5(1)(i) (includes also special price reduction) (not in force).
   Ont., s. 2(a)(vi).
   P.E.I., s. 3(a)(vi).

A representation that the goods or services have been supplied in accordance with a previous representation, if they have not.[1]

1. Alta., s. 4(1)(d)(ix).
   B.C., s. 2(3)(h).
   Nfld., s. 5(1)(h) (not in force).
   Ont., s. 2(a)(vii).
   P.E.I., s. 3(a)(vii).

A representation that the goods or services or any part thereof are available to the consumer when the person making the representation knows or ought to know they will not be supplied.[1]

1. Alta., s. 4(1)(d)(x).
   B.C., s. 2(3)(i).
   Nfld., s. 5(1)(k) (not in force).
   Ont., s. 2(a)(viii).
   P.E.I., s. 3(a)(viii).

A representation that a service, part, replacement or repair is needed, if it is not.

Example

If you are told that you need your transmission overhauled when in fact nothing is wrong with it, this kind of misrepresentation is made.

1. Alta., s. 4(1)(d)(xii).
   B.C., s. 2(3)(k).
   Nfld., s. 5(1)(m) (not in force), s. 5(1)(n) (misrepresenting that repairs have been done when they have not been done) (not in force).
   Ont., s. 2(a)(ix).
   P.E.I., s. 3(a)(ix).

A representation that a specific price advantage exists, if it does not.[1]

In Newfoundland, a representation that goods or services are free when they are not will be an unfair trade practice.[2]

1. Alta., s. 4(1)(d)(xi).
   B.C., s. 2(3)(j).
   Nfld., s. 5(1)(l) (not in force).
   Ont., s. 2(a)(x).
   P.E.I., s. 3(a)(x).

2. Nfld., s. 5(1)(v).

Example

Door to door salespeople for an encyclopedia company used a script prepared to be the framework for dealing with prospective customers at their homes. Statement made at the time that the door was opened to them that suggested that the salespeople were doing some kind of survey when they wanted to sell their goods was found to be a deceptive practice by the judge. The legislation was to be read to protect not only alert potential customers but also those who are unsuspicious and credulous. Anything said after the door was opened which does not reasonably reveal the true purpose of the call "must be suggestive of some other purpose and is thus deceptive". Statements that would have a prospective buyer to suppose that if his family was a "qualified family" then the encyclopedia company would give him a special offer meaning that he would get a special price or benefit are deceptive when the only qualification needed to buy an encyclopedia is a good credit rating. This is deception under the general declaration that statements that may deceive are unfair trade practices as well as the specific ones of leading the buyer to believe he will get some special price or benefit.[1]

1. Stubbe v. P.F. Collier & Son Ltd. (1977), 74 D.L.R. (3d) 605 (B.C.S.C.).

A representation that misrepresents the authority of a salesman, representative, employeee or agent to negotiate the final terms of the proposed transaction.[1]

1. Alta., s. 4(1)(d)(xvi).
   B.C., s. 2(3)(o).
   Nfld., s. 5(1)(r) (not in force).
   Ont., s. 2(a)(xi).
   P.E.I., s. 3(a)(xi).

A representation that the proposed transaction involves or does not involve rights, remedies or obligations if the indication is false or misleading.[1]

1. Alta., s. 4(1)(d)(xiv).
   B.C., s. 2(3)(m).
   Nfld., s. 5(1)(p) (not in force).
   Ont., s. 2(a)(xii).
   P.E.I., s. 3(a)(xii).

A representation using exaggeration, innunedo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

1. Alta., .
   B.C., s. 2(3)(r).
   Nfld., s. 5(1)(w) (not in force).
   Ont., s. 2(a)(xiii).
   P.E.I., s. 3(a)(xiii).

Giving an estimate or quotation of the price of the goods or services which is materially less than the price of the goods or services as subsequently determined or demanded by the supplier and the supplier has proceeded with his performance of the consumer transaction without the express consent of the consumer.[1]

1. Alta., s. 4(1)(d)(xvii).
   B.C., s. 2(3)(p) (not in force)?
   Nfld., s. 5(1)(s) (not in force).
   Ont., .
   P.E.I., .

(i) Giving, in any representation, less prominence to the total price of the goods or services than to the price of any part of the goods or services;

(ii) giving, in any representation, the price of any part of the goods or services without giving the total price of the goods or services;

(iii) giving, in any representation, less prominence to the total price of the goods or services than to the amount of any instalment to be paid in respect of the goods or services;

(iv) giving, in any representation, the amount of any instalment to be paid in respect of the goods or services without giving the total price of the goods or services.[1]

1. Alta., s. 4(1)(d)(xviii), (xix), (xx) (xxi) for (i, ii, iii, iv).
B.C., s. 2(3)(q) for (i).
Nfld., s. 5(1)(t)(u) (not in force) for (i), (iii).
Ont., .
P.E.I., .

A representation such that a consumer might reasonalby conclude that the goods are available in greater quantities than are in fact available from the supplier.[1]

1. Alta., s. 4(1)(d)(xv).
   B.C., s. 2(3)(n) (not in force).
   Nfld., s. 5(1)(q) (not in force).
   Ont., .
   P.E.I., .

A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.[1]

1. Alta., s. 4(1)(d)(xiii).
   B.C., s. 2(3)(1).
   Nfld., s. 5(1)(o) (not in force).
   Ont., s. 2(a)(xiv).
   P.E.I., s. 3(a)(xiv).

Certain other circumstances in which transactions are made and considered unfair and gives consumer a right to relief. In Alberta, some of these situations are described as unfair practices and give rise to the same rights as the above representations do. In British Columbia, Newfoundland (but there the legislation is not yet in force), Ontario and Prince Edward Island these practices are called unconscionable. That is, a transaction arising from those practices are unfair and it would be unjust to let them stand without giving the consumer some right to relief. To decide whether a transaction was made in such circumstances that the consumer should have a right to relief, factors to be considered by the judge are listed in the provincial legislation and vary from province to province. The factors consist of what the person making the representation or his employer knows or ought to know that makes the resulting transaction an unfair one.

That the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors.[1]

1. Alta., s. 4(1)(b) (an unfair practice if the supplier takes advantage of this).
   B.C., s. 3(2)(b).
   Nfld., s. 6(1)(f) (if the seller took advantage of this) (not in force).
   Ont., s. 2(b)(i).
   P.E.I., s. 3(b)(i).

That the price grossly exceeds the price at which similar goods or services are readily available to like consumers.[1]

1. Alta.,
   B.C., s. 3(2)(c).
   Nfld., s. 6(1)(c) (not in force).
   Ont., s. 2(b)(ii).
   P.E.I., s. 3(b)(ii).

That the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation.[1]

1. Alta., s. 4(1)(c).
   B.C., .
   Nfld., s. 6(1)(b) (not in force).
   Ont., s. 2(b)(iii).
   P.E.I., s. 3(b)(iii).

That there is no reasonable probability of payment of the obligation in full by the consumer.[1]

1. Alta., .
   B.C., s. 3(2)(d).
   Nfld., s. 6(1)(a) (not in force).
   Ont., s. 2(b)(iv).
   P.E.I., s. 3(b)(iv).

That the proposed transaction is excessively one-sided in favour of someone other than the cusomter.[1]

1. Alta.,
   B.C.,
   Nfld.,
   Ont., s. 2(b)(v).
   P.E.I., s. 3(b)(v).

That the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable.[1]

1. Alta., .
   B.C., s. 3(2)(e).
   Nfld., s. 6(1)(d) (not in force).
   Ont., s. 7(b)(vi). Note: Should s.7 be s.2?
   P.E.I., s. 3(b)(vi).

That he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment.[1]

1. Alta., .
   B.C., .
   Nfld., .
   Ont., s. 2(b)(vii).
   P.E.I., s. 3(b)(vii).

That he is subjecting the consumer to undue pressure to enter into the transaction.[1]

1. Alta., s. 4(1)(a) (an unfair practice).
   B.C., s. 3(2)(a).
   Nfld., s. 6(1)(e) (includes trickery) (not in force).
   Ont., s. 2(b)(viii).
   P.E.I., s. 3(b)(viii).

## REMEDIES FOR UNFAIR PRACTICES IN ALBERTA, BRITISH COLUMBIA, NEWFOUNDLAND (not in force yet), ONTARIO AND PRINCE EDWARD ISLAND STATUTES

In Alberta, a consumer who has been misled into a contract by an unfair practice can enforce his right to relief in court and the court can declare the act an unfair one, award damages for the losses suffered because of his being misled into the bargain, award damages that are designed to be a punishment to the seller, make the supplier perform his obligations under the contract, restore the property and money to the customer, rescind (end obligations) the contract, grant an injunction to stop the supplier from continuing his unfair practice or grant the consumer any relief the court thinks would be proper and may make the loser pay part of the winner's legal costs.[1]

1. Alta., s. 11.

In British Columbia, where there has been an unconscionable practice or act in respect of a consumer transaction, the supplier cannot enforce the contract.[1] The consumer has a right to go to court to have an act or practice declared a deceptive or unconscionable one.[2] And he also has a right to relief where there was an unconscionable or deceptive act or practice with respect to the contract which may include damages for any loss because of the practice including damages meant to punish the supplier, recission (ending of obligations) of the contract, or an order restoring property and property furnished by the consumer under any terms the court considers just.[3]

1. B.C., s. 3(3).

2. S. 16.

3. S. 20

In Newfoundland the consumer will have a right to take action in court against a supplier who has engaged in a deceptive or unconscionable act or practice when the legislation comes into force. The court may declare the act unfair or unconscionable, award damages for any loss suffered by the consumer because of the misrepresentation or unconscrionable act including damages intended to punish the supplier, rescind (end obligations) the contract, issue an injunction to prevent the supplier from continuing the practice, reopen the transaction and have money repaid to the consumer or make sure the consumer pays a fair price if the price for the goods or services was excessive and make any other kind of order for relief that the court thinks proper.[1] (NOT IN FORCE YET!)

1. Nfld., s. 14 (not in force).

In Ontario, where a consumer has been misled into a contract by a deceptive or unconscionable practice, he can have the contract rescinded (put an end to) and any other remedy that can be had at common law including damage for loss suffered because of the disadvantageous nature of the contract. If rescission is not possible because things cannot be restored to the way things were before the contract was entered into or another person has a right to the subject matter of the contract because he bought it in good faith and paid a price for it, then the consumer can recover the amount that he paid over the actual value of the goods or services. If the act was unconscionable, the court may award damages sufficient to punish the supplier. The consumer must give the supplier notice in writing of the remedy he seeks to the other parties to the agreement within six months of the date of the contract. The notice can be given personally or sent by registered mail.[1]

1. Ont., s. 4.

In Prince Edward Island, the consumer has a right to have the contract rescinded (end of obligations) where he was induced to enter the contract by a deceptive practice. In addition to this, the consumer can get any other remedy that is available from the court in checking damages for loss resulting from his being misled. If things cannot be restored to the way things were before the contract was formed or if some other person has acquired a right in the goods or services received in good faith and for a price, he can recover the amount by which the amount of money he paid exceeds the actual value of the goods or services he received under the contract. He might also get damages. If the unfair practice was also unconscionable, the court could make the supplier of the goods and services who is responsible for the representation to pay an amount of damages meant to be a penalty. In order to exercise this right to relief, the consumer must give notice of his intention to do so to the supplier of goods and services who is responsible for the unfair or unconscionable practice. The notice must be given personnally or sent by registered mail.[1]

1. P.E.I., s. 5.

## UNFAIR REPRESENTATIONS AND BUSINESS PRACTICES IN MANITOBA

In Manitoba, the consumer of goods or services must get togehter with three other consumers who are resident in the province and over eighteen years of age and make a complaint to the minister in charge of administering the legislation. Where these complainants have reason to believe that someone carrying on some business in the province deals in goods of inferior quality or goods that are improperly adulterated, makes unfair or improper service charges, commissions or handling charges, engages in misleading advertising, offers educational services that are inadequate to properly qualify the students, makes improper or misleading appeals to the public for support or uses unfair or improper practices in business, or if they have reason to believe that conditions exist in the business tht are detrimental to employees or the public, they may make a complaint to the Minister in charge of the administration of the legislative scheme in writing. The Minister then has an inquiry made to see if something should be done. The result may be that the price of the product that may be the subject of a complaint may be fixed and is guilty of an offence if the limit is not obeyed.[1]

1. Man., The Trade Practices Inquiry Act, R.S.M. 1970, c. T110, as am.

## THE COMMON LAW OF REPRESENTATIONS: THE BASIC PROTECTION OF THE CONSUMER'S RIGHT NOT TO BE MISLED INTO A CONTRACT

The common law provides the basic protection for the buyer of goods and services in the common law provinces. The above legislation supplements this body of law, but it must be emphasized that the consumer has rights to be protected from being misled into a contract of sales under the common law and these rights still belong to the consumer whether or not he is in a province with the newer deceptive and unfair trade practices legislation. So if he is misled into a contract by such a representation and he fits the description of a consumer so that trade practices legislation covers the transaction in Alberta, British Columbia, Newfoundland (when the law comes into force), Prince Edward Island and Ontario, he has two sources of protection. If he does not come under the description of consumer in those provinces, such as someone who buys a car to use solely for his business needs may not be a party to a "consumer" sale which generally covers the situation where goods or services are bought for personal or family consumption or indeed lives in a province where no such legislation is in force, then the common law will be his only source of protection of his right not to be misled into a contract.

Representations are enforceable either as "mere" representations or terms of the contract. As enforceable "mere" representation is a statement of fact made to the person who was intended to rely on it with the intention and the effect of inducing another party to enter into the contract in reliance on that statement. A term of the contract is simply one of those things which intended to be part of the contract, something that, if not true, could be said to mean that the contract was not properly performed.

Representations may be made expressly in words, either spoken or written, but a court may find them in conduct[1] or pictures and symbols[2] as in a brochure.[3]

So a statement made to the consumer may be a representation. And so may a picture and symbols on a box with the product inside.

1. Farmston, Cheshire and Fifoot's Law of Contract (9th ed., 1976), 251.

2. Newman v. Pinto (1887), 57 L.T. 31 (C.A.)

3. Murray v. Sperry Rand Corporation
   Lowe v. Suburban Developers (Sault Ste. Marie) Ltd., [1962] O.R. 1029 (C.A.)

## IS THE STATEMENT PART OF THE CONTRACT?

Although it is difficult to tell whether a statement is part of the contract or only a representation and so outside the contract giving different rights to the buyer who has been misled by it, courts try to find the intention of the parties: whether the parties intended the statement as part of their contract.[1] Some factors have been noted:[2]

1. the court may find a term where only a short time passed from the making of the statement to contract;

2. evidence of intention to make a statement a term can be found when one party has indicated that the matter is so important to him that he would not contract when one party has indicated that the matter is so important to him that he would not contract unless the statement was true;

3. where one party states a fact which he knows or should know and the other party is ignorant on the matter, this is evidence that the statement was intended as a term of the contract,

4. where the parties enter into a contract in writing which does not include the statement made earlier, this may show that the statement was only a representation (however, sometimes the court will find an independent agreement containing only this statement, called a collateral contract, here);

5. where the seller suggests that there be some independent survey or opinion made of the thing sold it may be that the statement was not intended as a term of the contract;

1. Heitbur, Symms & Co. v. Buckleton, [1913] A.C. 30 (H.C.)

2. Halsberry's (4th ed.), p. 221. Cheshire and Fifoot's Law of Contract (9th ed., 1976), 116-121. Richvein Construction Co. Ltd. v. Raspa (1975), 66 D.L.R. (3d) 193 (Ont. C.A.).

Another way of asking the question is whether an intelligent bystander would reasonably infer that the parties intended this to be part of the deal as a term of the contract.[3]

3. Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd. [1965] 2 All E.R. 65 (C.A.). Approved in Quaker Oats Co. of Canada Ltd. v. Kitzul (1965), 53 D.L.R. (2d) 630 (Sask. Q.B.).

The court may say that the statement was intended to be part of the contract if it was made in order to induce the other party to enter into the contract on the basis of it being true.

If the goods supplied do not live up to the expectations that have been created about them by statements by the seller, you have a right to a remedy as discussed under the consumer's right to have goods that match up with expectations of the goods.[2]

1. Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd., [1965] 2 All E.R. 65 (C.A.).

2. See above.

Example

An advertisement for an old caterpillar tractor said that it was "Ready to go to workë. The buyer answered the advertisement, inspected the machine and had it test run. He paid $5,450 for it. But not long after he started to use it, the tractor broke down. He spent $2,535 to make it usable and sued the seller alleging that what was said was a term of the contract. The court found that the words were not a term of the contract but were in fact a misrepresentation which was innocent and the buyer had not sought relief for the problem.[1]

1. Chapman's Crane Service Ltd. v. Ka & Ka Investments Ltd., [1975] W.W.D. 26 (B.C.S.C.).

Example

A dealer in cars inadvertently sold a 1975 Datsun when the car the buyer thought she had bought was a 1976. The judge found that there was a misrepresentation which was innocent; there was little difference apparently between the two model years. She used the car daily and had put 25,000 miles on it. The judge found that the representation of model year was a term of the contract and gave the buyer damages for breach of warranty.[1]

s. Selesse v. Central Garage Sales & Services Ltd. (1977), 18 N.B.R. (2d) 64 (N.B.Q.B.).

Example

In one case a farmer sought to increase the productive capacity of his farm by purchasing a new forage harvester. He had seen such a machine a couple of times and discussed the machine with a salesman of a local dealership. The salesman gave him a brochure that described the machine and he studied it carefully. One of the featues that interested him was the harvesting capacity of the machine; it was said to be well over 60 tons per hour. The seller and his salesman assured the farmer that the harvester would perform as well as described in the brochure, that it was ideally suited to the kind of farming that the farmer said he did and that it would do a better job than the machine he had at the time. The farmer bought the harvester. The machine never approached the level of performance as set out in the brochure: it worked only at a rate of 16 tons per hour. The machine's failure delayed the farmer's harvest and part of the crop was ruined and another part was lost. The judge found that these oral representations were terms that were independent, binding contractual terms called collateral warranties and the seller was made liable for the loss which resulted from the fact that the machine was not as good as the parties had agreed that it would be.[1]

1. Murray v. Sperry Rand Corporation (1979), % B.L.R. 284 (Ont. H.C.).

Example

Mr. Woods bought a car from Mr. Borstel which he was told was a 1959 Thunderbird. In fact it was a 1958 Thunderbird with a 1959 grill. The court held that there was fundamental agreement on the car: it was the particular Thunderbird the seller wanted to sell and it was that particular Thunderbird that the buyer wanted. However, the car being the one the buyer wanted, the year model would only affect the price: it was a matter collateral to the contract, a warranty. The remedy was by way of damages.[1]

1. Woods v. Borstel (1962), 34 D.L.R. (2d) 68 (Alta. S.C.A.D.).

Example

Mr. Botcher advertised a Volkswagon for sale in a Halifax newspaper. It said "1971 Saper Beetle, excellent condition". Mr. Selig called Mr. Bottcher and then went to see the car. The potential buyer saw drops of oil around the car. The potential seller said that the oil was from a recent oil change done by him and that the car only burned a pint of oil every thousand miles. Mr. Selig paid $1,100 for the car and drove it home. The car drizzled oil on the drive home and he had the car fixed at a gas station the next day. The car continued to leak oil. A new engine had to be installed. The court held that the representations that the car was "in excellent condition" and that it burned only one pint of oil every thousand miles were made for the purpose of inducing Mr. Selig to buy the Volkswagon and that they induced him to enter the contract. This led the court to the inference that the representations were intended as warranties. The buyer was awarded damages for breach of those warranties.[1]

1. Selig v. Bottcher (1978), 26 N.S.R. (2d) 347 (N.S.S.C.D.).

Example

A misrepresentation that will give a buyer to whom such a statement was made a right to relief only if it was a representation of a material fact which was intended to induce and did induce the buyer to center into the purchase.[1] The misrepresentation, in order to give a right to a remedy, must have been a cause, though not necessarily the only cause, of the buyer entering into the contract.[2] The representation must have been a material one, that is, an important one like finding that the amount of timber you actually received under a contract was only two-thirds of what you had contracted for.[3] One judge said "a misrepresentation, to be material, must be one necessarily influencing and inducing the transaction and affecting and going to its very essence and substance".[4] If a representation has been made, calculated to induce the buyer to enter into a contract it has been said that the court will assume that it did so induce the buyer.[5]

1. Corbeil v. Appell, [1950] 1 D.L.R. 159, 160 (B.C.S.C.).

2. Panzer v. Zeifman (1978), 88 D.L.R. (3d) 131 (Ont. C.A.);
Pomehichuk v. Gale (Gale's Auto Mart), [1950] 2 W.W.R. 66 (Man. K.B.);
Hinchey v. Gonda, [1955] O.W.N. 125 (H.C.).

3. Fukukawa v. American Timber Holding Co., [1928] 30 D.L.R. 44, 49 (B.C.S.C.).

4. Hinchey v. Gonda, [1955] O.W.N. 125, 127 per Mr. Justice Schroeder.

5. Redgrave v. Hurd (1881), 20 Ch. 0. 1, 21 (C.A.). (N.S.S.C.D.).

Example

A car seller told a prospective purchaser that a car he was trying to sell was new. In fact the car was not new and the buyer was given relief on the ground that this was a misrepresentation.[1]

Example

A car seller told a purchaser that the car he was trying to sell was free from security interests of other people and that the sellers had bought the car from a particular car dealer. Relief on the basis that these statements were misrepresentations was given.[2]

1. Wiebe v. Butchart's Motors Ltd., [1949] 2 W.W.R. 688 (B.C.C.A.).

2. Pomehichuk v. Gale (Gale's Auto Mart), [1950] 2 W.W.R. 66 (Man. K.B.).

Courts are less likely to find a misrepresentation if the buyer was probably not in a position to have been misled in reliance on the statements made to him, like an experienced farmer who had entered into a contract after certain representations had been made to him but after he had inspected the property four times.[1] Also, the person who made the representation may prove that the party to whom the representation was made had knowledge of facts contrary to the representations or that no reliance was placed on the truth of the representation and a court may not grant the remedy.[2]

1. Shortt v. MacLellan, [1959] S.C.R. 3.

2. Redgrave v. Hurd (1881), 20 Ch. 0. 1, 21 (C.A.).

Other statements are considered by the law to be less important and less likely to infringe the right of the consumer not to be misled into making a contract.

Vague, general statements that sellers often make to commend their products will not give the consumer a right to relief as long as they are honest commendations that would not have misled a sensible man negotiating a purchase.[1]

1. Waddams, The Law of Contracts (1977), 250. Robinson v. McDonald (1922), 22 O.W.N. 215 (S.C.), affd 22 O.W.N. 471 (Div. Ct.).

A misrepresentation made by the seller to the buyer about the law affords the consumer no right to relief unless it was made deliberately with an intent to deceive.[1] But where there is a misrepresentation of the effect of the law on a transaction involving the consumer's private rights, such as the legal status of his or her property with respect to the other party[2], the legal effect of a term of the contract[3] or the legal status of the thing to be sold or rented[4], relief may still be granted by the courts for a breach of the right of the consumer not to be misled into a contract.

1. Rule v. Pals, [1928] 3 D.L.R. 295 (Sask. C.A.).

2. MacKenzie v. Royal Bank of Canada, [1934] A.C. 468 (P.C.).

3. Robson v. Roy (1917), 35 D.L.R. 485 (Alta. S.C.A.D.).

4. Graham v. Legault, [1951] 3 D.L.R. 423 (B.C.S.C.).

Example

So if a statement is made that if a consumer takes a certain correspondence course he will be able to practice law in one of the provinces, there is no remedy when the buyer finds that the laws of that province do not allow him to be admitted to the Bar because he was not a British citizen.[1]

1. Rule v. Pals, [1928] 3 D.L.R. 295 (Sask. C.A.).

The misrepresentation must be made of some presently existing fact in order for a right to relief to exist in the consumer; so a statement about what the party making the assertion intends to do in the future does not confer such a right.[1] But if the person making the statement about is intention really did not intend what he actually stated, courts may characterize this as a misrepresentation of fact and a right to relief for this accrues to the person who received the representations.[2]

1. Ontario Mortgage Corporation v. Troup (1931), 40 O.W.N. 349 (Div. Ct.);
   Roberts v. Arnott Co., [1932] 1 D.L.R. 798 (Alta. S.C.A.D.);
   Ross v. Benjaminson Construction Co., [1927] 2 D.L.R. 830 (Man. K.B.).

2. Pruther v. King Resources Co. (1972), 33 D.L.R. (3d) 112 (Alta. S.C.A.D.).

Example

Before the buyer purchased a house, the developer said that on the vacant lot next to that house, he was going to put up a couple of bungalows. He built an apartment building instead. The buyer sued alleging a misrepresentation was made. The court found this statement only a casual remark but also said that a representation as to what a party intends to do in the future does not give a right to relief and so dismissed the case.[1]

1. Ross v. Benjaminson Construction Co., [1927] 2 D.L.R. 830 (Man. K.B.).

A misrepresentation which amounts merely to a statement of opinion, judgment, probability or expectation does not create any right to relief.[1] The buyer might have a right to relief if he can establish that what was said to him was done as a fraud.[2] But where one party is more knowledgeable about the subject matter of the contract than the other, often the situation of the seller, his opinion might be found a representation by a court because it may indicate he knows of facts that justify the opinion.[3] There may be a right to relief for misrepresentation if the seller could not reasonably have held the opinion he expressed.[4] But if the person making the opinion did not really believe what he said or if he really had as belief or opinion on the subject, then relief for the misrepresentation of the state of his own mind can be had.[5]

1. Bisset v. Wilkinson, [1927] A.C. 177 (P.C.); Hinchey v. Gonda, [1955] O.W.N. 125 (H. Ct.).

2. Bisset v. Wilkinson, ibid.

3. Ibid.

4. Ibid.

5. International Casualty Co. v. Thomson (1912), 48 S.C.R. 167, 202-203.

Example

A potential buyer of company shares was told that the company was paying an 8% dividend and that the shares were worth $100 each. He bought the shares. The representation was wrong. The court found that assertions as to value of property are only expressions of opinion or judgment and the trial judge's dismissal of the case was upheld by a court of appeal.[1]

1. Bivens v. Brouse (1923), 24 O.W.N. 585 (Div. Ct.). Also Brauchle v. Lloyd (1915), 21 D.L.R. 32. (Alta. S.C.).

Where material representations are made and they are calculated to induce a person to enter into a contract the law presumes that he has a right to relief and he loses this right only if the person who made the representation shows that the buyer had knowledge of facts contrary to the statement made to him or that he either said or showed clearly by his conduct that he did not rely on what was said to him. And the person who made the statement cannot say that the buyer had a duty to look into the truth of the statements made to him. It does not affect the right of the buyer that he had means of finding whether or not the statement was true and that he might have found out the truth had he used reasonable diligence to do so.[1]

1. Bevan v. Anderson (1957), 12 D.L.R. (2d) 69, 74 (Alta. S.C.);
   Brauchle v. Lloyd (1915), 21 D.L.R. 321 (Alta. S.C.);
   Parna v. G & S Properties Ltd., [1971] S.C.R. 306, 317.

If some important facts were not disclosed by a seller making a sale, the common law did not give a right of relief for misrepresentation; some actual mistatement of fact must have been made by the seller to induce the buyer into the contract.[1] But if only some of the facts are made known to the buyer and what is left unsaid makes what was said false, a court may find this a positive misrepresentation.[2] And one judge has said that "active concealment of a fact is equivalent to a positive statement that the fact does not existö and elaborated by saying that this means that something is done to prevent a fact from being discovered like covering over the defects in an article that is sold with the intent of making sure the buyer does not discover them.[3] Also, a person must disclose all material (important) facts to someone to whom he owes a special duty of trust and confidence and must exercise rights and powers for their advantage (a fiduciary duty) like solicitors and their clients[4] or agents and their principals.[5] Sometimes, a court will find a non-disclosure of something very important to the deal a fraudulent misrepresentation but the authority for this statement is weak.[6] Contracts

1. Peek v. Gurney (1873), L.R. 6 H.L. 377.

2. Wallace v. Grummerson (1915), 8 O.W.N. 35 (H.C.); Ibid.; Twigg v. Greenizen (1922), 63 S.C.R. 158.

3. Leeson v. Darbon, [1926] 4 D.L.R. 415, 432 (Ont. S.C.A.D.) per Master, J.A., approved in Ames v. Investo-Plan Ltd. [1973] 5 W.W.R. 451, 453 (B.C.C.A.); Gronan v. Schlamf Investments Ltd. (1974) 52 D.L.R. 631 (Man. W.B.).

4. Brickenden v. Condon Loan & Savings Co., [1934] 3 D.L.R. 465, 469 (P.C..

5. G. Mida Construction Ltd. v. Imperial Developments (International) Ltd., [1978] 5 W.W.R. 577 (Man. C.A.).

6. Hines v. McCallum [1925] 2 D.L.R. 403 (Man. K.B.); Can. Farm Implement Co. v. Alta. Fdry. & Mach. Co., [1927] 2 D.L.R. 871 (Alta. S.C.).

of insurance are a special kind of contract and the consumer has a duty to disclose all facts that would influence a reasonable insurer to accept the policy or change the premium.[7]

7. Mutual Life v. Ontario Metal Products, [1925] A.C. 344 (P.C.).

The kind of remedy a buyer will get for his being misled into a contract by some false statement depends upon the kind of representation it was. The kind of representation there was depends in turn upon the state of mind of the person who made it; it can be fraudulent, negligent or innocent. The development of these remedies was a long and complicated one. They remain entangled in a complex of rules. The basic remedies have been discussed before. They are rescission or the cancellation of rights and obligations under the contract and damages, or monetary compensation for loss. Of course, the general statements about misrepresentations made above apply to each kind

A fraudulent misrepresentation is a false statement made by a person who knows that it is false, or who has no belief that it is true or who makes it recklessly, careless whether it is true or false and it does not matter that there was no intention on the maker's part to cheat or injure the person to whom the statement was made.[1] Also, it must have been intended to and to have had the effect of inducing the buyer to make the contract as mentioned above in the general discussion of misrepresentations. An allegation of fraud is a very serious one and it must be strictly proved.[2] Fraudulent misrepresentation, in addition to being a cause of action, may be a defence in an action against the buyer for payment.[3] If you have been the victim of a fraudulent misrepresentation, you may cancel the contract and sue for damages as well.[4] If you allege fraud and fail to prove it (something judges do not like and for which they may make you pay legal costs of the other side even if you win on another ground[5]) you may still win relief on the basis of innocent misrepresentation.[6]

1. Derry v. Peek (1889), 14 App. Cas. 337, 374 (H.C.) fnd. in Parna v. G. & S. Properties Ltd. [1971] S.C.R. 306, 316.

2. Dunn v. Darbyson (1960), 31 W.W.R. 422 (B.C.S.C.).

3. Pomehichuk v. Gale (Gale's Auto Mart), [1950] 2 W.W.R. 66 (Man. K.B.) and Davis v. Moranis and Smith, (1949) O.W.N. 638 (C.A.).

4. Newbrigging v. Adam (1886), 34 Ch. 0. 582, 592 (C.A.); Hill v. Stephen Motor & Aero Company, Ltd., [1929] 2 W.W.R. 97 (Sask. C.A.).

5. Caldwell v. Cockshutt Plow Co. (1913), 30 D.L.R. 244, 262 (S.C.A.D.).

6. Corbeil v. Appell, [1950] 1 D.L.R. 159 (B.C.S.C.).

Example

On September 26, 1949, Mr. Pomehichuk sold a 1948 Chev. Sedan to Mr. Gale for $1,850 Mr. Gale paid $850 in cash and handed over a cheque for the rest. At the time of the sale, Mr. Pomehichuk said that the car was free from other interests in it and that it had been bought from Frank Clement, a car dealer in Russell, Manitoba. After finding that this was not true, payment was stopped on the cheque. Pomechichuk sued for his money. The court found that the representations were made at the time of the sale and were false to the knowledge of the seller and that the seller knew they were false when he made them and that Gale was induced into making the contract by them and that he elected to cancel the contract within a reasonable time after discovering the falsity of the statements. The court said that Gale could cancel the contract and the court ordered the contract ended. The sellers had to pay back the $850 paid by Gale and Gale had to give back the car.[1]

1. Pomehichuk v. Gale (Gale's Auto Mart), [1950] 2 W.W.R. 66 (Man. K.B.).

Example

The owner of a car told a potential purchaser that he had used the car privately and had bought it from a private individual and also that the car had been carefully used. In fact the car had been used as a taxi for ten months and wrecked in a collision. The person who was now trying to sell the car bought the broken taxi and repaired it. The fact that the seller did not say the car had been used as a taxi and this made what was stated untrue leading the buyer to believe that the car had been used carefully. The implanting of such a belief in the mind of the buyer intending that he buy the car on the basis of a false belief in its quality was held to be a fraudulent misrepresentation.[1]

1. Guerard v. Frith (1957), 10 D.L.R. (2d) 110 (Man. C.A.)

Basically, an innocent misrepresentation is one that is not fraudulent. In other words, if the person who made the statement honestly believed on reasonable grounds that it was true and was innocent of any fault or fraud then the representation of material fact that was intended to induce and did induce the purchaser to buy the thing is an innocent misrepresentation.[1] The remedy is rescission of the contract and an indemnity against all obligations that arose from the contract and not damagaes.[2] The person who was misled must be put back in the position he was before he entered into the contract. This is the law now, though there was doubts that this remedy was available for contracts for sales of goods.[3] So, for example, if a thing is purchased because of an innocent misrepresentation and improvements are made to it by the buyer, when the parties are restored to the position they were in before the contract was made, he may be able to recover the cost of the improvements.[4] If a car was part of an agreement of purchase and sale and the contract

1. Dick Bentley Productions, Ltd. v. Harold Smith (Motors) Ltd., [1965] 2 All E.R. 65 (C.A.); Corbeil v. Appell, [1950] 1 D.L.R. 159 (B.C.S.C.); Wiley v. Fortin, [1946] 2 D.L.R. 712 (B.C.S.C.).

2. Newbigging v. Adam (1886), 34 Ch. D. 582 (C.A.); Wiley v. Fortin [1946] 2 D.L.R. 712 (B.C.S.C.).

3. Goldsmith v. Rodger, [1962] Lloyds List L.R. 249 (C.A.) and see the discussion in Atigah, The Sale of Goods (5th ed., 1975), 301-304; Cloud v. Furguson (1953), 10 W.W.R. 426 (Alta. D.C.).

4. Wiley v. Fortin, [1946] 2 D.L.R. 712 (B.C.S.C.). See also Gervis v. Howson [1928] 4 D.L.R. 207 (Sask. C.A.).

was rescinded for innocent misrepresentation, the car would have to be returned undepreciated by use or accident, that is a sum paid to the persons getting the car back for any depreciation it suffered or injury by accident, but no compensation for the loss of the use of the car which would have been part of damages if these could be awarded with this remedy.[5] There is to be a "giving back and a taking back" on all sides.[6]

5. Corbeil v. Appel, [1950] 1 D.L.R. L59 (B.C.S.C.). See also Stephenson v. Bromley, [1928] 4 D.L.R. 737 (Man. C.A.); Wiebe v. Butchart's Motors Ltd. [1949] 4 D.L.R. 838, 841 (B.C.C.A.).

6. Newbigging v. Adam (1886), 34 Ch. D 582, 595 (C.A. per Lord Justice Bowen.

Example

Mr. Goldsmith wanted to buy Mr. Rodger's boat. The latter said he would sell it for £400. Goldsmith went to the place where the boat was kept and inspected it. He phoned Rodger and said that the boat suffered from extensive rot and worm in the keel and that he would only pay £100. Rodger believed this and accepted the low offer thinking Goldsmith had done an extensive inspection. Later he found out that Goldsmith had not done this and that there were no problems with the woodwork. Rodgers telegraphed Goldsmith and said he would not sell. Goldsmith wanted damages. The court found that this was an innocent misrepresentation and cancelled the contract.[1]

1. Goldsmith v. Rodger, [1962] 2 Lloyd's List L.R. 249 (C.A.).

Example

A seller of cars and trucks sold a truck to a buyer. He said to the prospective purchaser that the truck was a 1958 model transport tractor truck. But earlier the truck had been accepted by the seller in a trade in as a 1957 model though later it was found to be a 1956 model. The cab of the truck was a 1958 cab but the truck itself was a 1956 model. When the buyer found out about this, he promptly rejected the truck and sought to cancel the contract. The court said that the misrepresentation was innocent and the sales documents had been executed and completed but nevertheless, the buyer was entitled to have the contract rescinded because he did not get what he bargained for: there was a difference in substance between what was contracted for and what was delivered.[1]

1. F. & B. Transport Ltd. v. White Truck Sales Manitoba Ltd., (1965) 49 D.L.R. (2d) 670 (Man. C.A.).

## DO NOT DELAY IF YOU WANT TO RESCIND A CONTRACT

You cannot get rescission of the contract if you have elected to abide with it after you have found out about the misrepresentation. So a contract must be avoided within a reasonable time of learning of the misrepresentation.[1] The contract can be affirmed expressly after the truth is discovered but more important, a court may find the contract affirmed if the buyer uses the goods after discovering the defect longer than needed for examining and testing them to find the defects and their extent.[2] So a farmer who continued to use a machine that he had purchased under a misrepresentation after he found that the representation was untrue was held by the court to have acted inconsistently with rescission of the contract.[3] In one well known case, an innocent misrepresentation was discovered five years after the contract was entered into and the court said it was too late to rescind despite the fact that the truth was unknown for that period of time.[4]

1. Walton v. Candstock Investments Ltd. (1976), 13 O.R. (2d) 693 (C.A.); Hinchey v. Gouda, [1955] O.W.N. 125, 128 (H.C.).

2. Long v. Lloyd, [1958] 1 All E.R. 402, 407 (C.A.) and Guest ed., Bejamin's Sale of Goods (1974) 404.

3. Caldwell v. Cockshutt Plow Co. (1913), 30 D.L.R. 244,260 (S.C.A.D.); J.I. Case Thrashing Machine Co., Inc. v. Webb, [1920] 1 W.W.R. 338 (Sask. K.B.).

4. Leaf v. International Galleries, [1950] 1 All E.R. 693 (C.A.).

Example

A man bought a truck after he read a newspaper advertisement in the paper saying that it was in "exceptional condition". The seller said that his Dennis truck would do 40 miles per hour and would get 11 miles per gallon. The prospective buyer took it for a test run and found a few things wrong with it but after being assured by the seller that there was nothing else wrong with it, he bought it. Something else went wrong and was fixed with the help of the seller. The buyer took it on a trip and it broke down. The buyer wrote the seller and said that oil leaked, a gasoline consumption of nine miles per gallon, a speed of only 25 miles per hour and a cracked wheel. He asked for his money back and said that he would return the truck in a couple of days. The judge said that apart from special circumstances, the place of delivery was the proper place for examination, which the buyer could have done with the aid of experts. Some representations would have to be tested like the gas mileage and a reasonable time to do this would necessarily have to be given the buyer so acceptance would wait for this amount of time as long as in the meantime he did not do something that was inconsistent with the ownership of the seller (like sell it). But the buyer here drove the truck after he had found out about all the problems and later allowed his brother to drive the truck on a business trip. The judge found this to be the final acceptance of the truck and meant there was to be no rescission of the contract.[1]

1. Long v. Lloyd, [1952] 2 All E.R. 402 (C.A.).

There is a rule in Canadian law that says that an executed contract cannot be cancelled by rescission for an innocent misrepresentation.[1] A contract is executed when the party seeking to have the contract rescinded has done all that he was required to do under the contract.[2] However, courts do not appear to let this stand in the way of giving the consumer a remedy when he has bought under an innocent misrepresentation. A court will say that despite the fact that the misrepresentation was innocent and the sale executed and completed, there was a difference in substance between what was contracted for and what was delivered, that the consumer did not get what he had bargained for.[3] If this is the case, the contract may be cancelled by rescission.

1. Redican v. Nesbitt, [1924] S.C.R. 135; Shortt v. MacLennan, [1959] S.C.R. 3.

2. Ibid., pp. 153, 155 per Mr. Justice Anglin.

3. Redican v. Nesbitt, [1924] S.C.R. 135; Shortt v. MacLennan, [1959] S.C.R. 3; F. & B. Transport Ltd. v. White Truck Sales Manitoba Ltd. (1965), 49 D.L.R. (2d) 670 (Man. C.A.); Caldwell v. Cockshutt Plow Co. (1913), 30 D.L.R. 244 (Ont. S.C.A.D.).

## TO BE ABLE TO HAVE THE CONTRACT RESCINDED YOU MUST BE ABLE TO GIVE BACK WHAT YOU GOT UNDER IT

In order for there to be a rescission of the contract, it must be possible to restore both parties to their original positions, the purchaser must get his purchase money back and in turn must return the property back to the seller unimpaired.[1] There will be no rescission of the contract if the goods have been destroyed[2] or used up or if they were sold to other persons.[3] A truck's being used to a considerable extent or being repossessed legally will be bars to rescission.[4] However, the courts have fairly wide powers here and may allow rescission even though perfect restitution is not possible but will try to achieve a just and practical solution by compensation.[5] Courts may give the person who receives his property back after having made a misrepresentation compensation for its use[6] by the innocent party though it may subtract money spent by the latter to make repairs on it.[7] A court might even give monetary compensation to the innocent party where the vehicle he traded in on the one that was purchased subject to a misrepresentation had been sold

1. Thurston v. Streilen, [1951] 4 D.L.R. 724, 728 (Man. K.B.).

2. Ibid., p. 735.

3. Ibid.; Brady v. Fensom (1928), 33 O.W.N. 346 (Div. Ct.).

4. Weyerman v. Fageol Motor Sales Co., [1931] 2 D.L.R. 817 (B.C.S.C.)

5. Glanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218, 1278-9 (H.L.); Carter v. Golland, (1937) O.R. 881 (C.A.).

6. F. & B. Transport Ltd. v. White Truck Sales Manitoba Ltd. (1964), 47 D.L.R. (2d) 419 affd. (1965), 49 D.L.R. (2d) 670 (Man. C.A.); Wiebe v. Butchart's Motors Ltd. [1949] 4 D.L.R. 838 (B.C.C.A.).

7. Ibid.

is that only the party who made the misrepresentation gets his vehicle back.[8] The buyer might even get back interest on the purchase money that he receives back from the person who made the representation.[9]

8. Ibid.; Beck v. Brady, [1943] 1 W.W.R. 360 (Alta. S.C.).
9. Addison v. Ottaa Auto and Taxi Co., (1913), 30 D.L.R. 51, 59 (S.C.A.D.).

Example

A man bought a car from a car dealer on the basis that it was new. This was said to him by the dealer. The car was not new and the buyer sought rescission. He got it but had to pay the dealer $600 for the use he had of the car before the contract was rescinded because of deterioration.[1]

1. Wiebe v. Butchart's Motors Ltd., [1949] 4 D.L.R. 838 (B.C.C.A.).

## MISREPRESENTATIONS THAT ARE NEGLIGENT

In some business situations, a person who makes a false statement without taking proper care to make sure it was true may be liable to compensate the person who relied on the statement to his loss.[1] This is a new and developing area of the law and many questions have yet to be litigated. But basically, the party making the representation owes a duty to the other party to take reasonable care to make sure what he is saying is correct where a "special relationship" exists between the two parties. What constitutes a "special relationship" is not clear. A narrow interpretation restricts it to businesses or professions which involve giving advice.[2] Basically the relationship is the one where it is plain that the party wanting the information was trusting the other to take a reasonable amount of care in the circumstances where it was reasonable for him to so trust the party from whom he sought advice and where the adviser knew or ought to have known that the person asking the information was relying on him.[3] Canadian courts have broadened this requirement. A report given in the business operation of a company that had manufactured construction machinery on the state of one of the cranes it had built and sold was held to have contained negligent misrepresentations; all the circumstances indicated that it had accepted responsibility for the report's accuracy.[4] However, this remedy does not apply where there is a contractual relationship between parties at the time the representation is made unless the statement is somehow independent of the contractual relationship.[5] The remedy for such a misrepresentation is damages.

1. Hedley Byrne & Co. v. Heller & Partners Ltd. [1964] A.C. 465 (A.C.).

2. Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt, [1971] A.C. 793 (P.C.).

3. Hedley Burne, as above, p. 486 per Lord Reid.

4. Tower Equipment Rental Ltd. v. Joint Venture Equipment Sales (1975), 60 D.L.R. (3d) 621, 630 (Ont. H.C.).

5. J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co., [1972] S.C.R. 769.

Example

A crane was to be purchased for a construction project by the buyer who was to rent it to the contractor on the site. The buyer wanted a report on the crane from its manufacturer. The district manager of the manufacturer made a report and said that the crane had been used for four months only and had been stored carefully for two years. The report went on to state that the crane was in "like-new conditionë and in "excellent conditionë. Thë manufacturer had made the report at the request of the seller and was nöt a party to the conträct. The crane was purchased but the contractor would not use it and an engineer prepared a second report that concluded that the crane was not suitable and not in good condition. The report was found to contain negligent misrepresentations as it was intended for the buyer and the buyer intended to act on it and the circumstances indicated that the manufacturer had assumed liability for its contents' accuracy. The buyer received damages.

1. Tower Equipment Rental Ltd. v. Joint Venture Equipment Sales (1975), 60 D.L.R. (3d) 621 (Ont. H.C.).

## CAN YOUR CONTRACT BE ENFORCED?

Provincial Sales of Goods Acts say that your contract cannot be enforced in a court of law unless one of three requirements is met.[1]

(1) You must accept and actually receive part of the goods sold to you. Here an acceptance includes the situation where you (the buyer) do any act in relation to the goods that indicates there is a pre-existing contract of sale.

1. SGA.: Alta., s. 7 (over $50); B.C., ; Man., s. 6 (over $50); N.B., s. 5 (over $40); Nfld., s. 6 (over $50); N.S., s. 6 (over $40); Ont., s. 5 (over $40); P.E.I., s. 6 (over $30); Sask., s. 6 (over $50).

Example

Someone ordered custom made furniture from a maker. The furniture was delivered to these customers but they either rejected it or returned it with a request to change the finish. More furniture was sent and the same claims were made. Then the customers refused to pay for the goods. The seller here sued for the price. The customers said there was no writing or any other evidence of the contract and so they thought the contract was unenforceable.

The court said that an act of acceptance to make the contract enforceable only had to indicate that a contract existed before they accepted the goods. The customers' admission that they had ordered the furniture from the maker, written down before trial was evidence of the contract. Also, the fact that the goods were received by the customers and rejected because the finish on the wood did not correspond with the finish ordered showed that the goods were ordered and a contract existed.[1]

1. J. Mathue Design & Construction Ltd. v. Gendel (1970), 17 D.L.R. (3d) 268 (Ont. C.A.).

Or (2), you must give something in earnest (a nominal sum given to the seller to show that the parties are in earnest in concluding a contract of sale) to bind the contract or in part payment. An earnest is given at the time of the contract, accepted by the seller to indicate completion of the contract and be given without intention of getting it back.[1] Part payment is something paid as part of the purchase price.[2]

1. G.H.L. Fridman, Sale of Goods in Canada (1973), 37.

2. Ibid.), 17 D.L.R. (3d) 268 (Ont. C.A.).

Or (3), you must have some note or memorandum (a note of the particulars of the transaction) in writing of the contract signed by the person against whom the contract is to be enforced. All the terms agreed upon by the parties at the time such memorandum was made and signed must be included.[1] A number of documents can be put together to make the memorandum but these documents must make some internal reference to each other.[2]

1. Berry v. Robinson (1921), 67 D.L.R., 500, 502 (N.B.S.C.A.D.).

2. Fennell v. Fisher, [1947] 2 W.W.R. 1007 (Sask. C.A.).

In addition to these requirements, some provinces have added requirements of form to some consumer sales. These are contracts between you and the seller for the sale of goods and/or services where delivery of the goods, performance of services or payment in full is not made when the contract is entered into. The goods must be purchased for personal use (not for resale, for use in business, or where buyer is a business organization or corporation) and the price is over fifty dollars.[2]

Such a contract is not binding on you, the buyer, unless it contains:

a. the name and address of you and the seller;

b. a description of the goods sufficient to identify them with certainty;

c. the price of the goods and a detailed statement of the terms of payment;

d. where credit is extended, a statement of any security for payment under the contract, including particulars of any negotiable instrument, or security arrangement;

e. if the transaction is one on credit, the statement required concerning the cost of borrowing;

f. any warranty or guarantee applying to the goods and if there is none then that fact must be recorded.[3]

Both parties must sign the contract, and a copy must go to you either personally or by mail. These conditions for enforceability do not apply in Ontario if the contract is one made under an agreement where the lender agrees to extend credit to the borrower at the borrower's option for the purchase of goods and services.

1. Consumer Protection Act, S.B.C. 1967, c. 14, as am., s. 2;
The Consumer Protection Act, R.S.O. 1970, c. 82, as am., s. 1(h).

2. B.C., s. 6; Ont., s. 31.

3. B.C., s. 6; Ont., s. 31.

These same conditions must be contained in every contract for sale of goods on credit in Prince Edward Island.[4]

4. Consumer Protection Act, R.S.P.E.I. 1974, c. C-17, s. 16.

Special rules govern agreements of sale that are made in places other than the seller's normal place of business or at a retail store. These are called direct sales.

In Alberta, direct sales are sales of goods or services or both for future delivery or performance, or where upon the happening of some event on payment of the price or compliance with a condition of the contract, or where the buyer must do some act or pay a price of over $25 to become the owner of goods or entitled to have services performed (or other more technical arrangements, where the contract is not solicited, negotiated or concluded at the seller's normal business premises. But a sale at a market place, auction, trade fair, agricultural fair or exhibition is not a direct sale for these purposes. And a direct sales contract does not include contracts for goods or services for resale, for business purposes, to a corporation, for perishable food-goods or sales where there were no personal dealings between buyer and seller. The contract is concluded for the purposes of the direct sale legislation when signed by the buyer.

The contract is of no legal efect unless it (a) has been signed by the buyer, (b) contains a statutory notice of the buyer's right of cancellation as specified in the act and (c) the buyer has received a copy, personally or by mail within seven days of the signing of the buyer.[1]

1. Direct Sales Cancellation Act, R.S.A. 1970, c. 110, as am., ss. 2-5.

In British Columbia, direct sales are a kind of contract for sale of goods and/or services for over $20[1], where delivery of goods, performance of services or payment in full is not made when the contract is made where it has been solicited, negotiated or entered into at a dwelling not the seller's usual place of business. A contract for perishable food or food products or a contract with a seller who only occasionally carries on business away from his usual business premises is not a direct sale for the purpose of these provisions. Where the contract is one for over $50, it must comply with the form as above[2] and a notice of the buyer's right of rescission must be part of the contract, as prominent as the other parts, and the blanks in it filled in.[3]

1. Consumer Protection Act 1977, S.B.C. 1977, c. 8, s. 1.

2. See above, para. .

3. Consumer Protection Act, S.B.C. L967, c. 14, as am., ss. 4-7.

Direct sales in Manitoba are those for sales of goods, services or both where the contract is entered into at a place other than the sellers' usual place of business where the seller appraoches the buyer and includes the situation where the sale is made at the usual place of business of the seller but the buyer was personally contracted by the seller before the sale was made away from that place. Direct sales do not include sales where there is no personal communication between seller and buyer before the goods or services are delivered, or sales or hire-purchases of vehicles, trailers or farm machinery and equipment covered by other legislation, sales of lumber, coal, feed grain, feed supplement, fertilizer, weed spray where the seller has a place of business in the municipality where the sale takes place, sales of water, propane or fuel, farm produce or one's own farm, services for farming or of a domestic nature, where the price is a charitable donation, or sales to a buyer who is in the retail sales business, or sales of perishable food products, newspapers. Sales to a buyer for resale, to a corporation or sales where the cash price is over $7,500 are not included.[1]

Notice in statutory form must be given to the effect that the contract can be cancelled by the buyer. The seller however can specify an omission of this notice by delivering such notice to the buyer personally and if the buyer refuses to accept the notice, the contract is cancelled.

1. The Consumer Protection Act, R.S.M. 1970, c. C200, as am., s. 1(1) and .

2. Ibid., ss. 59-62.

In New Brunswick, a direct sale is one ade in a house to house method of selling goods or services. This does not include, for the purposes of the legislation governing this kind of sale, where the contract is solicited or entered into at the seller's normal business premises, market-place, auction, trade fair, agricultural fair or exhibition, or where the buyer intends to resell the goods or for use in his business, or where the buyer is a corporation, or where there is no personal dealings between the seller and buyer until after the contract is concluded or where the goods are perishable food products, or where the contract is for less than $25.

The buyer must get a copy of the contract including notification of his rights under the contract that include notice that he can cancel the contract and that the contract is cancelled if the goods are not supplied within the specific time under the legislation and the buyer delivers or sends by registered mail a written notice of cancellation on the seller within one year of the purchase. The contract must also include the seller's address for service within the province. The address of the seller, if the sale is not negotiated by him, must be included in the contract along with the address of the person making the direct sale.[1]

1. Direct Sellers Act, R.S.N.B. 1973, c. D-10, ss. 1-10.

In Newfoundland a direct sale is one created by someone who sells from house to house, calls by telephone or has people come to him at a place other than normal place of business in order to sell goods or services immediately or for future delivery. Persons selling newspapers, dairy, bakery products, firewood, coal, motor vehicles, farm implements, feed grain and supplement, fertilizer or weed spray if he has a place of business in the province, fuel oil, farm products, fish, meat or a person involved in reselling goods or with written authority of the CNIB to sell goods or services or non-profit corporations, or person already licenced to carry on business under othe legislation.

The seller must give the purchaser a copy of the contract. It must contain the seller's address. Provisions in the contract saying that the contract is wholly written does not prevent evidence being given of oral representations being made to the buyer when the seller tried to induce him into the contract. A written receipt must be given by the seller for any payment made on the price by the buyer under the contract.[1]

1. The Direct Sellers Act, R.S.Nfld. 1970 c. 96, as am., s. 2, s. 27.

In Nova Scotia, a direct sale is one made for future delivery of goods or services from door to door, from a hotel or motel, by written solicitation, by telephone or by other means other than by a merchant from a recognized retail store and any sale of a hearing aid. Not included are sales already regulated by statute, food or drink for animals or humans, newspaper sales, sales by Crown corporations, goods for resale or otherwise in the course of business, goods sold in recognized retail stores or goods sold on behalf of a charitable organization.

All such contracts must be in writing and contain:

a. name and address of buyer and seller;

b. description of goods or services sufficient to identify them with certainty;

c. price of goods or services and a detailed statement of terms of payment;

d. where credit is extended a statement of any security for payment under the contract including the particulars of any negotiable instrument or security arrangement;

e. any warranty or guarantee applying to the goods or services and where there is no warranty or guarantee a statement to that effect;

f. a notice that the buyer has a right to cancel within the statutory period of time. If the last element is not in the contract, the agreement may be cancelled by the buyer by giving written notice to the seller within 30 days after the first goods are delivered or services performed. The seller, if he has left such notice out, may give the buyer notice of the right of cancellation. If the buyer refuses this notice after the contract has been made, the contract is cancelled anyway.

The seller must deliver a copy of the contract to the buyer.[1]

1. Direct Sellers' Licensing and Regulation Act, S.N.S. 1975, c. 9, ss. 2, 6, 7, 20-21, 24.

In Ontario, direct sales contracts are a kind of contract of sale of goods or services where delivery of goods, performance of services or payment in full are not made at the time the contract is entered into, where the seller solicits, negotiates or arranges for the signing of a buyer of an executory contract at a place other than the seller's permanent place of business.[1]

These contracts must be in the form as specified above where the price is over $50.

1. The Consumer Protection Act, R.S.O. 1970, c. 82, as am., ss. 1(h), 30-33.

2. See above, para.

Example

Some people decided to have an interior decorating form do their house. The bill amoutned to over $11,000 and $7,900 was paid on it. A couple of the elements of the contract for future services were missing: it was not signed and nothing at all was said about warranties or guarantees. The judge said that unless the formal requirements are met the buyer can consider the contract as void but once partly complied with or completed, the buyer is bound to pay the whole amount under the contract.[1]

1. J. Schofield Manuel Ltd. v. Rose (1975), 9 O.R. (2d) 404 (Co. Ct.).

In Prince Edward Island, a direct sale is one that arises from a seller soliciting orders, selling or offering for sale, goods or services, by telephone, mail, telegram, house to house or by any other method of communicating with the buyer. Direct selling does not include newspaper, dairy, bakery, food products if the seller has a place of business or resides in the province, farm, fish or meat products, sold by a resident, or sales firm or retail store or person selling for a non-profit organization or sales regulated by other legislation.

The buyer must get a copy of the contract and the address of the seller and the person who sold the goods to him (an employee or agent of the seller usually).[1] If the goods were bought on credit and cost more than $50, the contract must comply with the formal requirements as above.[2] The direct sales contract must also contain notice that the contract can be cancelled by written notice to the seller in seven days of the date of the contract and notice too that the buyer may cancel by written notice within one year to the seller if the goods or services are not supplied within the statutory period.

1. Direct Sellers Act, R.S.P.E.I. 1974, c. D-10, ss. 2, 6, 11.

2. See above, para.

In Saskatchewan, direct sales are the result of house to house selling or offering for sale or soliciting orders for the future delivery of goods or services. Direct sales for the purposes of the legislation do not include sales of newspapers, water propane or fuel (as covered by other legislation), dairy, bakery, lumber products or coal if the seller has a regular place of business in the municipality, sales of feed grain or suplements, fertilizer or weed spray if he has a place of business in the province, farm and livestock services, nursery stock, farm products on the sellers own farm, fish caught by the seller, retail store sales, sales authorized by the CNIB, or other non-profit organizations or sales governed by other legislation.

The seller must give a copy of the contract to the buyer. There is no prescribed form for the contracts.[1D]

1. The Direct Sellers Act, R.S.S. 1965, c. 331, as am., ss. 2, 4, 23.

In the Yukon a direct sale is one where a retail sale (not a contract where the goods are intended for resale in a business of the buyer, a contract for sale of a vending machine for a retail establishment, a contract of sale to a corporation, or a sale where cash price is over $8,500) of goods or services is entered into by the buyer at a place other than the vendor's usual place of business and which may have resulted from a solicitation on the seller's initiative. This does not include sales under $10, sales of vehicles or trailers regulated by other legislation, sales of water, propane gas or petroleum products, sales of lumber or coal where the seller has a place of business in which the sale takes place, sales of feed grain, supplement, fertilizer, weed spray where the vendor has a place of business where the sale takes place, sales of produce by the farmer in the territory, sales of services for livestock care, planting and harvesting crop or domestic service, sales for charitable purposes and sales of goods or services by a merchant with a recognized retail store in the territory selling goods or services ordinarily sold there.[2]

If the agreement is in writing or if this is a receipt for a payment on the purchase price, there must be a notice saying that the agreement can be cancelled in seven days and that notice of cancellation must be sent by registered mail to the address that must be given or by person delivery there.[3] If the agreement does not contain the proper words, it can be added later by the seller by personal delivery of a notice bringing the seven-day cancellation period to the attention of the consumer and if he refuses delivery of the extra notice, the agreement is cancelled.[4] The consumer must get a duplicate copy of the agreement at the time of signing.[5]

1. Consumers' Protection Ordinance, Consolidated Ordinances 1976, c. C-13, s. 60.

2. Ibid., s. 61.

3. Ibid., s. 63.

4. Ibid., s. 63(4)(6)

5. Ibid., s. 63(7).

In the Northwest Territories, direct sales are retail sales of goods or services (except goods bought for resale in a business, vending machine for retail establishment sales, sales to corporations, a sale over $7,500) entered into elsewhere than the seller's usual place of business at the instigation of the seller.[1] Direct sales do not include sales of under $10, sales of vehicles under other legislation, sales of water, propane or petroleum, fuel, sales of lumber where the seller has a place of business in the municipality, sales for charitable purposes and sales by a merchant with recognized retail stores in the Territories and selling goods or services of a kind normally sold in such a store.[2] If the agreement is in writing there must be a notice to the consumer of his right to cancel within four days by sending a notice by registered mail or delivery.[3] If this is not included, the seller can deliver the notification personally to the consumer but if the consumer does not accept delivery of this correction, the refusal cancels the agreement.[4] Where the agreement must be in writing, the buyer must get a duplicate copy at the time of signing.[5]

1. Consumer Protection Ordinance, R.O.N.W.T. 1974, c. C-12, s. 59.

2. Ibid., s. 60.

3. Ibid., s. 62(1).

4. Ibid.. s. 62(4), (6).

5. Ibid., s. 62(7).

## DIRECT SALES CONTRACTS: YOUR RIGHT TO A "COOLING-OFF PERIOD AND CANCELLATION OF A DISADVANTAGEOUS CONTRACT

In Alberta, a buyer may rescind a sales contract by giving a notice of cancellation not later than four days after he gets the copy of the sales contract. By the same method, he can rescind within one year from the time of receipt if he does not receive all the goods or services within 120 days after the buyer signed the contract and no date of delivery was set out in the contract; or the seller was not properly licensed at the time of the contract; or his salesmen were not licensed at that time. The contract can also be rescinded within six months after the date all the goods or services have not been supplied within 30 days of that date.[1] The buyer must indicate his intention to cancel or withdraw from the contract and sent the notice by mail to the person whose name is on the contract for that purpose or otherwise the seller, a salesman or the person in the government who admisters the Act.[2] The notice ends all obligations under the contract.[3] The seller must give the buyer back his money and trade-in and the buyer must return what he got if so requested by the seller (and the buyer must take reasonable care of the goods until they are returned at least until 21 days after he sent the notice of cancellation in) but they can be "returned" at the buyer's premises.[4] The buyer can keep the goods until he has been paid his money back and until he gets back what he traded in or its equivalent in money.[5] If he does not get his money back or his trade-in in substantially the same condition as when he delivered it to the seller or the money equivalent, he can sue the seller for it as a

1. The Direct Sales Cancellation Act, R.S.A. 1970, c. 110 as am., s. 6(1).

2. Ibid., s. 6(2)(3).

3. Ibid., s. 7.

4. Ibid., s. 8.

5. Ibid., s. 9.

debt.[6] Excluded from the coverage are lightening rod sales from a licensed dealer, real estate deals from licensed agents, nursery sales from licensed dealers, trade school contracts under special legislation.[7]

6. Ibid., s. 10.

7. Regulations under The Direct Sales Cancellation Act, Alta. legs. 446/67, 258/68.

In British Columbia, where a seller has a consumer enter into a contract at a place other than his business address, the buyer can cancel if the contract is for more than $20 and if it has not been performed (delivery or payment) by giving notice of cancellation within seven days of the time he received a copy of the contract. He can also cancel within one year after that date if all the goods are not supplied within 30 days of the date specified for delivery in the contract unless the buyer accepted the goods. He can cancel too within 130 days after the contract date where there is no date specified for delivery in the contract and all the goods to be supplied under the contract are not supplied within 120 days after the date of the contract if the buyer has not accepted the goods. If the contract has been performed on both sides, it can be cancelled by giving notice of cancellation within seven days of the contract date.[1] Goods have been accepted when the buyer notifies the buyer he has accepted the goods, or where the goods are delivered to them and he does something with them that is inconsistent with them still being owned by the seller, or by keeping a reasonable time and not saying them.[2] Provisions for services are not in force yet.[3] The buyer just has to deliver the notice of cancellation, which must indicate his intention to cancel, in person or by registered mail to the person whose name is on the contract for this purpose or to the seller's address.[4] The buyer must deliver the goods back to the seller and the seller must return the money and trade-in within 15 days of the notice.[5] The buyer can keep the goods until he gets his money and trade-in (or money equivalent) back.[6] He can also sue for this as a debt.[7]

1. Consumer Protection Act 1977, S.B.C. 1977, c. 8, s. 13.

2. Ibid., s. 13(2) and Sale of Goods Act, s. 40.

3. Ibid., s. 13(3), (4).

4. Ibid., s. 13(5).

5. Ibid., s. 14(1).

6. Ibid., s. 15.

7. Ibid., s. 18.

In Manitoba, direct sales contracts (described above) not in writing may be cancelled by notice in writing within four days of the buyer's of the buyer's entering into the contract sending notice by personal delivery or registered mail to the vendor at his usual place of business. It must just indicate an intention to withdraw from the contract.[1] The written contract is supposed to contain a notice of the right, if it does not, the buyer has 30 days from the time the goods are delivered or services performed.[2] The seller can correct this omission by giving the buyer notice of the four day period effective from the date of this notice's receipt by the buyer, but if the buyer will not accept this notice, the contract is cancelled.[3] The contract can also be cancelled if the seller was not licensed at the time of the contract, the goods or services were not supplied within 120 days of the day of the contract, the seller has not complied with the terms of the licence by written notice served on the seller within six months of the time the contract was signed or purchase made.[4] The contract upon cancellation ends and the vendor gives the buyer's money and trade-in (or money substitute) back.[5] The buyer can cancel the agreement despite the fact that the goods are used but the right to cancel is lost for deliberate destruction of the goods or complete consumption of all the goods under the agreement and complete performance by the seller of all services under the contract.[6] The vendor can get compensation for the amount the goods have been used.[7] The buyer must hand the goods back to the seller after he has received what is payable to him by the vendor.[8]

1. The Consumer Protection Act, R.S.M. L970, c. C200 as am., s. 61.

2. Ibid., s. 62.

3. Ibid., s. 62(4)(5)(6).

4. Ibid., s. 63(1).

5. Ibid., s. 64.

6. Ibid., s. 65.

7. Ibid., s. 65(2).

8. Ibid., s. 65(3).

In New Brunswick, the purchaser can serve written notice on the seller in five days after the contract with the direct seller to have the contract rescinded. Or, the purchaser can serve a written notice of rescission on the seller or the actual salesman who sold the goods or services within one year of the contract if the seller or his salesman was not licenced under the Act at the appropriate time, or if the goods or services are not supplied within 120 days after contract, or if the seller or his salesman has not complied with the requirements set out in his licence. If these things are done, the contract is rescinded.[1] The notice must be served on the direct seller or his salesman by delivering it to him or by sending it by registered mail to the address shown on the contract.[2] The notice must indicate an intention of the seller to rescind the contract.[3] The seller must refund the purchaser's money within 10 days of delivery of the notice of rescission or 15 days after the day on which a notice arrives at the post office to which it is addressed.[4] The seller is entitled to be compensated for any goods or services consumed by the consumer.[5] The consumer must give back the goods he received under the contract in substantially the same condition he got them in.[6] The right of rescission does not apply to sales of newspapers, gas, dairy products, bakery goods, primary forest products, coal, motor vehicles, fishing equipment, farm implements, feed grain and supplements, fertilizer, weed spray, nursery stock, treatment of crops, breeding care of livestock and custom tilhing(?).[7]

1. Direct Sellers Act, R.S.N.B. 1973, c. D-10 as am., s. 17(1).

2. Ibid., s. 17(2).

3. Ibid., s. 17(4).

4. Ibid., s. 17(5).

5. Ibid., s. 17(6).

6. Ibid., s. 17(7).

7. Ibid., s. 23.

In Newfoundland, the consumer has 10 days to serve a notice on the direct seller after the contract to rescind the contract. If the seller was not licensed, or the goods or services are not supplied within 120 days of the contract or if the salesman has not complied with the conditions of his licence, the consumer has one year to rescind the contract by serving a notice on him by delivering it or sending him the notice by registered mail at his address or the address for service.[1] The notice must indicate the consumer's intention to rescind.[2] The vendor must refund the consumer's money in 10 days of the dat notice of rescission is delivered or 15 days from the time the notice arrives at the post office to which it is addressed.[3] For contracts less than $200 and services have been rendered at the consumer's premises before rescission or perishable goods delivered and accepted by the consumer, the seller may keep up to $50 as reasonable compensation for what has been done under the contract.[4]

1. The Direct Sellers Act, R.S. Nfld. 1970, c. 96 as am., s. 23(1)(s).

2. Ibid., s. 23(3).

3. Ibid., s. 23(4).

4. Ibid., s. 23(5).

In Nova Scotia, contracts with direct sellers are supposed to contain a notification tht the consumer has 10 days to cancel the contract by delivery or by sending by registered mail a notice of rescission. If the words are not contained in the contract, the consumer can cancel within 30 days of the time goods are delivered or services performed for the first time. But if the direct seller finds he has not included these words he can deliver the notice personally informing the consumer of his right to cancel in 10 days. If the consumer refuses this make up notice, the refusal is a cancellation of the contract.[1] A direct sale can be cancelled if the seller was not licensed at the time of the contract, the goods or services are not supplied within 90 days after the date of the contract or if the seller has not met the conditions of his licence. The consumer must serve written notice on the seller within six months of the contract date. Exceptions can be made by a court to the second reason for cancellation is inequitable in the circumstances.[2] The consumer can keep the goods until he is paid back and the trade-in or sum equal to its value returned to him.[3] These provisions do not apply to direct sales where the purchaser is going to use the goods or services in his business and not for resale and petroleum product sales.[4]

1. Direct Sellers' Licensing and Regulation Act, S.N.S. 1975, c. 9, s. 21.

2. Ibid., s. 22.,

3. Ibid., s. 23.

4. Regulations, N.S. Reg. 93/76.

In Ontario, where a seller solicits or gets a consumer to sign a contract that has not been performed or paid for at the time of the contract at a place other thn the seller's permanent place of business, the consumer can rescind the contract by delivering a notice of rescission in writing to the seller within two days after the buyer gets a duplicate copy of the contract. The buyer is not liable for any damages in respect of the rescission.[1] The buyer must return the goods immediately and the seller must pay for the returning term and the seller must hand back what he was paid and any trade-in.[2] The seller does not own the trade-in until after the two day period.[3] The notice must be delivered personally or sent by registered mail to the address on the contract.[4]

1. The Consumer Protection Act, R.S.O. 1970, c. 82 as am., s. 33(1).

2. Ibid., s. 33(2).

3. Ibid., s. 33(3).

4. Ibid., s. 33(4).

In Prince Edward Island a consumer can rescind a direct sales contract where he serves a notice of rescission on the seller or salesman seven days from the contract date. If the seller was not licensed at the time of the contract, or if the goods or services are not delivered within 30 days of the contract date, or if the seller has not complied with the terms of his licence, the contract can be rescinded by serving a written notice of rescission on the vendor or salesman within one year of the contract.[1] The notice can be served by personal delivery or by registered mail or telegram to the seller's latest known address.[2] The notice must indicate an intention to rescind the contract.[3] The seller must refund the consumer's money within 10 days of receiving the notice of rescission or 15 days of the notice's arriving at the post office to which it is addressed.[4] The seller can have compensation for goods used or services performed under the contract.[5] The consumer must give up the goods in substantially the same condition as which he got them.[6]

1. Direct Sellers Act, R.S.P.E.I. 1974, c. D-10, s. 10(1).

2. Ibid., s. 10(2).

3. Ibid., s. 10(3).

4. Ibid., s. 10(4).

5. Ibid., s. 10(5).

6. Ibid., s. 10(6).

In Saskatchewan, a direct sales contract is rescinded where the purchaser serves notice of rescission on the seller four days from the date of the contract. Also, if the seller or salesman was not properly licensed at the date of the contract, if the goods or services are not supplied within 120 days after that time, or if the vendor has failed to coply with the terms of the licence, the contract is rescinded if a written notice of rescission is served on the vendor within a year after the contract date.[1] The notice is served if delivered, sent by registered mail or telegram to the seller's last known address.[2] The notice must indicate the consumer's intention to rescind.[3] Within 10 days of the time the notice was delivered or 15 days from the time the notice arrives at the post office to which it is addressed, the vendor must refund the money he has received.[4] For a contract for less than $200, if services have been performed or perishable goods delivered and accepted by the purchaser, the vendor can retain up to $50 reasonable compensation for services rendered or goods consumed or deteriorated.[5] If the 120 day waiting period above is shown to be inequitable, the court can make some order it considers just.[6] Cancellation rights (except licence requirements) apply where a person who has a recognized retail store negotiates or concludes a contract in any house.[7]

1. The Direct Sellers Act, R.S.S. 1965, c. 331 as am., s. 20(1).

2. Ibid., s. 20(2).

3. Ibid., s. 20(3).

4. Ibid., s. 20(4).

5. Ibid., s. 20(5).

6. Ibid., s. 20(6).

7. Ibid., s. 20A.

In the Yukon, direct sales can be cancelled by notice in writing in seven days after the contract date by sending notice in registered mail or by personal delivery to the seller and the notice must indicate an intention to withdraw from the transaction.[1] If the agreement or receipt does not have the notice of cancellation explained on it, the buyer can cancel the agreement by written notice to the vendor within 30 days after the goods are delivered or services performed.[2] The sale can also be cancelled where the seller was not licensed at the time of the contract, or where the goods are not supplied within 120 days of the contract date, by written notice served on the seller six months after that date, however if it is inequitable that the last reasona pply, a cout can make any just order.[3] On cancellation the contract ends and the vendor pays the buyer the money he has received from him and return the trade-in or money substitute for it.[4] The right of the buyer to cancel is not affected by the delivery of the goods used by the buyer, accidental destruction of the goods by him, partial performance of services but the right is lost by deliberate destruction or damage to the goods or actual consumption of all goods or performance of all services.[5] But the seller can be compensated for use, accidental damage or services performed.[6] The buyer can keep the goods until he has been paid back and no longer.[7]

1. Consumers' Protection Ordinance, Consolidated Ordinances 1976, c. C-13, ss. 62, 63(1)(2).

2. Ibid., s. 63(3).

3. Ibid., s. 64.

4. Ibid., s. 65.

5. Ibid., s. 66(1).

6. Ibid., s. 66(2).

7. Ibid., s. 66(3).

In the Northwest Territories, direct sales contracts may be cancelled by notice in writing within four days after the contract date by sending notice of cancellation to the seller by registered letter or personal delivery and the notice is sufficient for the purpose if it indicates the intent of the buyer to withdraw from the contract.[1] If the agreement was in writing yet did not contain the notification of the right of cancellation, then the buyer may cancel the contract within 30 days after the first goods are delivered or seerrvices performed under it, by notice in writing to the seller.[2] Also, if the seller was not licensed at the time of the contract, or the goods or services supplied under the contract are not supplied 120 days after the contract date or the seller did not comply with the terms of his license the buyer may cancel within six months of the contract date by written notice served on the seller.[3] However, the court can make an order that is just if the 120 day period is inequitable.[4]

Upon rescission the seller gives the buyer back his money and return any trade-in or its value.[5] The fact that the goods have been delivered, used, consumed partially, accidentally destroyed or services partly performed, but not deliberately damaged or destroyed or totally consumed or services completely performed, does not take away the buyer's right to cancel.[6] Where the goods have been used, or accidentally destroyed or damaged or services performed, the seller may recover reasonable compensation.[7] The buyer can keep the goods until the seller has paid him back and then must give them up.[8]

1. Consumer Protection Ordinance, R.O. N.W.T. 1974, c. C-12, ss. 61, 62(1)(2).

2. Ibid., s. 62(3).

3. Ibid., s. 63(1).

4. Ibid., s. 63(2).

5. Ibid., s. 64.

6. Ibid., s. 65(1).

7. Ibid., s. 65(2).

8. Ibid., s. 65(3).

## ANOTHER WAY OF INDUCING A CONSUMER TO BUY FROM WHICH YOU ARE PROTECTED

Unsolicited goods are personal property which are sent to you when you did not ask for them. In Ontario, New Brunswick and Nova Scotia, a sender cannot say that the fact that you did nothing with the goods or you let a certain time pass without doing anything with the goods means that you did request the goods. But such goods do not include goods that you knew or should have known were intended to go to someone else and in Ontario, Newfoundland and Nova Scotia, goods which you received pursuant to a contract in writing that provides for more goods to be sent to you without your having to ask for them. Credit cards are often sent out in this manner too.

Most provinces have legislation protecting the consumer from the imposition of such debts and agreements.[1]

1. Alta. The Credit and Loan Agreement Act, R.S.A. 1970, c. 73 as am., ss. 15.1-15.2.

   B.C. Consumer Protection Act, S.B.C. 1967, c. 14 as am., s. 14A.

   Man. The Consumer Protection Act, R.S.M. 1970, c. C-200, as am., ss. 113-115.

   N.B. The Cost of Credit Disclosure Act, R.S.N.B. 1973, c. C-28, s. 14.

   Nfld. The Unsolicited Goods and Credit Cards Act, S. Nfld. 1973, Art. #11, ss. 2-6.

   N.S. Consumer Protection Act, R.S.N.S. 1967, c. 53 as am., s. 20A.

   Ont. The Consumer Protection Act, R.S.O. 1970, C. 82, as am., s. 46.

   P.E.I. Consumer Protection Act, R.S.P.E.I. 1974, c. C-17, s. 19.

   Sask. The Unsolicited Goods and Credit Cards Act, 1971, S.S. 1971, c. 61, ss. 2-6.

## CREDIT CARDS NOT REQUESTED

Legislation in Alberta, Manitoba, New Brunswick and Prince Edward Island says the sending of unsolicited credit cards is not allowed. You have the right to be free from legal obligations arising from the issue to you of such a credit card and any transaction entered into with the credit card unless you requested or accepted the card in writing in Alberta, British Columbia, Newfoundland, Nova Scotia, Ontario and Saskatchewan. In Alberta, Newfoundland, Nova Scotia and Ontario you are considered to have requested the card in writing if you used the card to obtain credit. Further, in Alberta, British Columbia, Newfoundland, Nova Scotia, Ontario and Saskatchewan an unrequested or unaccepted credit card in the sense those words are used above, creates no legal obligations for you in respect of their use or disposal unless you are considered by the statute to have accepted the service. However, most of the provinces do not consider replacement cards as being unsolicited.[1]

1. As above.

## GOODS NOT REQUESTED

Legislation in British Columbia, Newfoundland, Nova Scotia, Ontario and Saskatchewan says that no enforceable legal obligations for payment arise out of your receipt of unsolicited goods. This right to be free of unrequested obligations applies here notwithstanding the fact that the goods are used, misused, lost, damaged or stolen. In British Columbia and Saskatchewan the goods may be accepted by acknowledging them in writing. In Newfoundland, Nova Scotia and Ontario, there is no legal obligation arising from the use or disposal of the unsolicited goods. Prince Edward Island legislation prohibits delivery of unsolicited goods.[1]

1. As above.

# DIRECT SALES: REFERRAL SALES

## When Your Agreement Requries You to Find Other Buyers

A scheme of referral selling is one in which you buy or lease a product from someone and you were told that you would get a rebate, commission or other benefit based wholly or partly on sales or leases to persons whose names are supplied by you.[1] Such a scheme is prohibited by federal legislation unless the scheme has been licensed or otherwise permitted under the legislation of a province.[2] Anyone who induces or invites another to participate in a scheme of referral selling will be guilty of an offence unless the scheme has been permitted by the province.

Most provincial acts are aimed at the protection of the consumer who is buying goods and services for personal use and apply where the rebate depends on doing something after you agree to buy.[3]

In Alberta, for sales off the seller's business premises, a sale contract is void if an arrangement for referral selling is made in connection with it.[4] This does not apply to sales at a market place, auction, trade or agricultural farm or exhibition.

1. Combines Investigation Act, R.S.C. 1970, c. C-23 as am., s. 36.4(1).

2. Ibid., s. 36.4(2) and (4).

3. Ibid., s. 36.4(3).

4. The Direct Sales Cancellation Act, R.S.A. 1970, c. 110 as am., s. 5.

In British Columbia, contracts where the delivery of the goods, performance of the service or payment of the price is not made at the time the contract is made, are not binding on you, the buyer, if the seller agrees or offers to let the buyer participate in a referral scheme.[5]

In Manitoba, sales made or solicited off the seller's usual business premises as part of a referral selling scheme are prohibited.[6]

In Newfoundland, contracts for the sale of goods or services not made at the seller's business premises are not binding on the consumer if the seller agrees or offers to let you, the buyer, participate in a referral sales scheme as part of the deal.[7]

In Nova Scotia, contracts for the sale of goods or services are not binding if the seller agrees or offers to let you, the buyer, participate in a referral sales scheme as part of the deal.[8]

In Ontario, a seller is not to offer you, a buyer or potential buyer, any reward for helping him find or sell to another possible buyer. And any contract entered into after that promise does not bind you.

5. Consumer Protection Act, S.B.C. 1967, c. 19 as am., s. 5A.

6. The Consumer Protection Act, R.S.M. 1970, c. C200, as am., s. 60(2).

7. The Direct Sellers Act, R.S. Nfld. 1970, c. 96 as am., s. 29.

8. Consumer Protection Act, R.S.N.S. 1967, c. 53, as am., s. 20D.

9. The Consumer Protection Act, R.S.O. 1970, c. 82, as am., s. 46a.

## SPECIAL RIGHTS OF CERTAIN KINDS OF PARTIES TO THE CONTRACT:

### Children, Drunks, Mental Incompetents

The law has sought to protect certain parties who might be more easily misled into a contract than others. Special technical rules apply to contracts where these people are parties. The Sale of Goods Acts say that where goods are sold and delivered to minors[1] or to a person who is mentally incompetent or drunk and so unable to make a contract, and those goods are "necessaries", then the seller can recover a reasonable price only. The Act goes on to say that necessaries are goods suitable to the condition of life of the infant and his actual requirements at the time of sale and delivery.[2] Otherwise, infants' contracts for sales of goods are not binding on him unless he adopts the contract as binding on him after he has come of age.[3]

This is a very complicated area of the law and there are no clear answers.

1. At common law 21, now 18 in most provinces; Ont. Age of Majority and Accountability Act, S.O. 1971, c. 98, s. 1(1) (18 yrs.).

2. SGA, Alta, s. 4; B.C., s. 9; Man., s. 4; N.B., s. 3; Nfld., s. 4; N.S., s. 4; Ont., s. 3; P.E.I., s. 4; Sask., s.4.

3. D.R. Percy, "The Recent Law of Infants' Contracts" (1975), 53 Can. Bar Rev. 1, 23;
   R.V. Rash (1923), s. 3 O.L.R. 245, 263-265 (Ont. S.C. App. Div.), (goods bought by an infant for his business);
   Wong v. Kim Yee (1961), 34 W.W.R. 506b (Sask. D.C.);
   Waddams The Law of Contracts (1977), 408;
   In B.C., The Infants Act, R.S.B.C. 1960, c. 193, s. 2 makes any contract entered into by an infant void if the goods are not necessaries.
   See First Charter Financial Corp. Ltd. v. Musclon (1974), 49 D.L.R. (3d) 138 (B.C.S.C.).

Alta., The Age of Majority Act, S.A. 1971, c. 1, s. 11 (18 yrs.)

B.C. The Age of Majority Act, S.B.C. 1970, c. 2, s. 2 (19 yrs.)

Man. The Age of Majority Act, S.M. 1970, c. 91, s. 1 (18 yrs.)

N.B. The Age of Majority Act, R.S.N.B. 1973, c. A-4, s. 1 (19 yrs.)

N.S. The Age of Majority Act, S.N.S. 1970-71, c. 10, s. 2 (19 yrs.)

P.E.I. The Age of Majority Act, R.S. P.E.I. 1974, c. A-3, s. 1 (18 yrs.)

Sask. The Age of Majority Act, S.S. 1972, c. 1, s. 2 (18 yrs.)

Nfld. Minors (Attainment of Majority) Act, S. Nfld., #71, s. 6 (19 yrs.)

Example

An infant borrowed money to repair his car, for a trip, to pay an insurance premium, for school books, a jacket. The judge found that repairs to the car were not necessaries and neither the trip nor life insurance for the infant, who was single, was a necessary (even though legislation allowed an infant to contract for life insurance). But it was held that anything in connection with education was a necessary to this included loan for a transfer fee to one school and school books. The loan for the jacket was also a necessary. The infant then was responsible only for loans for the last three items.[1] The judge said that necessaries "... are things which the infant requires for his living, for his health, for his education and they must be things which a person who is an infant would be expected to require at the time such things are secured.[2]

1. Wong v. Kim Yee (1961), 34 W.W.R. 506 (Sask. D.C.).

2. Ibid., p. 508

## WHERE AN ADULT IS ASKED TO GUARANTEE A CHILD'S CONTRACT

Quite often when an infant buys valuable goods and pays for them with a promissory note (an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer). The law on this question is uncertain and complicated.[1] In a recent case, a judge in British Columbia said he thought it wrong to allow someone who guaranteed an infant's financial obligation to be relieved of liability if that infant's contract be of no effect knowing both that the infant was not liable for the debt and that the other party would not have made the contract without the guarantee.[2] The judge looked at the substance of the guarantee and found that the adult guarantor had agreed to make good any loss (indemnify) to the creditor from the contract.[3] There is another view that guarantee of an infant's contract for goods is not enforceable.

1. Percy, as above, 50-53.

2. First Charter Financial Corp. Ltd. v. Musclow (1974), 49n D.L.R. (3d) 138, 145 (B.C.S.C.).

3. Ibid., 145 per Justice Craig.

4. Percy, see above, 52.

Example

A car was bought by an infant who used it to commute from his home to his employer's place of business. The judge said that the car was not a necessary. Although the contract was found to be void freeing the infant from legal obligations, his mother, who had signed an "unconditional guarantee" of her child's debt, was liable to pay the person to whom the debt was owed. But the infant's mother was relieved of liability in this case because at the time she signed the guarantee, she had not been told that the insurance had been cancelled on her son's car and the judge found that she would not have signed had she known this. It was held that this was a basis for the agreement and without this, she was not liable.[1]

1. First Charter Financial Corp. Ltd. v. Muschow (1974), 49 D.L.R. (3d) 138 (B.C.S.C.).

## CHILDREN ADOPTING CONTRACTS OF SALES AFTER ATTAINING THE AGE OF MAJORITY

In New Brunswick[1], Nova Scotia[2], Ontario[3] and Prince Edward Island[4], a person cannot be sued on a promise, made after attaining the age of majority, to pay for a debt contracted while he was an infant unless the promise is in writing and signed by the person who is going to be sued. The same thing applies where a person has adopted a legal obligation after attaining full age arising from a promise or contract of sale made while he was an infant. There is no such legislative provision in British Columbia.

1. Statute of Frauds, R.S.N.B. 1973, c. S-14, s. 5.
2. Statute of Frauds, R.S.N.S. 1967, c. 290, s. 8.
3. Statute of Frauds, R.S.O. 1970, c. 444, s. 7.
4. Statute of Frauds, R.S.P.E.I. 1974, c. S-6, s. 1.

## YOU HAVE A RIGHT TO HAVE GOODS THAT MATCH UP TO EXPECTATIONS CREATED BY THE SELLER AND BY LAW

Once the contract has been formed, the consumer has a right to have goods or services that match up to expectations created by the selle or laid down by law. The effect of a misrepresentation of some fact about the goods or services has already been discussed. Many statements are made by a seller who is anxious to have a potential customer buy his product whether it be goods or services. Some of these will be found to be misrepresentations that will operate to give the misled consumer a remedy whether rescission or damages in the way explained above. However others of these statements may be found to be terms of the contract by using indicia described above. Sometimes these statements made by sellers are expressly made to be part of the contract either orally or in writing. The Sale of Goods Acts of the common law provinces imply terms into the contract as does some newer legislation in some of the provinces. This legislation acts as a base for consumer expectations. Those created by what the seller said, either construed by the court to be terms of the contract or express promises made by a seller about what can be expected from the product, have the effect of raising the consumer's expectations farther. If the expectations are not met, then the consumer will have a remedy. Of course, the Sale of Goods Acts apply only to create expectations imposed by law in sales of goods and not services. But the rest of what has been said applies to contracts for services.

1. Statute of Frauds, R.S.N.B. 1973, c. S-14, s. 5.

2. Statute of Frauds, R.S.N.S. 1967, c. 290, s. 8.

3. Statute of Frauds, R.S.O. 1970, c. 444, s. 7.

4. Statute of Frauds, R.S.P.E.I. 1974, c. S-6, s. 1.

## IF THE GOODS DO NOT MATCH YOUR LEGITIMATE EXPECTATIONS YOU HAVE A RIGHT TO A REMEDY

If the goods do not meet the expectations created by the seller or by law, then the consumer can seek a remedy in the courts. The remedy will probably be one that will take account of how far the product's quality, or whatever else was the subject of agreement in the contract, falls short of these legitimate expectations created before or during the time the contract was formed in the ways enumerated above. If the shortfall was a minor one, one that can be compensated for in money, then the court will classify it as a warranty which is an agreement with respect to the goods that are the subject of a contract of sale but only collateral to the contract, a term less important than others, and if the agreement is not carried out, then the consumer can recover a monetary compensation, called damages, only. But if the buyer did not get what he bartgained for and the deviation from expectations was so great that the buyer should be entitled to reject the goods and rescind the contract, the court will say there was a breach of a condition of the contract. Basically the question is one of the relative importance of the diference between what the consumer could expect to get and what he actually got.[1] The remedy for breach of warranty and breach of condition are established in the Sale of Goods Acts, it is the classification of a term into one or the other that allows a court to make the remedy match the degree of disappointment in what was supplied under the contract.[2]

1. Cehave v. Bremen, [1975] 3 All E.R. 739 (C.A.), application of principles of general contract law to contracts for sale of goods approved in Reardon Smith Line Ltd. v. Hansen-Tangen, [1976] 3 All E.R.570, 576 (H.C.); Hong Kong Fu Shipping v. Kawasaki, [1962] 1 All E.R. 474 (C.A.); Field v. Zien, [1963] S.C.R. 632; Markus v. Western Union Ins. Co. (1963), 45 W.W.R. 321 (Alta. S.C.).

2. SGA., Alta., s. 14(2); B.C., s. 17(2); Man., s. 13(2); N.B., s. 12(2); Nfld., s. 13(1)(6); N.S., s. 13(2); Ont., s. 12(2); P.E.I., s. 13(2); Sask., s. 13(2); Yukon, s. 13(2); N.W.T., s. 13(2).

## YOU HAVE A RIGHT TO INSIST THAT THE SELLER HAS A RIGHT TO SELL YOU THE GOODS

There is an implied condition of the contract that the seller has a right to sell the goods to the buyer. (If the contract is one where property is to pass to the buyer after the contract is formed, then it is a condition of the contract that the seller will have a right to sell the goods when property is to pass.) This is the case unless there are circumstances of the contract to show that something else was intended by the parties.[1] This different intention if it exists must be proved by the seller.[2] The fact that the seller did not know that the car was illegally imported made no difference.[3] Where a seller sells his goods in another country with the knowledge that he cannot lawfully sell in that market until he has discharged some legal condition and that until he has done this he can be legally prevented from selling a sale is in breach of the implied condition.[4] If the purchaser knows of a defect in the seller's title and buys it anyway this condition does not apply.[5] This condition covers the situation where some third party is entitled as of right to stop the sale so that the seller who wants to sell cannot transfer a good title to the intending buyer.[6]

1. SGA. Alta., s. 15(a); B.C., s. 18(a); Man., s. 14(a); N.B., s. 13(a); Nfld., s. 14(1); N.S., s. 14(a); Ont., s. 13(a); P.E.I., s. 14(a); Sask., s. 14(a); Yukon, s. 14(1)(a); N.W.T., s. 14(a).

2. Smith v. Goral, [1952] 3 D.L.R. 328 (Ont. H.C.).

3. Ibid.

4. Egekvist Bakeries Inc. v. Tigel, [1950] 1 D.L.R. 585 aff'd. [1950] 2 D.L.R. 592 (Ont. C.A.).

5. Northwest Co. Ltd. v. Merland Oil Co., [1936] 4 D.L.R. 248, 257 (Alta. S.C.A.D.).

6. Microbeads v. Vinhurst, [1975] 1 All E.R. 528 (C.A.).

Example

A car was imported into Canada and sold to a car dealer. No customs duties had been paid. A consumer bought it from the car dealer. The R.C.M.P. seized the car because it was illegally imported into Canada. The court found that the car was forfeit to the Crown for being illegally imported as soon as it was illegally imported and so the seller had no right to sell it at the time of sale to the consumer. The consumer got his money back with interest.[1]

1. Smith v. Goral, [1952] 3 D.L.R. 328 (Ont. H.C.).

Example

A produce seller entered into a contract to sell blueberries to a baker in the United States. He sold them knowing that they had to be inspected by the Food and Drug Administration but did not wait for the result. It was found that the berries were mouldy and could not be sold in that country. The court found the seller in breach of a condition of the contract that he had a right to sell and caused him to pay back the price to the buyers with interest.[1]

1. Egekvist Bakeries Inc. v. Tizel, [1950] 1 D.L.R. 585 affd. [1950] 2 D.L.R. 592 (Ont. C.A.) see J. Barry Winson v. Belgo Can. Manuf. (1975), 61 D.L.R. (3d) 352 (B.C.S.C.).

## YOU HAVE A RIGHT TO UNDISTURBED POSSESSION OF THE GOODS

There is an implied warranty that the buyer will have and enjoy quiet possession of the goods unless the circumstances of the contract show that there was not.[1] This means that the seller promises that the buyer will not be lawfully disturbed in his possession of the goods at any time after the sale.[2] Where a car was seized by the police for being unlawfully imported into Canada, it could be argued that there was a breach of the buyer's right to quiet possession.[3]

1. SGA. Alta., s. 15(6); B.C., s. 18(6); Man., s. 14(6); N.B., s. 13(6); Nfld., s. 14(2); N.S., s. 14(6); Ont., s. 13(6); P.E.I., s. 14(6); Sask., s. 14(6); Yukon, s. 14(1)(b); N.W.T., s. 14(6).

2. Microbeads v. Vinhurst, [1975] 1 All E.R. 529b (C.A.).

3. Smith v. Goral, [1952] 3 D.L.R. 328 (O.H. Ct.).

Example

A buyer purchased a machine from a Swiss Company. Later, another company's patent for the same machine came into effect making the buyer liable for breach of patent. The court said that the Swiss company was not liable for the breach of the condition that it had a right to sell the machine, for at the time of sale the patent rights of the other company were not enforceable so that the seller had a right to sell at that time. However, the sellers were liable for a breach of the implied warranty of the seller that the buyer shall have and enjoy quiet possession of the goods for that applied for the time following the sale.[1]

1. Microbeads v. Vinhurst, [1975] 1 All E.R. 529 (C.A.).

## YOU HAVE A RIGHT TO HAVE GOODS FREE OF ENCUMBRANCES

There is an implied warranty that there is no charge or encumbrance on the goods in favour of some third party which is unknown to the buyer before or at the time the contract is made, unless the circumstances of the contract show that the contract was not.[1]
Encumbrance is not to have a legal meaning but must be interpreted in the light of the contract as a whole.

1. SGA. Alta., s. 15(c); B.C., s. 18(c); Man., s. 14(c); N.B., s. 13(c); Nfld., s. 14(3); N.S., s. 14(c); Ont., s. 13(c); P.E.I., s. 14(c); Sask., s. 14(c); Yukon, s. 14(1)(c); N.W.T., s. 14(c).

2. Smith v. Goral, [1952] 3 D.L.R. 328 (O.H. Ct.).

## IF YOU BUY GOODS BY DESCRIPTION, YOU HAVE A RIGHT TO GET GOODS THAT CORRESPOND WITH THAT DESCRIPTION

There is an implied condition where there is a contract for the sale of goods by description, that the goods will correspond with the description.[1] A sales by description covers not only the situation where the buyer has not seen the goods but relies on the description alone[2] but also where the buyer is buying something displayed on a counter, even though it is a specific thing as long as it is not sold as the specific thing but as something that corresponds to a description such as woolen underwear, hot water bottle, a secondhand reaping machine.[3] The description to which the goods supplied must conform is that which identifies the subject matter of the sale as a term of the contract.[4] The court then will construe what is "contractually descriptive of the identify of the

1. SGA. Alta., s. 16; B.C., s. 19; Man., s. 15; N.B., s. 14; Nfld., s. 15; N.S., s. 15; Ont., s. 14; P.E.I., s. 15; Sask., s. 15; Yukon, s. 15(1); N.W.T., s. 15.

2. Varley v. Whipp, [1900] 1 Q.B. 513, 516; Runnymelde Iron v. Rossen Engineering (1961), 30 D.L.R. (20) 410, 414 (S.C.C.); Bakker v. Bowness Auto Parts (1976), 68 D.L.R. (3d) 173 (Alta. S.C.A.D.).

3. Grant v. Australian Knitting Mills [1935] All E.R. Rep. 209, 215 (P.C.); ? v. Nelson, [1973] 2 W.W.R. 597 (B.C.S.C.).

4. Bakker v. Bowness Auto Parts (1976), 68b D.L.R. (3d) 173, 178 (Alta. S.C.A.D.) approving Christopher Hill v. Ashington Piggeries, [1972] A.C. 441, 503 (H.C.).

goods.[5] In other words, the words that describe what was agreed upon to be bought in the contract of sale. And these descriptive words that are part of the contract may be written down or they may be construed from what was said between the parties. "This is what the seller purported to sell, and what the buyer intended to purchase".[6]

There may also be a sale by description where the buyer has seen the goods if the deviation of the goods from the description is not apparent but if the parties are really agreed on the thing an incorrect description in the contract may be irrelevant.[7]

The goods supplied under the contract must be what was described in the contract; only a trifling difference will be allowed between what was contracted for and what was supplied.[8] Though some cases will allow a wider tolerance.[9]

5. Bakker, ibid., 179.

6. Ibid., 180.

7. Beale v. Taylor, [1967] 3 All E.R. 253 (C.A.).

8. Runnymede Iron v. Rosen Engineering (1961), 30 D.L.R. (2d) 410 (S.C.C.).

Example

A buyer built roads as his business and needed a rock crusher to make asphalt and road bases. It worked for a few days and broke down. One of the main bearings had seized and broken in two places. Later another bearing seized and had to be replaced. The crusher worked well after that. The sellers had said that they would recondition the machine as necessary before it was delivered to the buyer. (The machine had been used before.)

Though this was the sale of a specific article and it was viewed by the buyer, it was still a sale by description because it was sold as corresponding to a description of a second-hand rock crusher that was reconditioned. It was necessary to separate what went to the identify of the machine and therefore of the description and what went to the quality of the machine which was thus not part of the description. The court held that reconditioned was not part of the description of the machine but a warranty, a stipulation of the shape the machine would be in when it was delivered. Thus, the problem was not with its not corresponding to description but rather with a breach of warranty quality.[1]

1. George Reed Inc. v. Nelson Machinery Co. Ltd., [1973] 2 W.W.R. 597 (B.C.S.C.)

Example

A person who owned a car advertised it for sale in a paper that had a good reputation for advertising secondhand cars. The ad said "Herald confertible, white, 1961, twin carbs., 190. Telephone Welwyn Garden", the number, and "after 6.0 p.m.". The buyer saw the advertisement, phoned the seller and was given a ride in it. The buyer offered 160 and the seller accepted. The buyer drove it away but found a problem with the steering wheel and took it to a garage to be checked. The garage-man found that the car was an amalgamation of two cars. The back half of the car was a 1961 Herald, the front half was off an earlier model welded to the back half about halfway. The car had been in an accident and it was said that it was unsafe to take on the road. The court found that the buyer came along to see a car as it was described in the advertisement. He saw what looked to be the thing described and on that basis he made the offer. Fundamentally, the seller was selling a car of that description. The description was false. The fact that neither buyer nor seller knew the truth at the time of the contract made no difference to the outcome. The buyer kept the car after he had the right to reject it and treat the contract as at an end and so he got only monetary compensation in damages.[1]

1. Beale v. Taylor, [1967] 3 All E.R. 253 (C.A.).

Example

When a buyer bought potatoes from a seller which were to be "free of small ones and scabs and should not grade lower than Canada Number Twoä, it was held by the court to be a sale by description under the Sale of Goods Act. The potatoes delivered were not free of small ones or scabs and they did not make Canada Number Two grade. The description of the goods tendered were different in some respect from that which was bargained for and so the seller had breached the condition. The buyer then could have rejected the potatoes but accepted them and so cost this right of repudiation under the Sale of Goods Act.[1] So he got damages instead for his loss.[2]

1. See above under "Acceptance".

2. Purkin v. Miller, [1938] 2 D.L.R. 323 (Sask. C.A.).

Example

Cornstarch bought for use in the manufacture of baking powder was not cornstarch but a poison. The buyer used it in its manufacturing process and sold it to another company which sold it to a grocer who sold it to a customer who used it and died from it. The cornstarch was found to have been bought on a sale by description and so the condition was breached for what was supplied did not correspond to the description.[1]

1. Renewo Products Ltd. v. Macdonald, [1938] 4 D.L.R. 799 (B.C.S.C.).

Example

A buyer bought boxes of canned fruit from Australia described as having 30 tins in a box. In fact there were only 24 tins in most boxes supplied and the court held that all the fruit could be rejected. The parties had made the 30 times per box a term of the contract as a description of the goods: they had agreed to that.[1]

1. Re Moore and Landauer Co., [1921] 2 K.B. 519 (C.A.)

Example

A buyer who bought not a particular vehicle but rather a 1974 Mazda RX4 of a jewel green colour bought the car by description.[1]

1. Thauberge v. Simon Fraser Sales Ltd. (1977), 3 B.C.L.R. L93 (Prov. Ct., Small Claims Ct.).

Example

Buyers ordered two "Fink 'V' snow plough" with attachments to fit 100 horsepower twin tractors fitted with sleigh-skid and they attached a letter with illustration, size and dimensions of the twin tractors. The ploughs delivered did not match up with what had been contracted for. The order form used by the buyers said "Fink 'V' snow ploughs" but the court heard the other evidence so as to enable it to find the meaning of the order and found that what was delivered did not correspond with what had been contracted for. Actually the sellers were suing the buyers to make them pay for what was delivered. The buyers had refused to accept. The court dismissed the action against the buyers because the condition had been breached.[1]

1. Soper v. Canadian Int'l. Paper Co. (1930), 38 O.W.N. 429 (Ont. H.C.) aff'd. [1931] S.C.R. 718.

## WHEN YOU HAVE A RIGHT TO GOODS REASONABLY FIT FOR THEIR PURPOSE

When a buyer makes known to the seller either expressly or impliedly the purpose for which goods are required so as to show that he is relying on the seller's skill or judgment and if the goods are of a description that it is in the course of the seller's business to supply (whether or not he is the manufacturer) then there is an implied condition that the goods will be reasonably fit for that purpose. If the contract is one for the sale of some specific thing under its patent or trade name there is no implied condition as to its fitness for any particular purpose.[1]

Reliance on the seller may be inferred from the fact a buyer goes into the store in the confidence that the seller has selected his stock with skill and judgment.[2] A particular purpose need not be stated where there is only one purpose for which anyone would ordinarily want the goods such as underwear.[3] However, if a special purpose for which the goods are required is disclosed to the seller, then circumstances alone may allow the court to assume that the buyer is relying on the skill and judgment of the seller.[4] The reliance placed on the seller's skill and judgment does not have to be exclusive release but need only be reliance such as to constitute a substantial and

1. SGA. Alta., s. 17(2)(3); B.C., s. 20(a); Man. s. 16(a); N.B., s. 15(a); Nfld., s. 16(1); N.S., s. 16(a); Ont. s. 15, para. 1; P.E.I., s. 16(a); Sask., s. 16, para. 1; but not proviso about trade name; Yukon, s. 16; N.W.T., s. 16.

2. Grant v. Australian Knitting Mills, [1935] All E.R. Rep. 209 (P.C.) especially if consumer is child; Godley v. Perry, [1960] 1 All E.R. 36 (Q.B.D.).

3. Ibid.

4. Laminated Structures v. Eastern Woodworkers, [1962] S.C.R. 160, 165.

effective inducement which leads the buyer to agree to purchase the commodity.[5] The seller in such cases, usually where the buyer is purchasing for business purposes, is only liable to the extent to which his skill and judgment was relied upon so a seller of electric motors was not liable for defects of a fan into which his product was assembled by a buyer arising from an uncompatibility of components about which he was not told.[6]

When a vendor deliberately deals in some commodity for the purpose of his business he makes it part of his business to supply such articles.[7]

5. Ibid., 167-168; Canada Building Materials v. W.R. Meadows, [1968] 1 O.R. 469.

6. Venus Electric Ltd. v. Brevel Products Ltd. (1978), 19 O.R. (2d) 417 (C.A.) approving statements made in Christopher Hill v. Ashington Piggeries, [1971] 1 All E.R. 847 (H.C.).

7. Buckley v. Lever Bros. Ltd., [1953] O.R. 704 (H.C.).

The exception that says that the condition will not be implied if the sale is one of some specific thing under its patent or trade name is not as potent as it would appear.[1] The fact that goods are described in the contract by its trade name does not make it a sale under a trade name.[2] The question a court may ask is whether the buyer specified the goods under their trade name in a way that indicated that he is satisfied, correctly or incorrectly, that the goods will meet his purpose and that he does not rely on the skill or judgment of the seller no matter how skilled or knowledgeable the seller may be.[3] Hence, if a buyer asks the seller for an article to fulfill some particular purpose and the seller sells him an article with a well-known trade name, this exception does not apply.[4] If the buyer says that he has had an article recommended to him by trade name ans asks whether it will suit a particular named purpose and the seller sells it to him without saying more, the exception probably does not apply.[5] But if the buyer says that he wants an article asking for it by trade name and indicating that he does not rely on their skill and judgment, the exception would apply and the implied condition would not arise.[6]

1. Atiyah, The Sale of Goods (5th ed., 1975), 97.

2. Baldry v. Marshall, [1925] 1 K.B. 260 (C.A.).

3. Ibid., 267.

4. Ibid., 266.

5. Ibid., 266.

6. Ibid., 266.

Example

In answer to the inquirer about foreign cars, sellers told a buyer that they were specialists in the sale of these kind of cars. The buyer had asked whether a Bugatti eight cylinder was likely to be on the market that year. The buyer made clear to the sellers the purpose for which he wanted the car. The buyer then filled in a form requesting the sellers to supply him with an ëeight cylinder Brigatti fully equipped and finished to standard to standard specification as per the car inspectedë. A car was delivered to him but he found that the car was not useful for the purposes which he had told the sellers. The court found that the sellers had indicated that the buyer might rely on their skill and judgment and that the buyer had done nothing to indicate that he was not relying on that.[1]

1. Baldry v. Marshall, [1925] 1 K.B. 260 (C.A.).

Example

A seller of farm machinery gave a farmer some pamphlets and tolk him to see a small machine of the same manufacturer in the locailty. The farmer ordered a combine a "1 Sp. 12 W/9 ft.-header Scourclean 1 pickup, clover att with wheat guard" for $5900. The machine was delivered but proved unsatisfactory because the auger which moved the cut straw into the combine choked and became wrapped in heavy straw. There were breakages too. The machine broke down repeatedly.

The court found that the mere disclosure of a purpose was sufficient evidence of reliance on the skill and judgment of the seller.[1]

Also the sale was found not be one made under a patent or other trade name because the fact that the article is sold under a trade name when the trade name forms part of the description of the thing does not necessarily come within the exception to the fitness for purpose condition.[2] The thing was sold as a J.I. Case combine.

The seller was in the business of selling farm machinery and as it was in the ordinary course of the seller's business to supply goods of the kind and description the buyer ordered.

The seller then was in breach of the implied condition that the goods be reasonably fit for the purposes the buyer had made known to him.

The court also had found that when the buyer not see the combine itself but only a specimen of a smaller machine of the same type.

The seller was forced to take back his combine and to refund the farmer's money.[3]

1. Citing Gillespie Bros. v. Cheney, [1896] 2 Q.B. 59.

2. Citing Baldry v. Marshall, [1925] 1 K.B. 260.

3. Hoggard v. McLennan, McFeely & Prior Ltd., [1953] 4 D.L.R. 794 (B.C.S.C.) affd. [1954] 2 D.L.R. 516 (B.C.C.A.)

Example

Mr. Sigurdson had his car repaired and two brake hoses were installed. A few days later he was coming up on an intersection and wanted to stop at a red light. The brakes failed to operate and he swung his car over hitting a power pole. There was no sight of problems with the hoses before. The vehicle was damaged beyond repair and Mr. Sigurdson lost three teeth. His family were also hurt as they were driving with him. The court found that the cause of the accident was brake failure caused by escape of brake fluid through the faulty hoses. Although the sellers installed the hoses, the court found that the implied condition that the brake hose would be reasonably fit applied to the contract. The hoses were not reasonably fit because they contained foreign bodies that caused a rupture and brake failure which was the cause of the accident. The buyer recovered damages from the repairers.[1]

1. Sigurdson v. Itillerest Service Ltd. (1976), 73 D.L.R. (3d) 132 (Sask. Q.B.).

Example

A consumer purchased food in a cafeteria at a Hudson's Bay Store in Edmonton. He ate a meat sandwich and something got stuck in his throat. He had difficulty breathing and could talk only in a whisper. He tried to swallow water but could not. He went to a hospital and had a piece of wood taken out of his throat. The court found that he had impliedly made it known to the seller that he would consume the food and that the consumer relied on the seller's skill and judgment in preparation of the food. The court found and implied warranty that the food would be reasonably fit for human consumption. The piece of wood in the meat sandwhich was a breach of the warranty. The consumer received damages as compensation.[1] No mention was made of the Sale of Goods Act.

1. Coote v. Hudson's Bay Company (1977), 6 A.R. 59 (D. Ct.).

Example

Buyers purchased a new Mark II Toyota Sedan with automatic transmission from Metro Toyota Ltd. It had been a demonstrator model. They were assured by the sellers that it was a good reliable car and would provide trouble-free service. The electrical system was faulty, the car would not start on its own. The buyers drove the car for six months and in that time three or four new batteries had been installed and the alternator was repaired or rebuilt twice and then finally replaced altogether. At the end of that time the buyers returned the car to the seller's lot and purported to end the contract. The court found that there was a breach of a fundamental term of the contract because it was not reasonalby fit for the purpose for which it was sold: it was not reliable transportation. The court found that the six months was a reasonable chance to allow the car to perform properly which it did not ever do. The car had been returned to the dealer, the court assessed damages for the buyers as the amount they had paid for the car in the first place.[1]

1. Finlay v. Metro Toyota Ltd. (1977), 5 B.C.L.R. 137 (B.C.S.C.).

## WHEN YOU HAVE A RIGHT TO GOODS OF MERCHANTABLE QUALITY

If goods are bought by description from a seller who deals in goods of tht description (whether or not he is the manufacturer), then there is an implied condition that the goods are of merchantable quality. But if the buyer has examined the goods, then there is no such implied condition covering defects that should have been discovered in the examination.[1]

A good is not merchantable if it is unfit for its only ordinary use because of defects not apparent on ordinary examination.[2] The goods must be merchantable in the state in which they were sold and delivered.[3] "Reasonable examination" must be understood by the common sense standards of ordinary life: all that could be reasonably expected of a potential customer.[4]

1. SGA., Alta., s. 17(4)(5); B.C., s. 20(b); Man. s. 16(b); N.B., s. 15(6); Nfld., s. 16(2); N.S., s. 16(b); Ont., s. 15, para. 2; P.E.I., s. 16(b); Sask., s. 16, para. 2; Yukon, s. 16 ; N.W.T., s. 16.

2. Grant v. Australian Knitting Mills, [1935] All E.R. Rep. 209 (P.C.).

3. Ibid.

4. Godley v. Perry, [1960] 1 All E.R. 36 (Q.B.D.).

Merchantable quality has been defined to mean that "the goods with form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description".[5] Another court asked itself if a reasonable man buying the scale to resell it to a customer would accept it with its defects".[6]

5. George Reed Inc. v. Nelson Machinery Co. Ltd., [1973] 2 W.W.R. 597 (B.C.S.C.) adopting the definition of Lord Wright in Carswell Laird v. Manganese Bronze, [1934] A.C. 402, 430 (H.C.); See Lord Dylock's ?? judgment in Christopher Still v. Ashington Piggeries, [1971] 1 All E.R. 847, 884 (H.C.).

6. I.B.M. v. Shcherban, [1925] 1 D.L.R. 864, 868 (Sask. C.A.).

Example

A consumer bought underwear from a store. He contracted ä skin disease from some chemical in the cloth. The court said that the goods had only one ordinary purpose and if the goods were not fit for that purpose then the goods were not reasonably fit for their purpose and also not merchantable. The seller was liable for breach of both conditions. The manufacturer was not liable on the contract because of the doctrine of privity mentioned above.[1] The manufacturer was liable for not taking reasonable care though.[2]

1. Grant v. Australian Knitting Mills, [1935] All E.R. Rep. 209 (P.C.).

2. See later in the Tableau, "Product Liability in Tort".

Example

A buyer purchased a 1968 Pontiac Firebird from a car dealer. He was not told that the car had been used for drag racing and due to strenuous use it was not fit for highway driving. The dealer knew of its use as a drag racer but did not tell the buyer. The buyer was giving his mother a ride on the highway two days after he had bought it and the engine exploded while he was driving at a maximum of 35 m.p.h. The court found that there was a breach of a warranty of fitness. The seller was also found to be in breach of a condition that the goods were of merchantable quality.[1] The buyer was awarded damages of $1,000.[2]

1. Manitoba, The Consumer Protection Act, R.S.M. L970, c. C200 as am., s. 58(1)(e).

2. Green v. Holiday Chevrolet Oldsmobile Ltd., [1975] 4 W.W.R. 445 (Man. C.A.).

Example

A buyer had someone buy some bottles of soft drinks for her. They were purchased for her and when she picked up the bag containing them there was a "popping noiseä and a fragment of glass flew up, striking the buyer in the face cutting it and her eye which had to be removed. The court found that the seller knew the purpose for which the drinks were bought, because the purpose could be none other than consumption as a beverage. The seller had to pay damages for breach of condition of reasonable fitness and merchantability referring to the underwear case where both of these conditions produced the same result when the goods were used for ordinarily for one purpose.[1]

1. Yelland v. National Cafe (1955), 16 W.W.R. 529 (Sask. C.A.).

Example

A consumer purchased a bottle of carbonated soda water at a Dominion Store. He took off the emtal top but before it was all the way off, there was a loud explosion and the bottle top hit and injured his eye. The court found that by implication he had indicated that he intended to open the bottle and put the product to its ordinary or usual use as a beverage. The court said that there is a warranty of fitness for the ordinary purposes for which the product is ordinarily used and that no communication need be made to the seller for that purpose. The product was held to be not reasonably fit for its ordinary purpose and also unmerchantable. The buyer got damages from the seller for breach of these implied conditions.[1]

1. McMorran v. Dominion Stores Ltd. (1977), 14 O.R. (2d) 559 (H. Ct.)

Example

A buyer built roads as his business and needed a rock crusher to make asphalt and road bases. It worked for a few days and broke down, one of the main bearings had seized and broken in two places. Later another bearing seized and had to be replaced. The crusher worked well after that. The sellers had said that they would recondition the machine as necessary before it was delivered to the buyer. (The machine had been used before.)

Though his was the sale of a specific article and it was viewed by the buyer, it was still a sale by description because it was sold as corresponding to a description of a second-hand rock crusher that was reconditioned. It was necessary to separate what went to the identity of the machine and thus part of the description and what wen tot the quality of the machine which was thus not part of the description. The court held that reconditioned was not part of the description of the machine but a warranty, a stipulation of the shape the machine would be in when it was delivered. Thus the problem was not with its not corresponding to description but rather with a breach of warranty of quality.

The seller knew that the buyer was a contractor who needed the crusher to crush rocks for materials in his business, that the machine was used to reduce the size of rock, that by saying that it would recondition the machine that the buyer was leaving it to its judgment to do whatever was necessary to make it fit to perform the function it was designed for. The court found this sufficient reliance on the seller to satisfy itself that the machine was fit. So there was a breach of the condition of reasonable fitness for purpose.

The goods were not merchantable and inspection to reveal the faults would have to have been done by heavy crane and stripping the machine down which was not a reasonable inspection. So reasonable examination would not reveal the defects. It was not merchantable because it was of no use for the purpose to which it normally would be put.[1]

1. George Reed Inc. v. Nelson Machinery Co. Ltd., [1973] 2 W.W.R. 597 (B.C.S.C.).

## IF YOU BUY BY SAMPLE, YOU HAVE A RIGHT TO HAVE GOODS THE BULK OF WHICH CORRESPOND WITH THE SAMPLE

In the case of a sale by sample, there is an implied condition in the contract that the bulk of the goods supplied will correspond with the sample in quality, that the buyer will have a reasonable opportunity of comparing the bulk with the sample and that the goods will be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample. A contract of sale is a contract of sale by sample where there is an express or implied term of the contract to that effect.[1]

A sample is öa small quantity of some commodity presented to a customer as a specimen of the goods offered for saleö.[2] The duty of the buyer is to examine the sample for defects and not necessarily the bulk, though he may do so.[3] The parties must contract with reference to a sample with an understanding between them that the sample furnished a description of the quality of the goods, it makes up for what cannot be said in words.[4] A breach of this condition is no less a breach if it could be made to correspond with the sample by some simple process or change.[5] "Reasonable examination" must be understood by the commonsense standards of everyday life: all that could be reasonably expected of any potential customer.[6]

1. SGA., Alta., s. 18; B.C., s. 21; Man., s. 17; N.B., s. 16; Nfld., s. 17; N.S., s. 17; Ont., s. 16; P.E.I., s. 17; Sask., s. 17; Yukon, s. 17; N.W.T., s. 17.

2. Goad v. Nelson (1919), 50 D.L.R. 61 (Sask. C.A.).

3. Carlstadt Development Co. v. Alberta Pacific Elevator Co. (1912), 7 D.L.R. 200 (Alta. S.C.).

4. Wawryk v. The A.E. McKenzie Co. (1921), 61 D.L.R. 25 (Sask. C.A.).

5. E. & S. Rubem v. Faire Bros. [1949] 1 All E.R. 215 (K.B.D.).

6. Godley v. Perry [1960] 1 All E.R. 36b (Q.B.D.).

Example

A sample of wool for which a price was quoted was sent to the buyer by the seller. The buyer sent a letter confirming the purchase of the wool over the phone said "same to be up to five pound sample expressed asö. A judge said that if the sellers did not want the sale carried out by sample they should have drawn this to the attention of the buyer.[1]

1. Bainton v. Hallam (1920), 60 S.C.R. 325.

Example

A buyer bought 500 bushels of flux deed at $2.25 per bushel. The buyer examined a sample sent to him and found it free from mustard seeds. It was an excellent sample and the buyer examined it carefully. The seed was in fact mixed with mustard seed and so the crop was poor. The court found that the defects could not have been discovered by an reasonable examination. The buyer did not have to have a government test done on the seekds to locate weed seeds, this would have been unreasonable trouble.[1]

1. Carlstadt Development Co. v. Alberta Pacific Elevator Co. (1912), 7 D.L.R. 200 (Alta. S.C.).

Example

A buyer who was in the farm machinery business wanted 5000 steel castings of a certain design which he submitted in blueprint for the people doing the castings. The seller made the first casting and the buyer had it some 2½ months before ordering production. The castings that were received did not meet the specifications of the blueprints exactly but were within the tolerance for steel castings within that industry. The buyer had been warned about the tolerances. The court found that it was a sale by sample and that the buyer had reasonable opportunity to examine the sample and also that the defect couldhave been discovered on reasonable examination. The buyer did not prove that the bulk did not correspond with the sample as he must in order to establish his case against the seller. The buyer had to pay the seller for the castings.[1]

1. Dominion Brake Shoe Co. Ltd. v. Kramer Tractor Co. Ltd. (1964), 46 D.L.R. (2d) 471 (Sask. Q.B.).

Where there is a sale by sample and description, it is a condition of the contract that the goods correspond with both the sample and description.[1]

Example

A buyer bought vulcanized rubber material of the description "linatex... in 41 ft. rolls, 5 ft. wide, 6 oz. to the square yard" and after receiving a sample which was flat, soft and of a natural colour. The material could not be used for the manufacturing purposes for which it was bought because it was crinkled. The goods were found by the court neither to correspond to description nor to sample.[2]

Example

An order was made for 200 raincoats, the order was "to be confirmed upon receipt of fully cemented sample". After details were ironed out, the seller sent the buyer a sample coat asking for "confirmation on the 200 coats, which will be made exactly as sample". The buyers agreed. When the coats came, the buyers refused to accept them because they did not conform with the sample. The court held that it was a sale by description and the sample was furnished as part of the description so it was both a sale by description and sample. The court said that the buyers did not have to accept because the coats did not conform to description whatever the quality of the coats may have been. The coats did not conform in all respects to the terms of the contract.[3]

1. SGA., Alta., s. 16; B.C., s. 19; Man., s. 15; N.B., s. 14; Nfld., s. 15; N.S., s. 15; Ont., s. 14; P.E.I., s. 15; Yukon, s. 15(1); N.W.T., s. 15.

2. E. & S. Ruben v. Faire Bros. [1949] 1 All E.R. 215 (K.B.D.).

3. Scottish Rubber Co. v. Berge Tailoring Co. (1921), 20 O.W.N. 463 (H.C.).

## SPECIAL PROVINCIAL RIGHTS

In Nova Scotia, certain conditions and warranties are implied into all consumer sales and cannot be avoided by a seller.[1] A consumer sale is a contract of sale of goods or services including an agreement of sale and conditional sale of goods, made in the ordinary course of business to a purchaser for his consumption or use but not including a sale to a purchaser who will resell it, or whose purchase is in the course of carrying on business, or a sale to an association, partnership or corporation or a sale by a trustee in bankruptcy, a receiver, liquidator or person acting under court order.[1] All the above conditions and warranties are implied irrevocably into consumer sales contracts and three more are added: there is an implied condition that the goods are of merchantable quality except for the defects that are described; there is an implied condition that the goods are new and unused unless otherwise described, whether the goods are bought by description or otherwise; and there is an implied condition that the goods shall be durable for a reasonabl period of time having regard to the use to which they normally would be put and the surrounding circumstances of the sale.[3] For the first of these additional implied conditions, the seller does not have to describe every defect separately but he must state the general condition or quality of the goods with reasonable accuracy.[4]

1. Consumer Protection Act, R.S.N.S., c. 53 as am., ss. 20E, 20C(3), 19, 20.

2. Ibid., s. 20C(1).

3. Ibid., s. 20C(3).

4. Ibid., s. 20C(4).

In Manitoba, certain conditions and warranties are implied into every retail sale of goods and retail hire-purchase of goods and cannot be gotten around by the seller.[1] A retail sale is a sale of goods or services or both made by a seller in the course of his business except a contract for sale of goods intended for resale by the buyer in the course of his business, a contract of sale of a vending machine for a retail establishment, a contract of sale of farm machinery under special legislation, a sale to a corporation and a sale where the cash price is over $7500[2] (but retail sale includes a sale of a mobile home over the price if it is used primarily for residential purposes[3]). All of the above conditions and warranties apply irrevocably to retail sale of goods contracts (with some slight changes of wording) except the merchantability condition in sales by description.[4] But goods must be of merchantable quality except for such defects as are described (but it is not necessary to specify every defect separately as long as the general condition or quality of the goods is stated with reasonable accuracy).[5] Also, there is an implied condition that the goods are new and unused unless they are otherwise described (but in the case of a motor vehicle, a description showing that

1. The Consumer Protection Act, R.S.M. 1970, C. C200, as am., s. 58(1).

2. Ibid., s. 1(E).

3. Ibid., s. 1.1.

4. Ibid., s. 58.

5. Ibid., s. 58(1)(e) and s. 58(2).

To be effective, a statement that the goods are new and unused, or of the age of the motor vehicle, or of the defects in the goods, or of the general condition or quality of the goods must be made in writing, in cash sales, and must also be contained in a notice readily visible before or at the time of the sale and must be so displayed as to make it clear that it refers to the goods or must be contained in a document delivered to the buyer before he accepts the goods.

Where goods are described as used, a decision about their merchantability must take into account the fact that they are used and the age of the goods as stated in their description or if no age is so stated, then the age of the goods as understood by the buyer at the time of the sale.[8]

All oral or written statements made by a seller regarding quality, condition, quantity, performance or effectiveness of goods or services contained in an advertisement, or made to a buyer shall be deemed to be an express warranty respecting those goods or services.[9]

Also, when a seller corrects defects in goods sold or services supplied by him, he is supposed to give the buyer a written record of parts and labour used to correct the problem at the time of that correction.[10]

8. Ibid., s. 58(5).

9. Ibid., s. 58(8).

10. Ibid., s. 58(9).

In Ontario, all the conditions and warranties of the Sale of Goods Act apply to goods sold in a consumer sale and the seller cannot get around them by any means.[1] A consumer sale is a contract for sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale to a purchaser for resale, or to a purchaser whose purchase is in the course of carrying on business, or to an association of individuals, partnership or corporation or by a trustee in bankruptcy, a receiver, a liquidator or person acting under court order.[2]

1. The Consumer Protection Act, R.S.O. 1970, c. 82 as am., ss. 44a(2), 44.

2. Ibid., s. 44a(1).

In Ontario, all the conditions and warranties of the Sale of Goods Act apply to goods sold in a consumer sale and the seller cannot get around them by any means.[1] A consumer sale is a contract for sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale to a purchaser for resale, or to a purchaser whose purchase is in the course of carrying on business, or to an association of individuals, partnership or corporation or by a trustee in bankruptcy, a receiver, a liquidator or person acting under court order.[2]

1. The Consumer Protection Act, R.S.O. 1970, c. 82 as am., ss. 44a(2), 44.

2. Ibid., s. 44a(1).

As mentioned before, the breach of a condition of the contract is a breach of an important part of the bargain, one that means that the other party is not getting what he had bargained for, allowing him to treat the contract as at an end. It means that because the first party did not live up to his side of the bargain, whatevern he was supposed to do before the other party had to do something, the other party does not have to perform his side of the bargain either. However, the law allows the innocent party to the contract an option, he may have the contract as at an end and for??? from having to do what he was supposed to do under the contract, or he may continue the contract by performing his side of it and then sue for damages. A breach of warranty gives use to an action for damages only; there is no option for the buyer. So the party who is not the one in breach of a condition, can treat the contract as at an end or he may treat the breach as a breach of warranty, that is just sue for damages to compensate himself for his loss. The idea is though that once the person who is not in breach has affirmed the contract, he cannot reject it. If you ordered goods to be delivered to you by a seller and he delivers goods of a different description you have a right to reject the goods because there is a condition implied into the contract by the Sale of Goods Acts of the common law provinces that the consumer has a right to receive goods that correspond with the description under which he bought them. The seller cannot require a buyer to accept goods that would violate this right. But if the goods of a different description are accepted in the belief that they are in accord with the contract, the contract has been affirmed and the buyer cannot later return them after having accepted them. But he may treat the breach of condition as a breach of warranty and get a monetary compensation for his loss in damage.[1]

Where a contract of sale contains only one agreement and not a number of independent agreements in one, and where the buyer has accepted the goods or a part of them the breach of any condition of the contract must be treated as a warranty. That is, the buyer can only get monetary compensation in damages. He cannot reject the goods for breach of condition if this is the case. Also, where the contract is for sale of specific goods (goods identified and agreed upon at the time the

1. See Wallis, Son & Wills v. Pratt & Haynes, [1911] A.C. 394 (H.C.).

contract is made), the right to reject is lost normally when the contract is made.[2] Then the breach of condition must be treated as one of warranty with a right to monetary compensation in damages. However, a term of the contract, either express or implied can extend the right to reject.[3]

The buyer is considered to have accepted the goods when he indicates to the seller that he has accepted them or when the goods are delivered to him and he does something with them that is not consistent with the fact that the seller still owns them, like selling the goods or if he keeps the goods for longer than a reasonable period of time without indicating to the seller that he has rejected them.[4]

Also, the buyer has a right to request a reasonable opportunity for examining the goods to see if they conform with the contract when they are delivered to the buyer, unless it is agreed between them that the buyer does not have the right. If the buyer has not examined the goods before they have been delivered, there is no acceptance until he has had a reasonable opportunity to examine the goods to see if they conform to the contract.[5]

2. Combined effect of the passing of property sections and rules for ascertaining the intention of the parties about the time property passes. See eg., Ont. ss. 18, 19. Also Benjamin's Sale of Goods (ed., Guest, 1974), 393. But see Wojakowski v. Pembina Dodge Crysler, [1976] 5 W.W.R. 97 (Man. Q.B.) where the court felt that here too acceptance should be when this provision becomes effective.

3. SGA, Alta., s. 14(4); B.C., s. 17(3); Man., s. 13(3); N.B., s. 12(4); Nfld., s. 13(1)(c); N.S., s. 13(3); Ont., s. 12(3); P.E.I., s. 13(4); Sask., s. 13(3); Yukon, s. 13(3); N.W.T., s. 13(3).

4. SGA Alta., s. 36; B.C., s. 40; Man., s. 37; N.B., s. 33; Nfld., s. 37; N.S., s. 36; Ont., s. 34; P.E.I., s. 35; Sask., s. 35; Yukon, s. 34(1); N.W.T., s. 34.

5. SGA, Alta., s. 35; B.C., s. 39; Man., s. 36; N.B., s. 32; Nfld., s. 36; N.S., s. 35; Ont., s. 33; P.E.I., s. 34; Sask., s. 34; Yukon, s. 33; N.W.T., s. 33.

Example

The Public Utilities Commission of the City of Waterloo ordered a computer from a seller of those machines. It was to be used for accounting purposes. However, the computer proved inadequate and could not do what it was supposed to do. The computer broke down a number of times and there were many expensive delays. The difficulties continued for a number of months and finally the buyer wrote to the seller and requested them to take the machine back. The court found that there was a breach of the implied condition of the contract to provide goods that were reasonably fit for the purpose. The question was then whether the computer had been accepted. The court said that the more complex and novel the subject matter of the sale, the more time is required to see if it is fit or can be made fit for the purpose for which it was purchased. However, the Commission had decided to reject the machine but used it for 14 months after making that decision. The court considered the enormous problem that the Commission would have had in changing their computer system system quickly and that the long wait was for a new system to be delivered and keeping the old computer for that time was what good business judgment required. The contract had not been affirmed and the goods not accepted. The buyers were allowed to reject the machine and treat the contract as having ended.[1]

1. Public Utilities Commission of the City of Waterloo v. Burrough Business Machines Ltd. (1979), 6 O.R. (2d) 257 (C.A.)

Example

Mr. Lightburn bought a new Ford Cortina, 1968 model, two-door sedan, white in colour. It cost him $2,705 and he received $595 on his trade-in. He was told it would be a very good small car with a high mileage rate per gallon of gasoline. The buyer had told the salesman that the car would be used around town and for the occasional long trip. The seller assured him that the car would meet his requirements for economy and reliability. It turned out that the car was very undependable. But the buyer used the car for eight months for a total of 8,000 miles. During that time, the car had been brought back to the dealer 17 times for repairs and still the seller could not find out what was wrong and repair it. The battery kept going dead and one occasion the engine died on a cold winter night and the buyer had to push it to a service station to have the battery charged. The day after that he took the car back to the seller and left it. There was a crash in the oil pump assembly, there were brake troubles as well.

The buyer had struggled with the car for eight months, but the court found that he was endeavouring to give the car a reasonable chance to perform. He was not acting as a capricious buyer who had repented the purchase and sought to get out of his contract at an early time on a frivilous basis. The court found that he had not accepted the car for the purposes of the Sale of Goods Act.[1]

1. Lightburn v. Belmont Sales Ltd. (1969), 6 D.L.R. (3d) 692 (B.C.S.C.).

Example

A car dealer told a buyer that he had a 1961 Wolsey and said, öWe have a demonstrator over here which has been sitting around the lot for two or three months now. We have loaned it to a fellow for a couple of months - not a couple of months, a couple of weeks - while he was waiting for a new car to come in." The buyer said he wanted a new car but the seller said, äWell, this is a demonstrator, it has only been sitting around the lot there.ï The buyer tried the car and after he discovered he liked it, he bought it. The car had 4,000 miles on it. When the car had been driven 7,000 miles by the driver, there was a rear-end breakdown. The seller paid the repair bills for the rear-end. The buyer sought to reject the car. He had found that the car had been registered to someone else earlier. However, no further effort was made to reject the car and the buyer put 24,000 miles on it.
The court found that the statement that the car was a demonstrator was a condition of the contract. But the buyer had accepted the car within the meaning of the Sale of Goods Act because he acted in relation to the car in a manner inconsistent with the ownership of the seller and also he had retained after the lapse of a reasonable time. Although the buyer had asked for his money back, he did allow repairs to be made at the seller's expense and used the car ever since. So the buyer's claim was for breach of warranty.

Example

A buyer owned a hotel and he found that the ventilation system in his beer parlour was not functioning properly because it was noisy and did not clear the smoke properly. He talked with a seller of air conditioning equipment. He was given a brochure for a Gibson air conditioner, one of the features öf the machine was described as a "Fresh Air/Exhaust - Brings in fresh out-door air or exhausts stale room air whenever you want - all year 'round." It was not made plain to the buyer that the air conditioner would not clear the air of smoke and the salesman knew this is the purpose for which the buyer wanted it or at least should have known from what he said before buying it. This was the expectation the buyer had of the performance of the machine. The machines were ordered and installed. They did not remove the smoke from the beer parlour. They did not have this capacity. To keep the air clear of smoke, the buyer had to take out one of the new air conditioners and put back his old exhaust fan.

The court found that the buyer made known his particular purpose for which the goods were required in such a way as to show that he was relying on the skill and judgment of the seller. The goods were of a description it was in the course of the seller's business to supply. So there was an implied condition that the goods would be reasonably fir for their purpose disclosed to the seller. The air conditioners were not reasonably fit.

The court found that the goods had been accepted by the buyer but there was an implied term of the contract keeping for the buyer his right to reject. He bought the air conditioners on the condition that they would exhaust smoke from the beer parlour. The buyer then had to have a reasonable time to try the goods and if they did not do the job for which they were purchased, he was to tell the seller. A reasonable time took into account the fact that the goods had to be installed in the wall of the beer parlour to be properly tested. The buyer did let the seller know as soon as he found out that the machines did not do their job. When the buyer would not pay for the machines, the seller sued him for the price. The court found tht there were negotiations going between buyer and seller which extended what would have been a reasonable time for rejection. The court found that the buyer retained his right to reject until possibility of some amicable

settlement was at an end. The court held that there was a final rejection as soon as could reasonably have been expected.

There was still a question of whether the term was a condition entitling him to treat the contract as at an end with the option to treat it as a warranty or a warranty entitling him to damages as a compensation for loss. The term that preserved the right of the buyer to reject was one which was of the essence of the contract, a breach of the term that the air conditioner would do what he wanted meant that he lost substantially the whole benefit of what he was supposed to have received under the contract. The term was thus a condition and he was entitled to treat the contract as at an end.[1]

1. Polar Refrigeration v. Moldenhauer (1967), 61 D.L.R. (2d) 462 (Sask. Q.B.).

In Nova Scotia, certain conditions and warranties are implied into all consumer sales and cannot be avoided by a seller.[1] A consumer sale is a contract of sale of goods or services including an agreement of sale and conditional sale of goods, made in the ordinary course of business to a purchaser for his consumption or use but not including a sale to a purchaser who will resell it, or whose purchase is in the course of carrying on business, or a sale to an association, partnership or corporation or a sale by a trustee in bankruptcy, a receiver, liquidator or eprson acting under court order.[1] All the above conditions and warranties are implied irrevocably into consumer sales contracts and three more are added: there is an implied condition that the goods are of merchantable quality except for the defects that are described; there is an implied condition that the goods are new and unused unless otherwise described, whether the goods are bought by description or otherwise; and there is an implied condition that the goods shall be durable for a reasonable period of time having regard to the use to which they normally would be put and the surrounding circumstances of the sale.[3] For the first of these additional implied conditions, the seller does not have to describe every defect separately but he must state that the general condition or quality of the goods with reasonable accuracy.[4]

*Where is footnote 2?

1. Consumer Protection Act, R.S.N.S., c. 53 as am., ss. 20E, 20C(3), 19, 20.

2. Ibid., s. 20C(1).

3. Ibid., s. 20C(3).

4. Ibid., s. 20C(4).

In Manitoba, certain conditions and warranties are implied into every retail sale of goods and retail hire-purchase of goods and cannot be gotten around by the seller.[1] A retail sale is a sale of goods or services or both made by a seller in the course of his business except a contract for sale of goods intended for resale by the buyer in the course of his business, a contract of sale of a vending machine for a retail establishment, a contract of sale of farm machinery under special legislation, a sale to a corporation and a sale where the cash price is over $7500[2] (but retail sale includes a sale of a mobile home over the price if it is used primarily for residential purposes[3]). All of the above conditions and warranties apply irrevocably to retail sale of goods contracts (with some slight changes of wording) except the merchantability condition in sales by description.[4] But goods must be of merchantable quality except for such defects as are described (but it is not necessary to specify every defect separately as long as the general condition or quality of the goods is stated with reasonable accuracy).[5] Also, there is an implied condition that the goods are new and unused unless they are otherwise described (but in the case of a motor vehicle, a description showing that it is more than one year old is not sufficient to describe it as used).[6] But for the warranty of freedom from encumbrances, the buyer must accept any existing encumbrance in writing, otherwise there may be a breach of warranty even if he is told of them.[7]

1. The Consumer Protection Act, R.S.M. 1970, C. C200, as am., s. 58(1).

2. Ibid., s. 1(E).

3. Ibid., s. 1.1.

4. Ibid., s. 58.

5. Ibid., s. 58(1)(e) and s. 58(2).

6. Ibid., s. 58(1)(d).

7. Ibid., s. 58(1)(c).

To be effective, a statement that the goods are new and unused, or of the age of the motor vehicle, or of the defects in the goods, or of the general condition or quality of the goods must be made in writing, in cash sales, and must also be contained in a notice readily visible before or at the time of the sale and must be so displayed as to make it clear that it refers to the goods or must be contained in a document delivered to the buyer before he accepts the goods.

Where goods are described as used, a decision about their merchantability must take into account the fact that they are used and the age of the goods as stated in their description or if no age is so stated, then the age of the goods as understood by the buyer at the time of the sale.[8]

All oral or written statements made by a seller regarding quality, condition, quantity, performance or effectiveness of goods or services contained in an advertisement, or made to a buyer shall be deemed to be an express warranty respecting those goods or services.[9]

Also, when a seller corrects defects in goods sold or services supplied by him, he is supposed to give the buyer a written record of parts and labour used to correct the problem at the time of that correction.[10]

8. Ibid., s. 58(5).

9. Ibid., s. 58(8).

10. Ibid., s. 58(9).

Example

A buyer saw an advertisement for a car as a 1972 Chevelle with 26,000 miles. He went to the seller's place of business and took the car for adrive and later paid a $10 deposit. The next day he asked if he might have it examined by a mechanic. The seller agreed but said he wanted the car back in 45 minutes, closing time. A mechanic looked at the car for 5 or 10 minutes. The mechanic said it might be "a pretty good dealä. The seller said that the car was a clear, low mileage car, that it had been in a minor accident, that the trunk did not open and the car had been in a compound for 2½ years. However, the accident had been severe.

The contract was prepared. The seller added the words "as is - no warranty". The seller also prepared an "unsafe motor vehicle dealer's certificate though it was left blank. The buyer signed the documents knowing that the seller was not giving any warranty. He asked no more questions of the seller.

The buyer took delivery of the car and took it to an Esso Car Clinic. A mechanic certified the car safe. The buyer wanted öto put out a few bucks towards the car" to make it roadworthy. Later the buyer found out that the engine was not the kind that usually came with the car and asked for return of purchase price. It turned out that the engine was older than the car. The buyer left the car on the seller's lot.

The court said that the disclaimers "as is - no warranties" indicates to the consumer that he could not expect the same qualities of even a used vehicle sold with warranties and that the Consumer Protection Act of Manitoba allowed a court to consider this.[1] In these circumstances, the buyer received a vehicle ofmerchantable quality, reasonably fit for the purpose for which it was intended.[2] The court found that the expectations which he could reasonably have had were met by the car.

1. Consumer Protection Act, R.S.M. 1970, c. C200, s. 58(5).

2. Ibid., s. 58(1)(e)(h).

Under the Manitoba legislation, a statement of the age of the motor becames part of the description. Though the judge found that the engine was of merchantable quality, he founmd that the plaintiff did not get what he had bargained for or what was part of the description. The buyer had been led to believe that he was buying a 1972 motor vehicle but received a 1972 chassis with a 1970 engine. The vehicle then did not correspond to the description under which it was sold as that conditionw as made a term of the contract that could not be avoided by the seller. The seller was then in breach of the condition that the consumer had a right to goods that correspond to the description he had bought from.

The question then was whether the buyer had accepted the car with its faults and was thus required to treat the breach of condition as a breach of warranty.[4] The question was whether the buyer asked within a reasonable time of becoming aware that the engine was of a different year of manufacture that the rest of the vehicle. He would have had the right to reject it within that reasonable time. But here the court found that the buyer had asked for return of purchase price but instead of insisting on it as soon after he had learned of the engine's age, he chose to keep the car for five months and drove it another 2,000 miles. Also, the buyer did not reject it later relying on his right to expect goods that matched their description but just said that it did not perform satisfactorily. The court then found that the buyer had accepted the car and had to treat the breach of the condition as a breach of warranty. The buyer was entitled to receive the cost of a 1972 engine and installation.[5]

Where is footnote to be indicated?

3. Ibid., s. 58(1)(f), (3), (4).

4. SGA, ss. 13(3), 54(1).

5. Carr v. G. & B. Auto Mart Ltd., [1978] 5 W.W.R. 361 (Man. Q.B.).

In Ontario, all the conditions and warranties of the Sale of Goods Act apply to goods sold in a consumer sale and the seller cannot get around them by any means.[1] A consumer sale is a contract for sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale to a purchaser for resale, or to a purchaser whose purchase is in the course of carrying on business, or to an association of individuals, partnership or corporation or by a trustee in bankruptcy, a receiver, a liquidator or person acting under court order.[2]

1. The Consumer Protection Act, R.S.O. 1970, c. 82 as am., ss. 44a(2), 44.

2. Ibid., s. 44a(1).

British Columbia

In British Columbia, in the case of a retail sale of goods except those which appear to be used goods or goods described or represented by the seller to be used goods on reasonable examination, the conditions and warranties implied by the Sale of Goods Act cannot be got around by the seller. For the purpose of this rule, a retail sale includes all contracts of sale by a seller in the ordinary course of his business not including a sale of goods to a purchase for resale, to a purchaser who intends to use the goods primarily in his business or to a corporation, industrial or commercial enterprise or trustee in bankruptcy, liquidator or sheriff.[1]

1. SGA., s. 21A.

Saskatchewan

In Saskatchewan, the expectations of the consumer receive additional protection from some new legislation.[1] For the consumer who is buying a product from a retail seller (does not include trustee in bankruptcy, receiver, liquidator, sheriff, auctioneer or person acting under court order) who sells consumer products, which are goods ordinarily used for personal, family or household purposes including ones that are attached to or installed onto other things or property and goods bought for agricultural or fishing purposes (not under special legislation), there are safeguards enshrined in the law. Now profit organizations may make consumer sales but persons who buy consumer products in order to resell them or by predominantly for business purposes (except for agriculture or fishing) cannot and they must rely on the Sale of Goods Acts and basic contract law. Basically the Act covers those who buy goods for their personal or family use. Also, a "sale" includes sales in the ordinary sense, conditional sales, leasing and hiring of goods and also transactions where a consumer product is supplied along with services.[2]

This new legislation supplements any other rights a consumer might have under the law of the province.[3]

A person who becomes the owner of the goods by purchase, gift or otherwise from the original consumer who purchased the goods from a retail seller, has generally the same rights against the retail seller as if he had bought the goods himself. He does not have rights arising from express warranties made to the original buyer though. These do not apply to someone who acquires a product through a consumer for purposes of resale or for use predominantly in business.[4]

1. The Consumer Products Warranties Act, S.S. 1976-77, c. 15.

2. Ibid., s. 2 definitions.

3. Ibid., s. 3.

4. Ibid., s. 4.

Rights of the consumer arise in three ways under this legislation. First, they arise from express warranties. Any promise, representation or affirmation of fact, expression of opinion or action that a consumer can reasonably interpret as a promise or affirmation relating to the sale or quantity, quality, condition, performance or efficacy of a consumer product or relating to its use or maintenance may be an express warranty. Such a representation can be made verbally or in writing directly to the consumer or may arise from advertising by a retail seller or manufacturer. It may be made by the retail seller or manufacturer itself or by an agent or employee who is either authorized by his employer to make such representations or if it reasonably appears that he is able to do it. The test for whether or not it is an express warranty is if it could usually induce a reasonable consumer to buy the product. It makes no difference whether or not the consumer actually relied on the warranty. And such a warranty cannot limit the statutory warranties that will be described next.[1] So basically any representation that would give relief under common law would be an express warranty under this legislation. An express warranty is proved by any evidence of what was said or affirmed.[2]

It is the right of a consumer to sue the retail seller on an express warranty that is on the label or package of a consumer product he has sold unless he has made it clear he does not adopt what was said on that label or package. A consumer has no right to sue a retail seller on an advertisement of the manufacturers unless he indicates expressly or impliedly that he adopts the warranties stated.[3]

These provisions are not in force yet.

1. The Consumer Products Warranties Act, S.S. 1976-77, c. 15, s. 8.

2. Ibid., s. 9.

3. Ibid., s. 10.

Second, the right of the consumer to goods that meet his expectations is ensured by statutory warranties. The consumer has then specific rights.

1. He has a right to have goods that the seller had a right to sell.

2. He has a right to goods that are free of other person's interests at the time he gets delivery of them unless these interests are expressly known or made known to him before the sale.

3. He has a right to quiet possession of the goods unless he knows of the interest of the person who is disturbing it before the sale.

4. Where the sale is one by description, the consumer has a right to have goods that correspond with the description. And any descriptive statements on the label or container or otherwise accompanies the consumer product are part of the description for the purpose of this consumer right.

5. The consumer has a right to have goods that are of acceptable quality. This means goods with characteristics and quality that a consumer can reasonably expect in the circumstances. It includes merchantable quality as discussed above. But no warranty is given with respect to defects specifically drawn to the consumer's attention before the contract is made or defects that he finds on pre-contract examination, if he makes one.

6. Where the consumer expressly or impliedly tells the retail seller a particular purpose for whish he wants the product, he has a right to get goods that are reasoably fit for that purpose. It make s no difference that the purpose is unlike the one for which the product is usually supplied. The consumer has no such right where it looks as though the consumer did not rely on the seller's skill or judgment or where it is unreasonable for him to do so.

7. Where the contract for sale of a product contains an express or implied term saying that it is a sale by example, the consumer has a right to have goods, the bulk of which correspond in quality with the sample, a right to have a reasonable opportunity to compare the bulk of the product with the sample and a right to have a product free from defects that makes the quality of the goods not acceptable as the term is used above and defects that would not be apparent on a reasonable examination of the sample.

8. The consumer has a right to expect that the goods will durable for a reasonable time according to the circumstances.

9. The consumer also has a right that spare parts and reasonable repair facilities will be available for a reasonable time after he bought a product that normally requires repairs.[1]

1. The Consumer Products Warranties Act, 1977, S.S. 1976-88, c. 15, s. 11.

A breach of some mandatory health or safety standards a set down by Parliament or provincial legislature is a good indication that the goods are not of acceptable quality or fit for the purpose for which it was bought.[1]

1. The Consumer Products Warranties Act, 1977, S.S. 1976-88, c. 15, s. 34.

Another source of consumer rights are additional written warranties over and above the statutory warranties set out above. These additional written warranties must contain the name and address of the party giving them, the parts of the product covered, the duration of the warranty, what the consumer must do in order to obtain the benefit under the warranty, the costs that the consumer must bear, a statement that these warranties are over and above the others given the consumer by this legislation, the procedure to have something done under the warranty and the address of the place responsible for repair, whether it be somewhere the product must be sent or a place from which repairers will be sent to the house of the consumer. The additional written warranty cannot make the person giving the warranty the judge of whether the claim of the consumer under the warranty is valid, it cannot exclude or limit the rights of the consumer under the Act, it cannot make the claim under the warranty depend on the consumer having to return the product when it would be unreasonable to require him to do this because of its weight, size or method of attachment that makes its removal or transportation very expensive. The additional written wrranty cannot limit the benefit of the warranty to the consumer excluding people who become owners of the thing later. And the additional written warranty cannot be deceptively worded.[2] Rights under such warranties are in addition to those given him by the additional written warranty itself and apply to persons who acquire ownership of the goods after the consumer who bought them in the first place from a retail seller.[3]

(Where is footnote 1 to be indicated?)

1. The Consumer Products Warranties Act 1977, S.S. 1976-77, c. 15, s. 18.

2. Ibid., s. 17.

3. Ibid., s. 19.

Where the goods do not meet up with the expectations the consumer has as a result of the statutory and express warranties and these warranties are breached, the consumer has a right to a remedy. If the goods can be brought up to the consumer's expectations and the breach of warranty is not substantial, the consumer has a right to have the breach made good free of charge by the party responsible within a reasonable time. If this is not done, the consumer can have someone else repair the goods and have the party responsible pay the bill. The consumer has a right to damages for losses he suffered that were reasonably foreseeable as liable to result from the breach. If the breach is substantial however, or is not repairable, the consumer can use the procedure just outlined or may reject the product and recover the purchase price from the party resonsible and recover the kind of damages as just described. The goods must be rejected in a reasonable period of time unless he has delayed because of assurances made by the party responsible for the breach that the breach will be remedied when it is not. A reasonable time is a period long enough to allow testing, trial or examination of the product as would normally be required to see if the expectations of the consumer as created and protected under the legislation have been met. This period of time starts with the delivery of the goods to the consumer whether or not the right is being exercised by a person who acquired ownership of the goods through the consumer.[1] If the person who is exercising his right to reject is one of these latter persons who acquires ownership through the original buyer from a retail seller, the purchase price he can recover is what he paid plus financing charges up to the full original price of the thing.[2]

If the product can be repaired, the consumer is to send it to the repair facility of the party in breach unless it is unreasonable as the terms used above, in which case, the responsible party must arrange for the return of it or its repair at the consumer's premises.[3]

1. The Consumer Products Warranties Act, 1973, S.S. 1976-77, c. 15, s. 20.

2. Ibid., s. 21.

3. Ibid., s. 22.

If the product is rejected, the consumer only has to notify the party responsible of the rejection. He need not return the goods. The consumer must pay something to the party in breach for the use of the goods while he had them. The consumer can keep the goods until he gets his money back.[4]

If the person who gives an additional written warranty does not do what he is supposed to do under it within a reasonable time, the consumer can have someone else do it and send the bill to that person along with a claim for damages for reasonably foreseeable losses.[5] If the additional written warranty covers only part of repair or replacement costs, the consumer must have agreed to paying any excess over that in writing and the warranty must have complied with the above terms for its written content. Otherwise, the person who gave the warranty would have to pay for it all.[6]

If the article is dismantled when it is to be repaired and is not found defective, the consumer must pay for this if he has agreed to do so in writing and was told that he was agreeing to do so by signing the document containing the provision in writing. The goods must be repaired in the shortest time possible.[7]

Special damages meant to make an example of the party responsible for breach of warranties under this legislation can be gotten by a consumer or person who acquired ownership of the goods through him. However, it has to be proved that there was a breach of these warranties wilfully and with knowledge that it was being done.[8]

4. Ibid., s. 23.

5. Ibid., s. 24.

6. Ibid.. s. 25.

7. Ibid., s. 26(1) and s. 26(3).

8. Ibid., s. 28.

A retail seller cannot reduce or limit the rights of the consumer under this legislation.[1] However, he may modify the right of the consumer to goods of acceptable quality, reasonable fitness for purpose and durability in contracts for used goods where the retail seller makes over 85% of his business, which cannot be one for used cars, from the sale of used goods. But in order to use this exception, the secondhand dealer must bring the attention of the consumer to the disclaimer and must advise him of the effect of this limitation on his rights.[2] Otherwise, it is an offence under the legislation for anyone to put make a disclaimer modifying or limiting the rights of the consumer under it.[3]D

1. The Consumer Products Warranties Act, 1977, S.S. 1976-77, c. 15, s. (7)1.

2. Ibid., s. 6(2).

3. Ibid., s. 7(2).

A person has two years from the date the breach of warranty is discovered to exercise his rights arising from the breach.[1]

The legislation applies to any retail seller, distributor or manufacturer or person who gives warranties that carries on business in Saskatchewan. It applies of course, to consumers who buy from retail sellers and consumers who acquire ownership from them in that province too.[2]

The provisions concerning additional written warranties and express warranties are not in force yet (July, 1979).

1. The Consumer Products Warranties Acts, 1977, S.S. 1976-77, c. 15, s. 30.

2. Ibid., s. 33.

New Brunswick

In New Brunswick, the consumer has his rights strengthened and even added to by new legislation that as yet is not in force.[1]

The rights accrue to a consumer transaction which includes a contract of sale of a consumer product, including a conditional sale contract, a contract of barter or exchange or a consumer product, a contract of lease or hire of such an article (it makes no difference whether there is an option to buy) and also a contract for services or for labour and materials if such a consumer product is supplied along with services or labour. As found in other statutes, the rights are accorded to a consumer who buys a consumer product meaning articles or goods, new or used, that areusually used primarily for personal, family or household purposes. The legislation is oriented to giving a consumer a right to a remedy in the event of a consumer loss which is not suffered in a business capacity. The kinds of losses covered here are any kinds of loss or damage whether damage to person or property.[2]

The legislationdoes not extend to a sale or supply of a consumer product by a seller who is not a distributor (a person who supplies consumer products as part of a regular business including manufacturers, producers and "middlemen" such as warehousemen) who does not deal in products of that kind and does not lead people to believe that he does so deal. Nor are these rights to be asserted against a trustee in bankruptcy, receiver, liquidator, sheriff or person acting under court order.[3] The legislation applies to all other consumer sales or supply of consumer products. These provisions cannot be avoided by any disclaimer.[4]

1. Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1.

2. Ibid., s. 1.

3. Ibid., s. 2.

4. Ibid., s. 2(3), s. 24.

Rights accrue to the consumer under this legislation from two sources. The consumer may get rights against a seller from express warranties or implied warranties. These two sources correspond to the expectations that are created in the mind of the consumer as a result of what was said or represented to him before or at the time of sale and also those that are created by law.

Any oral statement in relation to the product that the seller makes to the buyer is considered an express warranty under this new legislation unless the circumstances indicate that the buyer does not rely or that it is unreasonable for him to rely on what the seller said. Apparently this acknowledges that sellers may still make vague, commendatory statements as part of a sales pitch as long as it is not reasonable for the consumer to rely on what was said.

Also any written statement in relation to the product made by the seller to the buyer is an express warranty for the purposes of this legislation unless it was unreasonable for the buyer to have relied on the statement in the circumstances. However, this is considered an express warranty whether or not the buyer relies on the statement.

And a statement in relation to the product that the seller makes in any way to the public is an express warranty unless it was unreasonable for the buyer to rely on the statement. Again, whether or not the buyer actually relied on the statement is irrelevant.

A statement amounting to an express warranty can be made by the seller, his agent or employee and can also be made in writing on the product itself, its container, on a label, tag, sign or document attached to or near or with the product. But the seller can show that the statement was made by someone who did not sell the product and that he did not know and ought not to have known that the statement was made. Here, the word statement is broader than that discussed in connection with common law representations as it includes a promise, a representation of fact, intention or opinion.[1]

Any statement or representation that is an express warranty as laid out above may be proved in court even though it does not agree with what is contained in the actual contract for sale or supply.[2]

1. Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, s. 4.

2. Ibid., s. 5.

A warranty given by a seller to a buyer to repair, replace, make a refund or do anything else if the product is defective, breaks down, malfunctions or fails to meet his specifications is considered an express warranty that the product will not break down, malfunction or fail to meet specifications.[3]

These express warranties cannot exclude or restrict any implied warranty in the legislation.[4]

3. Ibid., s. 6.

4. Ibid., s. 7.

The second source of consumer rights under this legislation is a system of implied warranties similar to the one under Sale of Goods legislation as above, but more comprehensive and extensive in scope.

1. In contracts of sale, the consumer has a right to goods that the seller had a right to sell to the consumer.

2. Also the consumer has a right to goods that are free of other people's legal interests in them unless he has these interests made known to him before the sale. These interests include liens, charges or encumbrances on the product.

3. The consumer also has a right to quiet possession of the product except insofar as it may be disturbed by virtue of another person's interest made known to him before the contract is made.[1]

These three rights arise in contracts of sale or supply that are not contracts of lease or hire without option to buy. In that kind of contract, the consumer has these rights:

1. He has a right to products that the seller had a right to supply to him.

2. He has a right to quiet possession unles sdisturbed by someone who had an interest he knew about before the time of the making of the contract.[2]

There are further rights a consumer has in contracts for sale or supply of products.

1. The consumer has a right to goods that are unused unless before the contract is made the seller told him that the goods were used or he knew or should have known before the contract was made that the goods were used or were likely used goods. But the goods may still be considered unused if they were used only to test, service, prepare or deliver it and used only to a reasonable extent in the circumstances.[3]

1. Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, s. 8(1).

2. Ibid., s. 8(2).

3. Ibid., s. 9.

2. The consumer has a right to get a product that is of such a quality as is fit for the purpose or purposes for which products of that kind are normally used in light of all the circumstances. This right does not exist if the defects in the product were made known to the consumer before the contract was made.

   The right does not exist if the seller has reason to believe the defect exists and tells the consumer of it before he buys it. The right does not exist to the extent of any defects an examination by the consumer of a used product before the contract was made ought to have revealed. Where there is a sale by sample the right does not exist asfar as any defect that a reasonable examination of the sample ought to reveal.[4]

3. The consumer has a right to a product that complies with all mandatory federal and provincial health, safety and quality requirements.[5]

4. Where before the contract is made, the consumer expressly or impliedly makes known to the seller that he wants the product for a particular purpose, he has a right to a product that is reasonably fir for that purpose. It makes no difference that the purpose is not one for which the product is normally used. However, there is no such right if the circumstances show that the consumer did not rely on the seller's skill and judgment or that he ought not to have reasonbly done so.[6]

5. The consumer has a right to a product that is durable for a reasonable period of time. What is a reasonable period of time is determiend by all the circumstances.[7]

4. Ibid., s. 10(1)(a), (2).

5. Ibid., s. 10(1)(6).

6. Ibid., s. 11.

7. Ibid., s. 12.

Where the consumer has rejected the product, he must allow the seller to take it back.[8]

(Page missing??? - see page 262.)

1. Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, s. 14.

2. Ibid., s. 15.

3. Ibid., s. 16(1).

4. Ibid., s. 16(2).

5. Ibid., s. 16(3).

6. Ibid., s. 17.

7. Ibid., s. 18.

8. Ibid., s. 22.

It is possible to exclude the rights the consumer has as a result of express warranties except in cases of a sale by description when the express warranty forms part of the description.[1]

1. Consumer Product Warranty and Liability Act, S.N.B. 1978, c. -18.1, s. 25.

## CONTRACTS FOR SERVICES

When a consumer hires someone to do a job for him, he has a right to have the work done with all proper care and skill.[1]

However, courts are willing to say that the parties to a contract have come to some agreement as to the quality of the services even though nothing is really said about it in the actual contract itself.[2] In one situation where a news service supplied news stories to a television station, that slandered a certain individual, the court implied a term giving the consumer of these services, the television station, the same rights against the seller of the services as he would have had if the sale had been one of goods.[3] Because the news information contained such a fault, it was said that the "news" supplied was not reasonably fit for the purpose for which it was intended.[4]

1. Young and Marten, Ltd. v. McManus Childs, Ltd., [1968] 2 All E.R. 1169, 1171 (H.C.).

2. See Cheshire and Fifoot's Law of Contract (8th ed., 1972), 165.

3. Allan v. Bushnell T.V. Co. Ltd. (1968), 1 D.L.R. (3d) 534 rev'd. on another point.

4. Ibid., 543.

## CONTRACTS FOR SERVICES

The tendency has been for courts to award the consumer the same rights whether the contract be one for goods or goods and services because when this distinction is made problems arise when goods are provided with services.[1] Now a contract to have someone make something for you is probably a contract for sale of goods. An example of this might be custom furniture: a situation where labour is added to materials to create a product.[2] Making a refrigerator box for a ? has been held to be a sale of goods.[3] A dentist who supplied false teeth to a patient was held to have made a sale of goods.[4] The custom construction of two ships' propellers was treated as a sale of goods.[5]

Basically, the question here appears to be whether the dominant purpose of the contract is the production of an article or the provision of some special service.[6] So if an artist is commissioned to paint a portrait, it has been found that there is no sale of goods because the materials used to create the product were of insignificant value when compared with the value of the skill and labour.[7]

Naturally, if a contract is found to be one of sale of goods, then the consumer can assert his rights against the seller as provided under Sale of Goods legislation.

1. Young and Marten Ltd. v. McManus Childs, Ltd., [1968] 2 All E.R. 1169, 1171 (H.C.).

2. J. Materne Design & Construction Ltd. v. Gendel (1970), 17 D.L.R. (3d) 268 (Ont. C.A.).

3. Ross v. Sadsfshy, [1943] 1 D.L.R. 334 (N.S.C.A.).

4. Samuels v. Davis, [1943] 2 All E.R. 3 (C.A.).

5. Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd., [1934] A.C. 402 (H.C.).

6. Fridman, Sale of Goods in Canada (1973), 14.

7. Robinson v. Graves, [1935] 1 K.B. 579.

NOTE: Jim, I came across this page at this point in the text and wonder if it belongs in front of page 258 where I indicated a page was missing.
- Sharon

For a right arising from breach of warranty, the consumer is supposed to give the seller a reasonable opportunity to remedy the breach unless the consumer cannot do it because it would cause too much inconvenience or he is unable to do it, or unless the breach is a major one. The buyer is supposed to return the product to the seller or his repairer at the seller's request unless he cannot for the above reasons. And the seller is to return the product to the consumer once it has been repaired. The consumer does not have to return the goods to the seller if he cannot because of significant inconvenience. The seller has to pay for the consumer's returning the goods to him.[1]

Where the seller has breached a warranty that gave the consumer some right, the consumer has a further right to damages or monetary compensation for his loss that he suffered because of the breach.[2]

Where the seller does not repair the product as he is supposed to the buyer may reject the product if he does so within a reasonable time of discovering the breach and where he has discovered the breach within 60 days of delivery of the product.[3]

Where the breach is a major one, the consumer has a right to reject the product even though it is 60 days after delivery of the product, if he does so within a reasonable time after he ought to have discovered the breach.[4]

The consumer must notify the seller that he has rejected the product for the rejection to be effective. Also the rejection is effective if the seller ought to know that the consumer did not accept the product.[5]

Where the consumer rejects the product, the contract ends and he can recover his money and damages for other losses. Unless the consumer rejects in 10 days, the seller may have something for the benefit the consumer had from the use of the product. The seller may recover for any damages beyond reasonable wear and tear that is not his fault suffered by the product.[6] The consumer can keep the product after rejection until the seller gives him the money back.[7] Claims of consumer and seller can be adjudicated by a court.

A question arises in situations where goods are supplied by the people who install them. Because a component of what was supplied was labour making it a contract for work and materials there was a question whether or not the consumer had the same rights as he had if the contract had been one for sale. Following in the pattern suggested above, it has been determined that the consumer should have the same right to expect goods that are of good quality and reasonably fit for their purpose.[1]

1. Young and Marten v. McManus Childs, [1968] 2 All E.R. 1169 (H.C.).

Example

Where people had their car repaired at a garage, the mechanic found it necessary to put in new connecting rods. These were obtained by the garage from the manufacturer of the car. One of the rods had a latent defect. When the car was driven about it broke and caused considerable damage. The court said that someone who contracts to do work and supply materials warrants that the materials that he uses will be of "good quality and reasonably fit for the purpose for which he is using them". However, the circumstances of the transaction might indicate that any such warranties were excluded.[1]

1. G.H. Meyers & Co. v. Brent Crons Service Co., [1933] All E.R. Rep. 9 discussed by Lord Reid in Young and Marten, Lten. v. McManus Childs, Ltd. [1968] 2 All E.R. 1169 (H.C.).

Example

In one case, a person who wanted a house built hired a contractor to do it. The contractor in turn sub-contracted the roofing to a company that did that sort of thing. They were to use a certain kind of tile and the sub-contractor obtained it from the manufacturer. However, there was some kind of latent defect in the tiles that made it unsuitable for the purpose as it did not stand up to the elements. The argument was that the sub-contractor should not be liable for the defect because it was a contract for work and materials which was not governed by the Sale of Goods Act so the owner did not have the rights against them that he would have had if the contract had been one of sale.

The court found that the consumer had the right to goods of good quality and reasonably fit for their purpose. So similar are these implied terms to the ones implied under the Sale of Goods Act that the fact that the person who wanted the house built chose the kind of tile by trade name meant that the right to have goods of reasonable fitness for their purpose was excluded because of the trade name proviso discussed in connection with this right under the Sale of Goods Act. However the goods were found to have not been of the requisite quality and the sub-contractor was liable for the defect.[1]

1. Young and Martin Ltd. v. McManus Childs' Ltd., [1968] 2 All E.R. 1169 (H.C.).

## NOVA SCOTIA: Right to Services of the Quality You Would Expect

In Nova Scotia, in every consumer sale of services there shall be implied a condition of the contract that the services sold shall be performed in a skilful and workmanlike manner.[1] A consumer sale is a contract of sale of goods or services including an agreement of sale and a conditional sale of goods, made in the ordinary course of business to a purchase for his consumption or use but not including a sale to a purchaser who will resell it, or whose purchase is in the course of carrying on a business, or a sale to an association, partnership or corporation or sale by a trustee in bankruptcy, or receiver, liquidator or person acting under court order.[2]

1. Consumer Protection Act, R.S.N.S. 1967, c. 53 as am., s. 20c(5).

2. Ibid., s. 20c(1).

## RIGHTS OF THE CONSUMER CAN BE RESTRICTED BY SELLERS OR MANUFACTURER'S DISCLAIMER CLAUSES

One of the things that can stand in the way of the realization of the expectations of the consumer is a device for limiting the liability of the seller. These devices are formulations of words in various ways that make the obligations of the seller less onerous for him. They can eliminate his liability for anything wrong with the goods or services or they may limit it to something much less than the consumer would expect in the event that the goods or services were defective. Such disclaimers, as they are called, take a variety of forms.

The law of contract developed in an age when the consumer was expected to find for himself, he was to beware of shoddy services and defective goods. The idea was that a contract was a bargain fully entered into by buyer and seller and each negotiated for terms of contract and that the best contract was made as a result of freely competing forces in the marketplace. Thus, the seller would exclude some or all of his liability and in turn, the consumer would get something in return and if he did not, as contemporary thinking went, he was stupid. However, as time went by, and sellers got more powerful, it came to be realized that in many cases consumers were not able to negotiate this well. Often they were uninformed or incapable of negotiating with some powerful seller who could say: "take it or leave it". People were buying things but found that the seller had cut-off redress by some craftily worded term of the contract. The courts attempted to find ways around the strict wording of these disclaimers to see that the legitimate expectations of the consumer were not foiled. But as the courts devised means of getting around these disclaimers sellers were devising better ones.

An example may describe what was happening. A buyer signed a "sales agreement" to buy an automatic cigarette machine. The agreement has a disclaimer in it: "This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition statement or warranty, statutory or otherwise, not stated herein is hereby excluded." The clause was in small print and was left unread by the buyer. The machine was delivered but it did not work according to the expectations of Mrs. Grancob, the buyer. The

seller tried to fix it but it never worked correctly and the buyer asked them to take it away. The seller would not do this. The buyer sued for her money back because it was unfit for the purpose for which it was intended. The court found that the disclaimer was a term of the contract. The judge found that all conditions and warranties by which the buyer could receive redress, had been excluded by the clause. The buyer's legitimate expectations were thereby failed.[1]

Since that case of 1934 the law has developed. The courts have new devices for dealing with disclaimers to make sure that the consumer gets a bargain that lives up to his reasonable expectations.[2] They will consider whether a disclaimer should be considered part of the agreement between buyer and seller. The courts also construe the meaning of an ambiguous contractual term against the interest of the party who is responsible for setting the term in writing. And the courts also say that if there is a fundamental breach of contract, meaning that the buyer did not get the benefit he was supposed to get under the contract, then the disclaimer cannot work to exclude the seller's liability arising from obligations which the court finds the seller has not met.

The legislatures have come to the aid of the consumer here. The Sale of Goods Acts allow the use of disclaimers to limit seller's obligations under contracts.[3] However, many provinces have provided legislation to ensure that a seller cannot get out of many of these implied warranties and conditions, often adding to the list above, in certain types of contracts where an ordinary consumer is involved.[4]

1. L'Estrange v. Grancob, [1934] All E.R. Rep. 16 (C.A.).

2. See P. Cumming, "The Judicial Treatment of Disclaimer Clauses in Sale of Goods Transactions in Canada", 10 O.H.L.J. 281, 283.

3. SGA. Alta, s. 55; B.C., s. 69 except for retail sales, s. 21A; Man., s. 56; N.B., s. 52; Nfld., s. 56; N.S., s. 55; Ont., s. 53; P.E.I., s. 55; Sask., s. 54; N.W.T., s. 53; Yukon, s. 53(1).

4. See above.

## WHERE YOU HAVE SIGNED A DOCUMENT CONTAINING A DISCLAIMER

The court will consider whether the disclaimer is part of the contract.

Basically where a document that has contractual terms in it is signed then the person who signed it is bound except where there is fraud or misrepresentation, and it does not matter whether or not he read the document.[1] Very often, contracts of sales or offers and acceptances or agreements of sale and like documents are signed by the buyer. Normally he is bound. But where standard form contracts contain stringent or onerous terms, the party seeking to rely on such terms may not be able to do so without having taken reasonable measures to bring them to the attention of the other person.[2]

If the contract is not in writing or does not contain the disclaimer as a written term, the buyer may still be bound by the disclaimer if the seller does what was reasonably sufficient to give him notice of it before the contract was made.[3] So where a disclaimer is printed in the seller's general sales literature which was not read by buyers, the contract does not include the term.[4]

1. L'Estrange v. Grancob, [1934] All E.R. Rep. 16, 19 (C.A.).

2. Tilden Rent-A-Car v. Clendenning (1978), 18 O.R. (2d) 601 (C.A.).

3. See Thornton v. Shoe Lane Parking, [1971] 1 All E.R. 686 (C.A.).

4. Canada Bldg. Materials Ltd. v. W.R. Meadows of Can. Ltd. (1968), 66 O.L.R. (2d) 674 (Ont. H.Ct.).

Example

Buyer bought a 1975 Dodge Dart. There was some defects and the seller gave her a new one in exchange to avoid problems. A form of agreement was signed for the first car and one was filled out for the second but not signed. There was a couple of small defects in the second car that the seller said that he would correct. Later it was found that the second car's trunk leaked, oil leaked from the power steering apparatus and there were defects in the paint finish. The car was left with the seller a number of times and he did not fix the problems that he said he would correct. The drive shaft fell out of the car. In the first agreement, the one that was signed, there was a manufacturer's new car warranty which was said to be in lieu of all other warranties, express or implied, including the implied warranties of reasonable fitness or merchantability. But the agreement for the second car was not signed and the court found no evidence of her assent to its terms. The court said that the buyer was not bound and thus she could rely on the implied conditions of the Sale of Goods Acts.

Even if the first agreement governed the contract, the court said that the fact that the buyer could not read English and could not understand all that was said to her meant that she made no informed agreement on the terms and particularly the disclaimer. She did not know or agree to this.

The car was not reasonably fit for the purpose for which the buyer told him she required it. There was a breach of this implied condition of the contract.[1]

1. Wojakowski v. Pembina Dodge Crysler Ltd., [1976] 5 W.W.R. 97) (Man. Q.B.).

## THE EFFECT FRAUD AND MISREPRESENTATION HAVE ON DISCLAIMER CLAUSES

Disclaimers are ineffective where the contract has been induced by fraud even where the document containing that clause has been signed by the buyer.[1] There is some authority for saying that such a term will not stand up where the contract was induced by misrepresentation.[2] If the seller misrepresents the effect of the disclaimers he has put in the contract, he cannot rely on them in the face of his misrepresentation.[3]

1. L'Estrange v. Grancob, [1934] All E.R. Rep. 16 (C.A.); Parlby Const. Ltd. v. Stewart Equipment Co. [1972] 1 W.W.R. 503 (B.C.S.C.).

2. L'Estrange v. Grancob, Ibid., 19.

3. Canadian Indemnity Co. v. Okanagan Mainline Real Estate Ltd., [1971] S.C.R. 493.

Example

An auction was advertised by flyer. A buyer attended and purchased a D-8 Caterpillar tractor. Upon purchase, the buyer had it inspected thoroughly and then demanded rescission. The flyer and auction catalogue had stated that the condition of the machine was very good, that it was equipped with a new undercarriage. These were found to be material representations of fact tht induced the buyer to buy the tractor. But the seller claimed that there were disclaimers in both the flyer and the catalogue. He claimed that they were by those means brought to the buyer's attention as well as by the public reading of them prior to the auction and by the provisions on the registration card which was signed by the buyer. They read:

"Any description regarding the equipment offered is believed to describe the same and has been conscientiously set forth according to our information. The equipment is available for public inspection and examination and any description is merely a guide. The description as to condition or otherwise as set forth on each price is in no way a warranty or guaranty, actual or implied. Neither the auctioneer or the owner is responsible for any errors in description or condition."

The court found that these words in the catalogue and flyer were read to the people at the auction and so were adequately communicated to the buyer. Also, the registration card signed by the buyer had a disclaimer printed just above the space for signature that said:

"I agree to abide by the said conditions in accordance with the published conditions of sale. I further agree that there is no representation, warranty, collateral agreement or condition affecting my purchases other than as expressed herein in writing."

The court found that the buyer's signature on the card made this disclaimer a part of the contract of sale.

The court found that the seller had no basis for having an honest belief in the truth of the description. The sellers had looked at the machine before they had sold it. And in publishing a representation without an honest belief in its truth, the seller committed a fraud. Hence the buyer was not prevented by the

disclaimer in seeking a remedy for fraudulent misrepresentation. There was a rescission of the contract and the buyer got his purchase price back. The buyer also got damages for his expenses in having the machine inspected and some other minor losses. The seller got his machine back.[1]

1. Parlby Const. Ltd. v. Stewart Equipment Co. Ltd., [1972] 1 W.W.R. So 3 (B.C.S.C.).

## A COURT MAY INTERPRET A DISCLAIMER CLAUSE TO DECREASE ITS EFFECT ON A CONSUMER'S RIGHTS

One of the ways in which the courts make sure that the disclaimer clause does not infringe the consumer's right to have goods that match his reasonable expectations is to make sure that if the liability of the seller is to be excluded or limited, then clear and "apt" language to tht effect must be used. The seller cannot get out of his obligations without making clear his intention to do so. The courts have various rules they use to construe the language of documents and one of them is that where there is any ambiguity in the language of the documents the court will attach a meaning to it that least favours the party who is relying on it.[1]

An example is the situation where goods are bought by description which is the subject of one of the implied conditions and remains a "condition" even when it is breached and can only be treated as a warranty. A court found a disclaimer that said "sellers give as warranty expressed or implied as to growth, description or on any other matters" was insufficient to limit the seller's liability for breach the condition implied into the contract that goods sold by description must correspond with that description.[2]

1. Wallis, Son & Wells v. Pratt & Haynes, [1911] A.C. 394 (H.C.).

2. Cumming, as above, 287.

Example

A buyer purchased a tractor and trailer. The contract contained a clause saying that the vehicles were "sold as is, no warranty". The judge found that those words would be sufficient to exclude operation of the implied conditions of merchantability and reasonable fitness for purposes of the Sale of Goods Act.

However, the disclaimer could not operate to exclude the condition of merchantable quality in the Manitoba Consumer Protection Act.[1] The consumer got his remedy under that legislation.[2]

1. R.S.M. 1970, c. C200, s. 58(1)(e).

2. Rahtjen v. Stern GMC Trucks (1969) Ltd. (1976), 66 O.L.R. (3d) 566 (Man. C.A.).

Example

In a case where a buyer was purchasing anti-corrosion products for a manufacturing operation, the court held that in a case involving the goods reasonable fitness for purpose, the disclaimer that read:

> We warrant our materials to be of good quality and will replace material proved defective. This warranty is in lieu of all others express or implied and may not be extended by representatives, written sales, information or drawings. While we recommend uses for our materials based on tests believed reliable, we in no way guarantee particular methods of use or application or performance under special conditions. Nor do our distributors or salesmen or any representatives of distributors or of this company have any authority to extend any guarantees beyond that outlined above or to waive the limitations of the seller's liability.

would not exclude the conditions as to reasonable fitness for purpose under the Sale of Goods Act.[1]

1. Canada Bldg. Materials Ltd. v. W.R. Meadows of Canada Ltd. (1968), 66 O.L.R. (2d) 674 (Ont. H. Ct.).

Example

A consumer's car developed an oil leak and telephoned the manager of Rambler Motors (AMC) Ltd.'s garage to have it repaired. The garageman could not fix the car immediately but said that if the consumer left the car on the lot it would be fixed as time permitted. The garage usually got the customer to sign an "invoiceä when repairs were to be done to a car, though this was not done when it was supplying spare parts only. The "invoiceï contained a description of the work to be carried out on the car and the price for doing it. Underneath the signature of the customer was a disclaimer which said:

"Company is not responsible for damage caused by fire to customer's cars on the premises."

The court said that a clause excluding liability for negligence should make its meaning clear and plain on its face to any ordinary, literate and sensible person. The clause had to convey a meaning to such a person that they were agreeing that the person who would rely on the clause was freeing himself of liability for negligence. In this case, the court said, an ordinary man would be shocked to find the garage not liable for fire caused by their negligence. Clearer words would have been needed to disclaim liability for negligence of garage employers.[1]

1. Hollier v. Rambler Motors (AMC) LLLtd., [1972] 2 Q.B. 71 (C.A.).

Example

Mr. Freeman agreed to buy a Mercury from a car dealer. He took it for a short test drive but the car was not checked by an independent mechanic before it was purchased. The car was used by the buyer and his family and driven 2000 miles before it was discovered that the frame of the car was twisted. A mëchanic said that the car was unroadworthy, the tire wear was excessive and that there was a possibility of loss of cöntrol at high sppeeds.

There was a disclaimer on the ppuurchase order saying:

"The vendor shhll not bee liable for any defects in matërial or workmanship pertaining to the said goods not known to the vendor at the date hereof, nor shall the vendor be liabile for any injury or damage caused by any defect in material or workmanshipï.

In the rretail instalment contract there was a disclaimer saying:

"This contract constitutes the entire agreement between buyer and seller and no modification of any of the terms and conditions herein shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing duly executed by seller."

The court held that the first of these disclaimers did not exclude the condition implied into the contract by the Sale of Goods Act for goods that are reasonably fir for the purpose.

Although the buyer had driven the car for a month before rejecting it, the court held that he had not lost his right to reject the car for the breach of this implied condition.

The seller had to return the value of the buyer's trade-in that had been sold.[1]

1. Freeman v. Consolidated Motors Ltd. (1968), 65 W.W.R. 234 (Man. Q.B.).

## IF THE CONSUMER HAS NOT RECEIVED WHAT HE BARGAINED FOR, DISCLAIMERS MAY NOT APPLY

Another way the courts control the effect of disclaimer clauses in order to preserve the right of the consumer to goods or services that match his expectations is by the use of the doctrine of what is called "fundamental breach" or "breach of a fundamental term". If there is such a breach most disclaimer clauses are found to be inoperative. The rationale here is that the party who is seeking to rely on the clause, usually the seller, has failed in his obligation to supply goods or services so badly that it can be said that he has failed to begin to live up to his contractual obligations and so has breached the contract's most basic or fundamental obligation.

Example

Mr. Lightburn purchased a new Cortina car, 1968 model, 2-door sedan, white in colour. The buyer had seen the car advertised on radio, in neewspapers and on signboards. He wanted it for travel within the city and for some long trips. The seller said that the car would be satisfactory both for economy and reliability. The coürt föund that there was an implied condition of reasonable fitness for purpose. But there was a disclaimer that said:

> The vendor hereby warrants to the Purchaser (except as herein provided) each part of each new product marketed by Ford Motor CCompany of Canada, Limited and sold by the Vendor to the Purchaser to be free under normal use and service from defects in material and workmanship in accordance with the warranty policy of the Ford Motor Company of Canada, Limited at the time the Buyer purchased the goods. The Vendor makes no warranty whatsoever with respect to tires or tubes. The Vendor's obligation under this warranty is limited to replacing or otherwise making good at the Vendor's location such parts as shall be returned to the Vendor with transportation charges prepaid and as shall be acknowledged by the Vendor to be defective. This warranty shall not apply to any product that has been subject to misuse, negligence or accident, or in which parts are not made or supplied by Ford Motor Company of Canada, Limited are used if, in the sole judgment of the Vendor, such use affects its performance, stability or reliability; nor shall this warranty apply to any product which shall have been altered or repaired outside of the Vendor's place of business in a manner which, in the sole judgment of the Vendor, affects its performance, stability or reliability. This warranty is expressly in lieu of all other conditions and warranties express or implied, and of all other obligations or liabilities on the part of the Vendor except such obligations or liabilities as the Vendor may assume by its Owner Service Policy or other separate written instrument.

The buyer had to return it for repairs 17 times without the seller being able to ascertain or fix the trouble. The court said there was a fundamental breach of the contract because the defects were "so numerous, that,

taken en masse, they destroy the workable character of the thing sold". This disentitles the seller from relying on the disclaimer upon which he could have relied if the defects were considered one at a time. The court found that the disclaimer was "confined to an undertaking to replace defective parts and warrants that each part is free from defects in material and workmanship". This was not wide to allow the seller to get away with a fundamental breach which was a brech of the fundamental term and purpose of the contract to provide a car that worked and gave reliable performance throughout the year. There was rescission of the contract.[1]

1. Lightburn v. Belmont Sales Ltd. (1969), 6 O.L.R. (3d) 692 (B.C.S.C.).

Example

Buyers wanted a large dump truck. They inspected a truck on seller's lot which was said to be a new truck. There was a vibration found on test drive and seller promised to repair it. The contract of sale was signed. It contained a term that said:

"It is expressly agreed that there are no Conditions, no Warranties, either legal or conventional or contractual, including the legal Warranty for latent defects, or Representation, express or implied, statutory or otherwise, made by the Dealer or the Manufacturer, its Officers or Agents, on the Motor Vehicle. Chassis or Part furnished hereunder, nor shall any agreement collateral hereto be binding upon the Dealer unless endorsed herein in writing."

There were many things wrong with it. The truck was sent to a number of places for repair but nothing solved the problem. There were excessive vibrations, the truck shook for a variety of reasons, and was hard to drive and to work.

The court found that the sellers had committed a fundamental breach of contract; they had a new truck that did not operate as a new truck should have operated. For this, the buyers were entitled to terminate the contract. The purported performance of the contract was quite different than that which the contract contemplated.

The court said that fundamentally, the buyers expect to receive and the seller to give a thing that is free of such defects as to make it unsuitable for the performance of its obvious or known purpose and that cannot be corrected readily.[1]

1. Cain v. Bird Chevrolet-Oldsmobile (1976), 12 O.R. (2d) 532, affd. on all but damages assessed, 20 O.R. (2d) 569 (C.A.).

Example

A farm labourer bought a1970 DDodge diesel truck. He had seen an a in a local paper saying "1970 Dodge 80 Tandem, rebuilt, V-8 Cummins Allison 6 speed automatic, P.S., will supply new box and hoist. Priced to sell." He had gone to see the dealer and told him that the truck was for use in banking gravel and asphalt in the country. The dealer said it was a good truck. He said that the motor was a 210 h.p. V-8 Cummins that had gone only 80 miles since it was rebuilt and that it had "lots of power". After the buyer had signed the contract, the seller added "as is" under the caption of "Note - if used truck warranty is as follows" above the signature. The seller said "as is" referred to the "Certificate of Non Compliance" which was a statement of the thing such as tailights and mirrors that did not comply with the Highway Traffic Act. There was a clause on the back of the signed contract saying that the "goods are not warranted by the Vendor as to year, model, mileage or otherwise howsoever unless by authorized written warranty". The buyer's attention was not drawn to the conditions on the back.

A number of things went wrong. There was a ëclunk" in the transmission, the steering was bad, an oilpan leak and a leak in the power steering. The transmission began to leak. The motor finally quit. The buyer knew about the steering and the ëclunkö but these had been explained away by the seller and the buyer had also taken it on himself to do some minor repairs. But things kept going wrong with the truck. When the engine was examined it was found to be not a 210 h.p. as represented, but 185 h.p. There was a fundamental breach of the contract because the essential purpose of the contract, that of providing a truck that worked was not performed. So the disclaimer is avoided and the court rescinded the contract because the truck was not reasonably fir for its purpose.[1] The buyer received damages as well.[1]

1. Neilson v. Maclin Motors Ltd. (1976), 71 O.L.R. (3d) 744 (Alta. S.C. .D.).

## AGAINST WHOM ARE THE RIGHTS OF THE CONSUMER ASSERTED?

As mentioned near the beginning of the section of this work on Sales Law, rights of the comsumer are to be exercised against the other party to the contract, who in a contract of sale is usually the seller. This arises basically from the idea that a contract is a bargain between two parties and rights are asserted only by one party against another. Other persons who may have an interest in the contract are left out. Hence only the buyer under a contract of sale can sue the seller to enforce a right created by the contract. This is a contract idea called privity.[1]

A buyer who finds out that the goods he was supplied are not reasonably fit for the purpose for which they were bought sues the seller and not the manufacturer that made the thing.

However, courts have found a scheme to get around this problem in some cases. And the legislatures are also making inroads on the doctrine. By these means, the consumer can assert his rights against other than the seller.

1. See Tweddle v. Atkinson, [1861-73] All E.R. Rep. 369; Dunlop Pneumatic Tyre Co. v. Selfridge, [1915] A.C. 847 (H.C.).

If the manufacturer "guaranteesË his product, gives a "warranty" or makes a similar representation to consumers before the contract or at the time of the contract, courts often force it to live up to these statements or promises by a device called a "collateral contractö or "collateral warranty". The manufacturer might include it in a brochure, in a television advertising campaign or otherwise. It is characterized by the court finding that the manufacturer has said to a potential customer than in return for the purchase of his product, he "guarantees", "warrantsä or otherwise stipulates that what he has said is true.[1]

1. Shanklin Pie, Ltd. v. Detel Products, Ltd., [1951] 2 All E.R. 471 (K.B.D).

Example

A representative of a paint company said to the people who owned a pier that its paint would be suitable for painting the pier, that it would be free from corrosion and not subject to other problems paint had on such a surface. The pier owner hired people to paint the pier with that brand of paint. The paint lasted only three months. The court found that the representation that the pain was suitable was pärt of a contract between the paint company and the pier owners despite the fact that the former was not the seller. The actual seller was the company that did the painting. The content of the contract enforceable by the pier owner was the promise by the manufacturing the paint that it would be suitable.[1]

1. Shanklin Pier v. Detel Products, [1951] 2 K.B. 854.

Example

Sperry-Rand published a brochure to advertise their harvesters. Among the many representations made in it was that forage would be fine-chopped to 3/16 of an inch and that the machine would harvest over 45 tons of grain per hour, with ease. After the buyer had bought one it was found that the best it could do was 16 tons per hour. The failure of the machine delayed the harvest and part of the crop was lost entirely. The buyer bought the harvester not from the manufacturer but from a dealer so his remedy under the Sale of Goods Acts were limited to the seller. But the court found that the brochure was a sales tool and that the representations amounted to collateral warranties given by the manufacturer. Damages were awarded for breach of these warranties.[1]

1. MurraY V. Sperry Rand Corporation (1979), 5 B.L.R. 284 (Ont. H.C.).

## SASKATCHEWAN LEGISLATION ALLOWING REDRESS AGAINST THE MANUFACTURER

In Saskatchewan, the outline of consumer rights set out above applies to manufacturers, subject to some differences. A manufacturer for this purpose is a person, whether corporate or individual, who carries on the business of assembling, processing or manufacturing products. This covers persons who put their brand name on consumer products, persons who represent themselves to be a manufacturer, and also, where the consumer products are manufactured outside Canada and the foreign manufacturer has as regular place of business in Canada, includes the persons who import or distribute the products.[2] The manufacturer is basically liable the same way as the seller is.

1. Rights of the Consumer under the Saskatchewan Consumer Products Warranties Act, 1977, s. 5, 1976-77, c. 15, para.

2. Ibid., s. 2(h).

If the manufacturer makes a promise, representation, affirmation or expression of opinion or such action relating to the sale or to the quality, quantity, condition performance or efficancy of a consumer product or if he does this with respect to tis use or maintenance it may be deemed an express warranty. It could be made verbally or in writing and either directly to a consumer or indirectly through advertising by the manufacturer. The consumer has a right to a remedy if this action or representation would have induced a reasonable consumer to buy the product. It makes no difference whether or not the consumer actually relied on the warranty. And no such express warranty can modify or exclude the consumer's rights under statutory warranty.[1] (Not in force, July/1979).

1. The Consumer Products Warranties Act, 1977, s.s. 1976-77, c.15, s.8.

The manufacturer gives almost the same statutory warranties as does the seller. The rights numbered 2 to 9 are enforceable against the manufacturer.[1] but the partial disclaimer that the retail seller could get in used goods does not limit the liability of the manufacturer in the same circumstances.[2] Also, the manufacturer of consumer products is liable only for his own breach of statutory warranties or of his own express or additional written warranties he has given consumers. For example, the manufacturer is not liable for breach of right #2 and #3 above[1] unless it was an interest given someone else by him that leads to a breach of these rights. Also, the manufacturer is not responsible for the description of goods applied by the retail seller without the former's authority or approval. If the manufacturer told the seller of a defect with respect to right #5[1], and he could reasonably expect that the consumer should get notice by way of the retail seller, then there is no right against the manufacturer because of this defect. The manufacturer is really responsible only for the reasonable fitness for the consumer's purpose if that purpose is the one for which the product is normally bought. If the product is being sold for an unusual purpose, the manufacturer is not liable unless he consented to the sale for the unusual purpose.[3]

1. The Consumer Products Warranties Act, 1977, S.S. 1976-77, c. 15, s. 13 as above para .

2. Ibid., s. 6(2).

3. Ibid., s. 13.

The consumer may also have rights under additional written warranties given by the manufacturer. Basically the same provisions apply as with retail sellers.[1]

1. See above, para.

The same remedies apply as in the case of a breach of warranty by the retail seller.[1]

1. See above, para.

Because the proof of the manufacturer's fault in the case of a defective product is so difficult, there is special provisions here to allow the consumer to assert his case against his larger and somewhat impenetrable adversary. Where a consumer or someone who has gained ownership of the consumer product through him brings an action against a manufacturer for breach of his right to have goods of acceptable quality or goods that are reasonably fit for a particular purpose, he need only prove its poor quality, malfunctioning or breakdown and the court may presume that there was such a breach. This is the situation where the consumer or person gaining ownership through him cannot prove the exact cause of the problem and where the facts lead reasonably to the conclusion that the manufacturer breached either of these consumer rights. But the manufacturer can show that the problem was due to a cause for which he cannot be blamed or tht the goods were of acceptable quality or reasonably fit for their purpose where they left his control.[1]

1. The Consumer Products Warranties Act, 1977, S.S. 1976-77, c. 15, s. 15.

A consumer must assert his rights within two years from the time the breach of warranty is first discovered.[1]

Again, the provisions for express and addditional written warranties have not come into force.

1. The Consumer Products Warranties Act, 1977, S.S. 1976-77, c. 15, s. 30.

## NEW BRUNSWICK

The same rights a consumer has against a seller can be asserted against a manufacturer or distributor or anyone else in the chain of sale from production to sale to consumer. Anyone who suffered loss because of the defective product has a right to a remedy for that loss.[1]

1. Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, c. 23, s. 1, "seller".

## NOTE ON DAMAGES

As explained earlier, damages represent a monetary compensation for loss that results from a breach of a warranty that confers a right on the consumer to sue for compensation. This applies whether the first remedy was for breach of warranty or for a breach of condition that had to be treated as a breach of warranty because of the acceptance rules discussed earlier. The consumer can either pay the seller for what he has bought less the value of damage or he can pay the seller the full amount owing as the price and sue for damages later.[1]

The amount of monetary compensation that the consumer will get for the breach of warranty is the approximate value of the loss that directly and naturally results in ordinary circumstances from the breach.

1. SGA, Alta., s. 53; B.C., s. 57; Man., s. 54; N.B., s. 50; Nfld., s. 54; N.S., s. 53; Ont., s. 51; P.E.I., s. 53; Sask. s. 52; N.W.T., s. 51; Yukon, s. 51.