CONSUMER PROTECTION IN NEW BRUNSWICK*

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Any society concerned with legal aid must also concern itself with consumer protection. By a consumer I mean a person buying property or contracting for services primarily for personal, family, or household purposes.[1] There are many reasons why consumer protection is necessary.[2] They include:

First, the great disparity in the resources of consumers and the business firms they deal with. Compared with the average dealer, the consumer lacks both knowledge and bargaining power. Standard form contracts, carefully prepared by the solicitors of the large firm, are practically unintelligible to the average consumer. In many cases he enters into contracts without a full understanding of what is involved. But his problems do not end here. Even if he could understand all the terms of the contracts he makes, he could not change many terms because he lacks bargaining power. Where these factors are present, the freedom of contract principle of the common law begins to take on an air of unreality. The contract changes from an instrument of "unofficial *self*-government" to "the exercise of unofficial government of some by others, via private law".[3]

A second reason for consumer protection is the failure of many businessmen to avoid the temptation of taking advantage of the consumer.

Thirdly, there is considerable evidence that our legal system has failed in many cases to further or protect the interests of the consumer. Although our courts have not been blind to the plight of the consumer, it is abundantly clear that in many areas the progress has been slow and uncertain. Indeed, many areas of the law can now be remedied only by legislation.

The reasons for consumer protection also show the problems involved in achieving protection. We must take steps to ensure that consumers are aware of their rights and liabilities. We must

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1 See Uniform Commercial Code § 9 - 109(1).

2 See Ziegel, *Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint* (1968), 68 Colum. L. Rev. 488.

3 Llewellyn, *What Price Contract? — An Essay in Perspective* (1931), 40 Yale L. J. 704, at p. 731.

take steps to regulate and give certain consumer rights. But we must also take steps to devise effective methods of enforcing those rights, for some methods of enforcing rights are inefficient, even ineffective, because of their costs or administrative infeasibility. Finally, we should re-examine our existing system of *creditors'* rights to see whether it is as efficient and effective as it could be in ensuring that creditors are paid their just debts but at the same time preventing undue hardship or inconvenience to either party.

Obviously, these are difficult problems. But in Canada we have a further problem, resulting from the split of legislative authority between the provincial and federal governments. Under The British North America Act,[4] the provinces have jurisdiction over property and civil rights, but the federal government has jurisdiction over negotiable instruments, interest, banking, bankruptcy and insolvency, and criminal law. In many areas it is not clear who has jurisdiction and, even in those areas where it is clear, effective consumer protection is possible only if there is a high degree of cooperation between the federal and provincial governments.

My plan tonight is to discuss some aspects of the law relating to the sale of goods and their financing, to point out some particular problems in that law as it relates to consumer transactions, and to indicate some of the reform movements in our own and other jurisdictions.

First, the law relating to the sale of goods.

Sale of Goods

It is now more than three-quarters of a century since the Sale of Goods Act was drafted. And although many conditions in our society have changed, the Sale of Goods Act remains unaltered. Furthermore, the Act was mainly a codification of the common law, and at that stage in our legal history most of the cases coming before the courts concerned disputes between businessmen. It is not surprising that the draftsman did not address himself to many of the problems consumers face today. That task has been left to later legislators and judges.

Misrepresentations

One problem of particular concern is misrepresentation by the seller. What rights, if any, does the buyer have against the seller for misrepresentations?

The legal effect of a representation depends on whether it has been incorporated as a term of the contract. If the repre-

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[4] (1867), 30 & 31 Vict., c. 3 (Imp.).

sentation is a term of the contract and turns out to be false, the buyer can get damages and may, if it constitutes a condition, rescind. If the representation is not incorporated in the contract, the buyer's rights are much more limited. In fact, many representations have no legal effect. For example, the law allows a certain amount of puffing. In order for a representation to have legal effect, it must be a representation of a material fact that induced the other party to enter into a contract. If such a representation is made and turns out to be false, the buyer may have a remedy. The type of remedy depends on whether the representation was made innocently or fraudulently.

The common law does not give damages for innocent misrepresentations, but does give damages in tort for deceit for fraudulent misrepresentations. The test for whether a representation is innocent or fraudulent is whether the maker of the representation believed in its truth. A buyer cannot get damages for negligent misrepresentations because, although negligent, they are still innocent misrepresentations under the above test. There has been a recent development in tort law extending liability for negligent misrepresentations,[5] but it is still very unclear whether this will be carried over to the sale of goods context.

The only other remedy available for misrepresentations, which although not terms of the contract are such that they may have legal effect, is that of rescission. Rescission is the only remedy available for innocent misrepresentations. In the case of fraudulent misrepresentations, rescission is an alternative or additional remedy. But this remedy will not be available if the buyer has affirmed the contract or *restitutio in integrum* is impossible (although the court can make some allowance for deterioration). Furthermore, rescission for innocent misrepresentation will not be granted if the buyer has lost his right to reject the goods for breach of a condition under the Sale of Goods Act. Not the least of the buyer's problems is the fact that it is still an open question whether rescission for innocent misrepresentation is available after the contract has been performed.

In 1967 the British Parliament enacted legislation to improve the buyer's position. The Misrepresentation Act, 1967,[6] allows a buyer to recover damages against his seller for negligent misrepresentations even though they do not form part of the contract. The Act also regulates disclaimer clauses purporting

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[5] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465 (H.L.).

[6] 15 & 16 Eliz. II, c. 7 (Imp.).

to exclude or restrict liability or remedies for misrepresentations. Furthermore, the Act provides that mere performance is not a bar to rescission and gives the courts discretion in some cases to award damages for innocent misrepresentation in lieu of rescission. In New Brunswick, of course, we do not have such legislation.

Obviously, the common law rules relating to misrepresentations have not deterred irresponsible sellers from engaging in misleading advertising to the general public. There are, of course, many reasons for this — the difficulty of proving an advertisement to be a term of the contract, the difficulty indeed of proving that the misrepresentation is one for which the law will give any remedy, the difficulty in obtaining what remedies are available, and the expense and inconvenience to the individual consumer in obtaining those remedies compared with the benefits he can derive therefrom. Fortunately, not all sellers make misrepresentations.

Misleading Advertising

To provide better checks against those sellers who make misrepresentations, the federal government has enacted legislation dealing with misleading advertising. Sections 33C and 33D of the Combines Investigation Act[7] are two very important provisions. Section 33C(1) deals with misleading price advertising. It provides:

> Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.

It will be noted that this provision catches misrepresentations as to ordinary price no matter how made. It would catch a shelf display in a store as well as a newspaper, radio, or television advertisement.

It is clear that the federal government now intends to enforce this section as a number of prosecutions have been launched under it. The latest reported case, *R.* v. *Thomas Sales Agencies (1963) Ltd.*,[8] is typical. The accused was charged under section 33C for labelling bottles of Breck Shampoo with the words "$3.00 Value, Special Price $1.99". In fact, the articles in question never sold for the price of $3.00, but always for the price of $1.99 or less. The accused was convicted on two grounds: first, it was a materially misleading representation to say "Special Price $1.99"

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[7] R.S.C. 1952, c. 314, as am. S.C. 1960, c. 45, s. 13, S.C. 1968-69, c. 38, s. 116.

[8] (1969), 6 D.L.R. (3d) 208 (Ont., Co. Ct.).

when this was the regular price and, second, it was a materially misleading representation to say "$3.00 Value" when the market price of the article over a four or five year period was established at $1.99. The court held that the word "value" must be given its ordinary meaning, *i.e.*, exchangeable value or market price.

One important question is whether it is a valid defence if the person making the misrepresentation was mistaken about the ordinary selling price. Must it be proved that the accused *knew* his statement was false? A number of lower courts in Ontario have answered this question in the negative. *R.* v. *Allied Towers Merchants Ltd.*[9] is the leading case. It held that the offence under section 33C(1) is one of strict liability and does not require *mens rea*. Jessup J. said that the person making the representation should bear the risk of making a false statement; the public should be protected irrespective of his subjective guilt or innocence. In reaching his decision, he relied on section 33C(2), which exempts from section 33C(1) "a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business". If *mens rea* were required under section 33C(1), then section 33C(2) would be unnecessary. This decision has been followed in later cases.[10] So far the courts are giving a liberal interpretation to section 33C.

The Combines Investigation Act has another important section dealing with misleading advertising, section 33D, subsection (1) of which provides:

> Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published
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> (a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or
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> (b) to promote a business or commercial interest.

Section 33D(3) has a saving provision exempting the same persons who are exempted under section 33C of the Act.

Up until 1969, this section appeared in the Criminal Code. It was shifted from the Criminal Code to the Combines Investigation Act for administrative reasons. Under the Criminal Code this section was left to the provinces to enforce, and in fact there

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9 [1965] 2 O.R. 628 (Ont. High Ct.).

10 *R.* v. *Allied Towers Merchants Ltd.*, [1968] 2 O.R. 346 (Ont., Mag. Ct.); *R.* v. *Thomas Sales Agencies (1963) Ltd.* (1969), 6 D.L.R. (3d) 208 (Ont., Co. Ct.).

was no real enforcement. Responsibility for enforcement now lies with the Department of Consumer and Corporate Affairs and the Minister, Hon. Ronald Basford, has served notice that his Department intends to adopt a rigorous enforcement program. In fact, he has announced the following as examples of advertising to be studied with enforcement in mind:

1. A misleading statement of fact in an advertisement.
2. The deceptive use of contests.
3. "Free" offers that are not in fact free.
4. "Bait - and - Switch" operations where the item used as bait is not in fact held for sale by the advertiser. This is the practice of advertising an article at an exceptionally low price with the intention, not of selling that article but of switching customers to other goods.
5. Contests purporting to award prizes where such prizes are not in fact available.
6. The "stuffed flat".
   Example: An advertiser using the classified section purports to be selling his household furniture whereas in fact he is selling goods supplied from other sources.
7. "Clip and paste" solicitations.
   Example: This is a direct-mail device in which typically the customer is invited to verify a listing in a directory but which when signed and returned amounts to an order for which he may be invoiced.
8. Misrepresentation as to origin.
   Example: A manufacturer encloses a foreign made article in a display package marked "made in Canada".[11]

I might also add the Minister's announcement that his Department will draft new legislation if the present provisions are found inadequate to protect the consumer from misleading advertising.[12]

The only reported case on the new section 33D is *R.* v. *Jack Anthony*,[13] decided by an Ontario Provincial Court in September, 1969. The accused was charged with the unlawful promotion on television of a product supposed to be a jet ignition unit with transistors by making the following statement: "Engineered to give better gas mileage, easier starting and better performance". The charge was laid under section 33D (1) and (2). Section 33D (2) provides:

> Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy

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11 Canadian Sales and Credit Law Guide Reports (CCH Canadian Limited, Number 23, August 29, 1969).

12 5 *View From Ottawa* 213 (CCH Canadian Limited, Number 31, August 5, 1969).

13 Reported so far only in 1 Canadian Sales and Credit Law Guide 5077 (Ont., Prov. Ct.).

> or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction.

The accused pleaded guilty to the charge and the court issued an order prohibiting him from continuing or repeating the offence or engaging in any other misleading advertising relating to his products.

Most provinces now have legislation dealing with misleading advertising also, but in many provinces the legislation is restricted to advertisements relating to credit. New Brunswick's legislation, for example, is restricted to misleading credit advertisements.[14] However, some provinces have more general legislation. Ontario gives the Registrar under its Consumer Protection Act power to issue a cease and desist order against a person engaging in any misleading advertising.[15]

Besides these general provisions, there is other legislation dealing specifically with packaging, labelling, etc., of such things as food, drugs, cosmetics, medical devices, and so on.

Direct Sales Legislation[16]

Another field in which provincial governments have been active is that of direct selling. The door-to-door seller has been with us for many years. He provides personalized service in the comfort of the home. Unfortunately, many door-to-door sellers have been unscrupulous and have taken advantage of consumers. The direct sales legislation is an attempt to prevent some abuses. The abuses I refer to are the increased opportunities for fraud and deception, the apparent impulse or compulsion purchases, and the fly-by-night operator who is here today and gone tomorrow.

Many of these abuses are not restricted to the direct sale situation. Fraud and deception are not the exclusive preserve of the door-to-door seller. The problem is one of degree. But there is one major check on the established business and that is the knowledge that if it wants to attract and retain the patronage of the consumer it cannot continually cheat him. Many door-to-door sellers, on the other hand, are interested only in one transaction. They are not interested in the consumer's future patronage.

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[14] See text, *infra*, accompanying notes 80-81.

[15] The Consumer Protection Act, 1966, S.O. 1966, c. 23, s. 31, as am. S.O. 1968-69, c. 14, s. 3.

[16] See generally Cuming, *Consumer Protection — The Itinerant Seller* (1967), 32 Sask. L. Rev. 113.

Again, impulse buying is not restricted to the door-to-door sale situation. But again this is a matter of degree. A hard sell campaign, with the sales talk memorized word for word, appears to be very successful with many consumers, especially the housewife. Indeed, many campaigns take on the appearance of compulsion — it is not uncommon to discover the main reason for making a purchase was to get rid of the salesman. And, of course, many misrepresentations are made.

Another important problem with direct sale transactions is that the consumer may have difficulty in enforcing his rights against the seller. First, he must find the seller, who may be outside the jurisdiction. Secondly, if and when the seller is found, it often turns out that he is judgment proof.

Most provinces now have legislation covering direct sale transactions and, happily, New Brunswick is one of them. Our Direct Sellers Act[17] employs three principal devices to curb abuses: (1) licensing requirements, (2) bonding requirements, and (3) "cooling-off" periods.

The Act applies to the direct sale of goods or services. Direct selling is defined as the "house to house selling, offering for sale or soliciting orders for the sale of goods or services".[18] Some direct sale transactions are exempted because protection was thought to be either unnecessary or impractical.[19] Thus the Act excludes direct sale contracts solicited, negotiated, or concluded at the direct seller's normal business premises, direct sale contracts made without any dealings in person between the purchaser and the direct seller (*e.g.*, goods ordered through mail houses), and direct sale contracts in which the goods or services are bought for business purposes. Direct sale contracts exempted because of practical reasons are those in which the goods to be delivered consist only of food or food products in a perishable state at the time of delivery and goods or services with a value of $25 or less.

The Act imposes licensing requirements on all direct sellers who have not resided in the Province for at least one year.[20] Those direct sellers who have lived in the Province for at least one year are exempt from the licensing requirements. The licensing provisions, then, are clearly directed at outsiders.

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17 Direct Sellers Act, S.N.B. 1967, c. 8, proclaimed effective June 1, 1968, as am. S.N.B. 1968 (1st Session), c. 25, S.N.B. 1969, c. 29.

18 *Ibid.*, s. 1(b).

19 *Ibid.*, s. 3(2).

20 *Ibid.*, s. 4(1).

The licensing requirements can be, of course, a very effective administrative control device because a direct seller cannot carry on his business unless he has a license. The Director of the Consumer Bureau, who administers the Act, has fairly wide discretionary powers over the granting and revocation of licenses. For example, he can suspend or cancel a license if the licensee violates any provision of the Act, or is guilty of misrepresentation or fraud in his business, or has, in the opinion of the Director, demonstrated an incompetency or untrustworthiness to carry on a direct selling business.[21] Because the Director has such wide powers, the legislation provides the licensee with the right to appeal to a County Court Judge.[22]

Another protection device employed by the Act is a bonding requirement.[23] The bond provisions apply to all direct sellers. The purpose of the bonding requirement is to ensure that purchasers having valid claims against direct sellers will receive satisfaction of their claims. In other words, it is an attempt to strengthen consumer remedies. The proceeds from a bond can be used to pay off unsatisfied claims. Although the Act provides that every direct seller must provide a bond in the amount and form prescribed by regulation, the regulations require bonds only from direct sellers applying "for registration as a vendor".[24] The bond is to be $5,000 where five or less salesmen are employed and $10,000 where over five salesmen are employed.

Unfortunately, there is considerable confusion over the application of both the licensing and bonding requirements. They apply to direct sellers, of course, but the problem arises over who is a direct seller. In the absence of statutory definitions, one would think that the term would embrace both the owner of the goods being sold, *i.e.*, the principal, and his salesmen. If this were so then all of them would have to be both licensed and bonded. The problem arises over the fact that the Act does define a number of terms, including a direct seller, a salesman, and a vendor.[25] The result of the various definitions appears to be that a direct seller is one who actually does the door-to-door selling. Thus, under the definitions, all salesmen would be direct

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21 *Ibid.*, s. 13(1).

22 *Ibid.*, s. 16.

23 *Ibid.*, s. 15, as am. S.N.B. 1969, c. 29, s. 1.

24 (N.B.) Reg. 68-42, s. 9, as am. (N.B.) Reg. 68-73, s. 1.

25 Direct Sellers Act, S.N.B. 1967, c. 8, ss. 1(c), (f), (h), as am. S.N.B. 1968 (1st Session), c. 25, s. 1.

sellers but not all owners. The only owners who would be direct sellers are the owners who actually door-to-door sell in person. If this is right, then owners who do not personally direct sell could argue that they are not subject to the licensing and bonding requirements of the Act because these are imposed only on direct sellers. This could hardly be the intention of the draftsman, because throughout the Act and regulations appear references to vendor and salesman licenses and vendor bonds. Nevertheless, the provisions imposing the licensing and bonding requirements apply only to direct sellers.

The third protection device employed by the Act is found in the cooling-off provisions.[26] The purpose of the cooling-off provisions is to give the consumer a chance to consider the advisability of his purchase free from the influence of the direct seller. Generally, the Act has a five day cooling-off period, but there are some cases in which the cooling-off period is one year. If the purchaser decides that he wants to get out of the transaction, he can do so by notifying the seller and giving back the goods in return for any money he has paid. The Act provides for adjustments where the buyer has had the advantage of partial consumption of goods or services.

The cooling-off provisions were opposed by many direct sellers on the grounds that they would introduce too much uncertainty in commercial transactions and result in additional costs in cases where the goods were returned. These arguments have some merit, but the policy decision to protect the consumer from rash purchases simply outweighs them. Furthermore, it is interesting to note that many large mail order houses *voluntarily* take back or exchange goods when they are returned within a reasonable time.

Again, however, the Act and regulations are far from perfect. One of the keystones of such a provision is that the buyer must know his rights and be able to exercise them in as simple a manner as possible. The Act draws a distinction between written and verbal direct sale contracts. If the contract is in writing, section 9 of the Act requires the direct seller to give the buyer a true copy of the contract immediately upon its execution. The copy is to include a display of the purchaser's rights under the Act in accordance with the regulations and an address for service of the salesman and vendor. On the other hand, if the contract is a verbal

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[26] *Ibid.*, s. 17. But s. 24 exempts the sale of certain goods and services from the cooling-off provisions.

direct sale contract, the direct seller has to provide only a written statement setting out an address for service.[27]

Under the regulations, however, which purport to apply to *all* direct sale contracts, every direct sale contract is to have displayed on its face the purchaser's rights under the cooling-off provisions of the Act.[28] The draftsman of the regulations appears to have overlooked the distinction in the Act between written and verbal direct sale contracts, and insofar as the regulations purport to impose these requirements on verbal direct sale contracts they appear to be invalid. This is unfortunate because it means that in *verbal* direct sale contracts the purchaser has less opportunity to discover his rights under the cooling-off provisions. Some comfort may be taken, I suppose, in the fact that probably the higher cost purchases will be in writing because the sale will be on credit. Nevertheless, it does seem rather strange that the purchaser should not be told his rights under verbal direct sale contracts just as he is under written direct sale contracts.

Assuming the purchaser is aware of his right to rescind and decides to exercise it, he must notify the seller in writing of his election. It would probably be preferable if, in addition to the present requirements, the direct seller were required to give the purchaser a self-addressed envelope at the time of the sale containing a form of rescission and a notification of the purchaser's rights.[29] This would give consumers a better opportunity to discover their rights and at the same time would not result in undue expense or inconvenience to direct sellers.

In addition to the licensing and bonding requirements, the Act imposes fines for violations. For a first offence the fine is between $25 and $100, and for subsequent offences the fine is between $50 and $200.[30] There have been no prosecutions to date.

The Direct Sellers Act is certainly a step in the right direction, but it seems to me that it can be improved. I do hope that amendments will be forthcoming to clarify, correct, and adapt it. No doubt the Director will have a better idea of what should be done after seeing how the Act is working out in practice.

Implied Terms Under the Sale of Goods Act

Returning to the Sale of Goods Act[31] and assuming a valid contract of sale has been concluded, some important terms re-

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27 *Ibid.*, s. 10.
28 (N.B.) Reg. 68-73, s. 2.
29 *Cf.* Cuming, *Consumer Protection — The Itinerant Seller* (1967), 32 Sask. L. Rev. 113, at p. 125.
30 Direct Sellers Act, S.N.B. 1967, c. 8, s. 26.
31 R.S.N.B. 1952, c. 199.

lating to the goods are implied by the Sale of Goods Act unless the parties have contracted out of them. These implied terms apply even though there are express terms relating to the goods, unless the express terms are inconsistent with the implied terms. What are these implied terms?

The first important implied term relates to title, quiet possession, and encumbrances. There is an implied condition that the seller has a right to sell or will have the right to sell when property is to pass.[32]

Another important implied term deals with the sale of goods by description. In sales by description there is an implied condition that the goods correspond with the description.[33]

Furthermore, if the goods are sold by description and the seller deals in goods of that description, there is an implied condition that the goods are of merchantable quality.[34] The one proviso to this is that if the buyer has examined the goods the condition does not cover defects that should have been apparent on the examination.

It is obvious that important consequences follow from whether the sale of goods was by description. Many, if not most, consumer transactions are concerned with specific goods, *i.e.*, goods identified and agreed upon at the time the contract is entered into.[35] Are contracts for the sale of specific goods sales by description? The courts have clearly held that they can be. Lord Wright put it this way:

> It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations.[36]

But what about the sale of goods in a self-service store? Are these sales by description? Should a tomato be subject to a merchantability requirement depending on whether it has the word "tomato" printed on it?

Besides the uncertainty over what a sale by description is, there is also uncertainty over what is meant by the merchant-

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32 *Ibid.*, s. 13.

33 *Ibid.*, s. 14.

34 *Ibid.*, s. 15(b).

35 *Ibid.*, s. 1(1) (n).

36 *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85, at p. 100 (P.C.).

ability requirement. One frequently quoted definition of merchantability is that "the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again".[37] To be merchantable, an article must have both sale value and use value, but only for the general purpose for which the article is used. But how long must the goods be merchantable? A week, a month, a year? Planned obsolescence had not yet been heard of at the time of the drafting of the Sale of Goods Act.

Another important question is whether the merchantability condition attaches to the sale of used goods. This question was raised but not answered by the New Brunswick Court of Appeal in *Godsoe* v. *Beatty*.[38] The plaintiff, an infant, bought a used car from the defendant. The evidence disclosed that before the purchase he examined the used car and drove it a few miles. The written contract referred to the car as a "1953 used Meteor Sedan" and set out its serial number and motor number. Ritchie J.A., speaking for the Court, held that the implied condition of merchantability did not apply. After quoting extensively from Corpus Juris and Corpus Juris Secundum, he said that the car "was not bought on a description furnished to the plaintiff by the defendant".[39] It is not clear whether his view was that the condition of merchantability did not apply only because the goods were not sold by description or whether he was also of the opinion that it did not apply in any event to used goods.

In 1965, the same question came up before the English Court of Appeal in *Bartlett* v. *Sidney Marcus, Ltd.*[40] The Court held that the implied condition of merchantability does apply to the sale of used goods. Lord Denning M.R. said that a used car is merchantable as long as it is "in usable condition, even though not perfect".[41] His test does not take into account such factors as the age of the article, the use to which the article has been put, or the purchase price, but it is clearly better than nothing.[42]

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37 *Bristol Tramways &c., Carriage Co.* v. *Fiat Motors, Ltd.*, [1910] 2 K.B. 831, *per* Farwell L.J., at p. 841 (C.A.).

38 (1958), 19 D.L.R. (2d) 265 (N.B.C.A.).

39 *Ibid.*, at p. 267. But *cf.* text, *supra*, accompanying note 36.

40 [1965] 2 All E.R. 753 (C.A.).

41 *Ibid.*, at p. 755.

42 Ss. 221A and 221B of the Motor Vehicle Act, S.N.B. 1955, c. 13, as am. S.N.B. 1967, c. 54, s. 17, if proclaimed, will require every motor vehicle offered for sale to bear a certificate of roadworthiness.

Another very important implied condition relating to the quality of goods is that of fitness for a particular purpose. Section 15(a) of the Sale of Goods Act states:

> [W]here the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

This condition is important because an article may be merchantable, *i.e.*, fit for the general purpose for which the article is used, but may not be fit for a particular purpose a buyer had in mind. If the buyer can bring himself within section 15(a), he can sue for breach of condition of fitness for that particular purpose.

Because the courts have held that a particular purpose may be in fact the only purpose for which such goods are normally used, the conditions of merchantability and fitness for a particular purpose frequently overlap.[43] This benefits the consumer because the goods don't have to be sold by description in order for the condition of fitness to apply. However, in order to have the advantage of this condition, the buyer must make known to the seller the particular purpose for which the goods are required so as to show that he is relying on the seller's skill or judgment. Again, the courts have been very liberal to the buyer in their interpretation of these requirements. For example, it is assumed that the buyer relies on a retailer to choose suitable goods.[44] And as Lord Wright put it in *Grant* v. *Australian Knitting Mills, Ltd.*:

> [T]here is no need to specify in terms the particular purpose for which the buyer requires the goods, which is none the less the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods.[45]

Furthermore, the courts have interpreted the proviso dealing with sales under a patent or trade name in such a way that it applies only when in ordering the goods under their patent or trade name the buyer is showing the seller that he is not relying on his skill or judgment.[46]

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43 *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85 (P.C.).

44 *Ibid.*, at p. 99.

45 *Ibid.*

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

Still, there can be great difficulties in applying this section. In *Godsoe* v. *Beatty*,[47] the New Brunswick case I mentioned a few minutes ago of the infant purchasing the used car, you will recall that the infant examined the car and drove it for a test run before purchasing it. The Court held that the implied condition of fitness for a particular purpose did not apply because "the plaintiff did not make known to the defendant any particular purpose for which the car was required".[48] But other courts have held that the particular purpose may be the only purpose for which the goods are normally used and that the seller will be taken to know this purpose.[49] Another reason given by the Court in the *Beatty* case was that the plaintiff did not rely on the defendant's skill or judgment.[50] Although section 15(a) can apply notwithstanding an examination of the goods by the buyer, if the examination is taken to indicate a lack of reliance on the seller's skill or judgment the buyer will not be able to bring himself within the section. This raises the question whether the condition of fitness for a particular purpose would apply to the sale of goods in a self-service store. The self-service buyer might also have difficulty with the proviso to section 15(a).

The last implied condition I want to mention arises in sales by sample.[51] In sales by sample there is an implied condition that the bulk correspond with the sample in quality and answer the description, if any, under which the goods were sold. There is also an implied condition of merchantability except for defects that should have been apparent on a reasonable examination of the sample.

Remedies

Turning from the terms of the contract of sale to remedies for their breach, the buyer's remedies depend on whether the term is a condition or warranty. A buyer can rescind the contract only if there has been a breach of condition. He must content himself with damages for breach of warranty. The right to rescind for breach of a condition is usually lost if the buyer has accepted the goods or "the contract is for specific goods the property in which has passed to the buyer".[52] The latter is a great hurdle to many

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47 See text, *supra*, accompanying note 38.

48 (1958), 19 D.L.R. (2d) 265, at p. 267.

49 See, *e.g.*, *Freeman* v. *Consolidated Motors Ltd.* (1968), 69 D.L.R. (2d) 581 (Man. Q.B.).

50 But see *Freeman* v. *Consolidated Motors Ltd.*, *ibid.*

51 Sale of Goods Act, R.S.N.B. 1952, c. 199, s. 16.

52 *Ibid.*, s. 12(4).

consumers because first, as I mentioned earlier, many consumer transactions are for the sale of specific goods, and second, according to section 19 rule 1 of the Act, unless a contrary intention appears, "where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made". Applied literally, this would mean that in many cases the right to reject would arise and be lost at practically the same moment, the making of the contract. Some courts have avoided this problem by ignoring it[53] or by applying rather questionable interpretations,[54] while other courts have given the Act its literal interpretation.[55]

It is submitted that the only satisfactory solution to this problem is to repeal the words "or where the contract is for specific goods the property in which has passed to the buyer" in section 12(4). The Molony Committee on Consumer Protection said:

> . . . on the ordinary consumer sale the consumer is deprived of his right of rejection at the moment when he agrees to buy. If he finds the goods to be defective as soon as he gets home he has no right to return them. If the shopkeeper declines to take them back the purchaser is entitled in law only to sue him for damages. What he wants is to get his money back. We regard this position as deeply unsatisfactory. With elaborate packaging precluding inspection, and the impossibility of testing the operation of appliances in the shop, the consumer is often buying in ignorance. The value of the article usually discourages resort to Court action and a minority of retailers rest secure in this knowledge.[56]

Their recommendation was adopted in the English Misrepresentation Act, 1967.[57] In England, a buyer will lose his right to reject only if he has accepted the goods.[58]

Disclaimer Clauses

So far we have been discussing the buyer's rights and remedies because of misrepresentations or express or implied terms of the contract. But one of the greatest stumbling blocks to consumer protection in the sale of goods area is the widespread use of disclaimer clauses. Under such a clause the seller attempts

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53 *Leaf* v. *International Galleries*, [1950] 2 K.B. 86 (C.A.).

54 *Varley* v. *Whipp*, [1900] 1 Q.B. 513.

55 See *Home Gas Ltd.* v. *Streeter*, [1953] 2 D.L.R. 842 (Sask. C. A.).

56 Final Report of the Committee on Consumer Protection (Cmnd. 1781, 1962), para. 460.

57 (1967), 15 & 16 Eliz. II, c. 7, s. 4(1) (Imp.).

58 Another important improvement made by the Misrepresentation Act, 1967, was to provide that in cases of conflict between the English equivalents to our sections 32 and 33, section 32 will prevail: s. 4(2).

to contract out of or limit obligations that would otherwise be imposed on him. The Sale of Goods Act allows this on the freedom of contract principle.[59] This principle is both desirable and necessary in business transactions, but it can result in unfairness and oppression if blindly applied in consumer transactions, apart altogether from the fact that disclaimer clauses are frequently buried in fine print on the back of the printed contract.

The courts are well aware of this problem and have gone great lengths to get around some of the more obnoxious clauses.[60] They have done this under the guise of the interpretive process. This has resulted in a contest between the draftsman and the judge — both have displayed great ingenuity. The courts, construing such clauses very strictly, have held that the exclusion of warranties does not exclude conditions, that the exclusion of implied terms does not exclude express terms, and so on. The draftsman has countered with something like this:

> This agreement constitutes the entire contract between the parties and there are no representations, warranties, conditions, or collateral agreements, express or implied, statutory or otherwise, except as herein contained.

And, of course, the agreement itself may contain little. This sweeping disclaimer clause appears formidable, but it has not deterred courts from avoiding it, provided they had something to work with and the merits of the case were such as to move them to look for a way out. Thus the courts have held such clauses to be overridden by express oral statements at the time the contract is entered into,[61] or to be inoperative because of misrepresentation of their effect.[62]

Perhaps the greatest avoidance device developed so far by Anglo-Canadian judges is the doctrine of fundamental breach. This doctrine has sparked a continuing controversy over its true nature and legitimacy. It is said to be a rule of construction under which a so-called fundamental obligation falls outside the scope of an apparently all inclusive disclaimer clause.[63] Its application is even more difficult than its analysis. But it has enabled courts to effect practical justice in many cases, although at the

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59 R.S.N.B. 1952, c. 199, s. 52.

60 See Atiyah, The Sale of Goods (3rd ed., London, 1966), c. 13.

61 See, *e.g.*, *Couchman* v. *Hill*, [1947] K.B. 554 (C.A.).

62 See, *e.g.*, *Curtis* v. *Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805 (C.A.).

63 *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361 (H.L.).

expense of certainty. Our courts have preferred the interpretive process to the more radical doctrine of unconscionability under which some disclaimer clauses are struck down as being against public policy.[64] This reliance on the interpretive process alone is regrettable[65] and has inhibited the proper development of the difficult but necessary doctrine of unconscionability.

In fact, there is much to be said for legislative regulation forbidding a dealer from contracting out of certain implied terms in consumer transactions. This has been done in England[66] and in other parts of the Commonwealth.[67] In Canada, Saskatchewan regulates the terms in conditional sale agreements,[68] although why protection should be limited to conditional sale agreements is somewhat of a mystery. Manitoba, in its new Consumer Protection Act of 1969, regulates the contracting out of certain statutory terms in all retail sales.[69] Of course, there are considerable problems and disagreement over what terms should be regulated but, except in cases of used goods and specified defects pointed out to the consumer at the time the contract is entered into, why not consider forbidding the contracting out of sections 13 through 16 of our Sale of Goods Act in consumer transactions?

Finally, there is a whole host of miscellaneous statutes regulating the quality of such things as food, cars, tires, medicine, and so on.

Third Party Recovery for Defective Goods[70]

Another important area of consumer protection is the liability of a seller or manufacturer of defective goods to persons who are not parties to the contract of sale. Because of the privity of contract barrier, a third person who is injured by defective goods can recover only in tort for negligence. We have not

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64 *Henningsen* v. *Bloomfield Motors, Inc.* (1960), 161 A. 2d 69 (N.J. Sup. Ct.).

65 I am not suggesting that the doctrine of fundamental breach is an illegitimate device. It is not. Nor am I suggesting that it was developed as a consumer protection measure. It was not. But what I am suggesting is that courts are now using the doctrine as a consumer protection device.

66 Hire-Purchase Act 1965, 13 & 14 Eliz. II, c. 66, ss. 17, 18 (Imp.).

67 See Ziegel, *New South Wales Hire-Purchase Legislation* (1962), 25 Mod. L. Rev. 687.

68 The Conditional Sales Act, R.S.S. 1965, c. 393, ss. 25, 28.

69 The Consumer Protection Act, S.M. 1969 (2nd Session), c. 4, s. 58.

70 See Linden, *A Century of Tort Law in Canada: Whither Unusual Dangers, Products Liability and Automobile Accident Compensation?* (1967), 45 Can. Bar Rev. 831, at pp. 849-864, 870-874.

adopted the doctrine of strict liability. Some American jurisdictions have, for various reasons. First, there is a certain amount of "deep pocket" feeling, *i.e.,* let the rich guy pay. But that is not all. There is a feeling also that the manufacturer or seller is a better loss bearer because it is much easier for him to spread losses by raising the prices of his products to cover these costs and thereby spreading them to all persons using his products. There is also believed to be a very important deterrence factor. If the persons who produce defective products have the costs of those defective products thrown back on them, presumably they will have some incentive to devise better products so as to reduce the costs.

This is a very oversimplified picture, but it does give some idea of the policies on which some American courts are proceeding. But even courts that have adopted strict liability are still faced with some rather difficult policy decisions. For example, for what losses should there be strict liability? Personal injuries are covered, but what about property damage and what about economic losses? And on whom should the strict liability be imposed? Retailers? Distributors? Manufacturers? All parties in the marketing chain? The American courts will be deciding these issues in this decade.

Consumer Credit

So far I have discussed the sale of goods only and have not considered the sale of goods on credit. But the Canadian consumer credit industry is now a ten billion dollar venture and there is increasing concern over the effects of its growth on both the individual user and the general economy. We are concerned with the cost of credit, the types of security taken, the rights and remedies of the parties on default, the general position of the financing institution, and what to do with the debtor who finds himself hopelessly over his head.

Cost of Credit

Concern over the cost of credit has resulted in two different kinds of legislation: legislation requiring the disclosure of the cost of credit and legislation regulating the cost of credit. Until fairly recently, we relied mainly on free market forces to fix the cost of credit. But the proper working of the free market system depends on two vital factors: (1) competition and (2) consumers who are aware that competition exists and who are able to take advantage of it. The existence of both these factors has been questioned in the consumer credit industry.

Before the enactment of effective disclosure legislation, it was very difficult for a consumer to find out the true cost of

credit because of the amazing variety of methods of calculation employed by different lenders. The object of the recent disclosure legislation, in New Brunswick The Cost of Credit Disclosure Act,[71] is to let the consumer know the actual cost of credit and to enable him to easily compare the cost of credit from one lender as opposed to other lenders.

New Brunswick's Cost of Credit Disclosure Act covers credit extended by both lenders and sellers of goods or services. The Act excludes from its operation[72] credit secured by a mortgage on real property, or given on the sale of goods intended for resale, or given for industrial or business purposes. The Act also excludes credit transactions that amount to less than $50, presumably for practical reasons.

The Act requires the cost of credit to be disclosed in two ways; first, in terms of dollars and cents, and secondly, in terms of an effective annual percentage rate.[73]

The Act is an improvement over prior legislation in two major respects. First, it defines the cost of borrowing[74] and thereby avoids the problems that have arisen under the federal Interest Act.[75] There is now an entire body of law dealing with the distinction between interest and bonus payments, and lenders have been able to get around the disclosure requirements of the Interest Act, at least in part, by stipulating for bonuses or other charges that are not interest in its strict meaning.[76] The Cost of Credit Disclosure Act, however, defines the cost of borrowing so as to focus on the difference between the total sum that the borrower is required to pay and the total sum that he actually receives. Since The Cost of Credit Disclosure Act gives a better disclosure of the true cost of borrowing, it is unfortunate that real estate mortgages are exempted from its provisions.

This is not to say that The Cost of Credit Disclosure Act solves every problem. Far from it. For example, in credit sales one of the things to watch for under the new legislation is whether sellers try to hide part of the credit cost by inflating the so-called "cash price" of the goods. If they do try this and are successful,

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71 S.N.B. 1967, c. 6, proclaimed effective June 1, 1968; (N.B.) Reg. 68-43.

72 The Cost of Credit Disclosure Act, S.N.B. 1967, c. 6, s. 1(f).

73 *Ibid.*, s. 14.

74 *Ibid.*, s. 1(e).

75 R.S.C. 1952, c. 156.

76 See Sinclair, *Interest and Bonus Payments in the Law of Mortgages* (1964), 14 U.N.B.L.J. 35.

the effectiveness of the disclosure provisions will be considerably diminished.

The other major improvement which The Cost of Credit Disclosure Act makes over previous legislation is that it lays down the method of calculating the interest rate, the purpose of which is to come as close as possible to the effective annual rate. The details are found in the regulations.[77] It should be noted, however, that the Act distinguishes between variable and non-variable credit. Variable credit means the various types of open-ended credit such as revolving credit accounts and budget accounts.[78] Since the balance in such accounts may change from month to month, the Act contains special provisions for disclosing the cost of credit under these arrangements.[79]

Besides requiring a lender, before extending credit, to provide the borrower with a written statement disclosing the cost of the credit in terms of dollars and cents and as an effective annual percentage rate, the Act also contains provisions regulating advertising by lenders.[80] For example, the Act provides that a lender shall not advertise his charge for credit unless it includes the full cost of borrowing in dollars and cents and as an effective annual percentage rate. The Act also regulates advertising relating to other terms of the credit transaction. The Director of the Consumer Bureau may order the stoppage of misleading advertisements.[81] Misleading credit advertisements would also fall within section 33D of the Combines Investigation Act.[82]

Every lender must be registered before he can carry on business as a lender,[83] and there are provisions for the suspension or cancellation of a lender's registration.[84] The Minister may require any lender to provide a bond or collateral security as prescribed by regulation.[85] We saw earlier that the Direct Sellers Act imposes licensing and bonding requirements also.[86]

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77 (N.B.) Reg. 68-43, ss. 9, 10.

78 The Cost of Credit Disclosure Act, S.N.B. 1967, c. 6, s. 1(n).

79 *Ibid.*, s. 14(2); (N.B.) Reg. 68-43, s. 10.

80 The Cost of Credit Disclosure Act, S.N.B. 1967, c. 6, s. 17; (N.B.) Reg. 68-43, ss. 12, 13.

81 The Cost of Credit Disclosure Act, S.N.B. 1967, c. 6, s. 13.

82 See text, *supra*, accompanying notes 7-15.

83 The Cost of Credit Disclosure Act, S.N.B. 1967, c. 6, s. 5.

84 *Ibid.*, ss. 7, 8, 9, 10.

85 *Ibid.*, s. 26.

86 See text, *supra*.

The penalties for violating The Cost of Credit Disclosure Act are heavier than those under the Direct Sellers Act. A person who violates The Cost of Credit Disclosure Act is liable on summary conviction to a penalty of not more than $2,000 or to imprisonment for a term of not more than one year, or both. Corporations can be fined up to $25,000.[87] Furthermore, a lender who fails to comply with the disclosure requirements of the Act can recover from the borrower only the amount of the principal plus any portion of the cost of borrowing that was disclosed in accordance with the Act's requirements.[88]

In addition to the recent disclosure legislation, there is also legislation regulating the actual cost of credit. In fact, the legislation regulating the cost of credit predates the recent disclosure legislation. However, one very strange fact about most of the legislation regulating the cost of credit is that it applies only to money-lending transactions and not to credit sales.

The federal Small Loans Act[89] goes back to 1939 and applies to loans up to $1,500. The maximum rates permitted under this Act are 2% per month on the first $300, 1% per month on the next $700, and ½% per month on the next $500.[90] One of the most frequent criticisms of this Act is that it does not apply at all to loans over $1,500. The charge is also made that there is a tendency for lenders to charge the maximum rates allowed by the Act.

The debate over whether actual rate regulation is desirable or possible is likely to continue for some time. The process of setting a fair rate is extremely complicated, because the interest rate must take into account not only the fact that the lender should be compensated for the use of his money but should also take into account the risk factor involved. In many cases, what would appear at first glance to be an exorbitant interest rate merely reflects a high risk factor. And it is precisely this differing risk factor that makes the setting of a uniform rate very difficult. If the rate is set too low, many people will be cut off from the market. And even assuming that some people should be cut off from the market, there remains the difficult problem of drawing that line by legislation. If the rate is set too high, you will catch only the most flagrant abuses and may encourage lenders to increase their interest rates.

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87 The Cost of Credit Disclosure Act, S.N.B. 1967, c. 6, s. 23.

88 *Ibid.*, s. 15.

89 R.S.C. 1952, c. 251, as am. S.C. 1956, c. 46.

90 *Ibid.*, s. 3.

The various provincial Unconscionable Transactions Relief Acts deal with the problem of regulating the cost of borrowing on a case by case basis. It may seem rather odd that the provinces have legislated in this field at all, because under The British North America Act interest is a federal responsibility. And there is that rather imposing provision of the Interest Act,[91] section 2, which states:

> Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount that is agreed upon.

Nevertheless the Supreme Court of Canada has held the provincial Unconscionable Transactions Relief Acts to be valid.[92] Our Act allows a court to re-open a money-lending transaction when it finds that, having regard to the risk involved and to all the other circumstances, the cost of the loan is excessive and the transaction is harsh and unconscionable.[93]

Secured Transactions

Another area of consumer credit causing increasing concern is what happens when a buyer or borrower goes into default on his payments. The rights of a creditor depend on whether his debt is secured or unsecured. A secured creditor has the additional advantage of real remedies.

In Canada, the two most common types of chattel security are the chattel mortgage and the conditional sale, and of these two the latter is more common. Under both chattel mortgages and conditional sales, title is being transferred to or reserved in the creditor or seller for the purpose of security. Notwithstanding this similar purpose, there are important differences depending on which type of security is used. This is because in conditional sale agreements the common law focuses most of its attention on the sale aspects of the transaction and tends to overlook the security aspects of the transaction. The result is a difference in the position of a chattel mortgagor and a conditional buyer.[94]

Thus, in contrast to a chattel mortgagor, a conditional buyer does not have any redemption rights at common law. This re-

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91 R.S.C. 1952, c. 156.

92 *Attorney-General for Ontario* v. *Barfried Enterprises Ltd.*, [1963] S.C.R. 570.

93 Unconscionable Transactions Relief Act, S.N.B. 1964, c. 14, s. 2.

94 See generally Goode and Ziegel, Hire-Purchase and Conditional Sale: A Comparative Survey of Commonwealth and American Law (London, 1965), at pp. 13-15, 136-146.

sulted in hardship in cases where a conditional buyer went into default after having made substantial payments on the purchase price of the article. As far back as 1899, New Brunswick introduced legislation giving a conditional buyer certain rights analogous to those of a chattel mortgagor,[95] but the legislative changes were and are a long way from assimilating the rights of a conditional buyer with those of a chattel mortgagor. In New Brunswick, the form of the transaction is very important in determining the rights and duties of the parties. We have not yet adopted the American approach of looking at the substance of the transaction.[96] Ontario has.[97]

Section 14 of our Conditional Sales Act[98] requires a conditional seller who has exercised his repossession rights to hold the goods for a twenty day period and gives the buyer a redemption right during this twenty day period. In order to redeem, the buyer must tender the costs and expenses of repossession plus either "the amount then due on the contract price" or the balance of the purchase price.

There are at least two problems concerning the buyer's redemption right. First, section 14 does not require the seller to notify the buyer of his redemption right. Why this is not required is somewhat of a puzzle. It is true that if the seller wants to retain a right to sue for a deficiency he must serve a notice on the buyer containing the information required by section 14(4), but no notice is required if the seller does not intend to look to the buyer for a deficiency. The usual case where the seller will not intend to look to the buyer for a deficiency is the case where he does not expect a deficiency. And that is the case where the buyer has made substantial payments on the purchase price of the article so that the balance owing is less than the market value of the article. But surely this was one of the reasons for passing the legislation, to protect the buyer's interest in goods on which he has made substantial payments. It is submitted therefore that the seller should be required to notify the buyer of his rights, especially when it is remembered that the buyer must redeem within twenty days of repossession.

Another problem under section 14 is the effect of an acceleration clause on the buyer's redemption right. Most security

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95 An Act Respecting Conditional Sales of Chattels, S.N.B. 1899, c. 12, s. 6.

96 Uniform Commercial Code — Secured Transactions, Article 9.

97 The Personal Property Security Act, 1967, S.O. 1967, c. 73.

98 R.S.N.B. 1952, c. 34, as am. S.N.B. 1955, c. 32, S.N.B. 1959, c. 35, S.N.B. 1965, c. 13.

agreements contain acceleration clauses under which the creditor can declare the entire debt due on default in payment of any instalment. Does this mean that the buyer must tender the accelerated balance in order to redeem? This depends on the interpretation of the words "the amount then due on the contract price". There are conflicting decisions on similarly worded sections in other jurisdictions. In *Peresluka* v. *General Motors Acceptance Corp. of Canada Ltd.*,[99] Hall J., of the Manitoba Queen's Bench Division, denied effect to an acceleration clause, saying that to hold otherwise would in most cases destroy a buyer's redemption right. But in *Delta Acceptance Corp. Ltd.* v. *Novits*,[100] Colter C.C.J., of the Ontario County Court, gave full effect to an acceleration clause, pointing out that under mortgage law a mortgagor could redeem only by paying the full amount of the mortgage balance.

As a matter of policy, it is difficult to decide what the position *should* be. The seller inserts an acceleration clause for a very good reason. He does not want to be stuck with a debtor who consistently misses payments — the time, trouble, and expense of collecting each instalment from a "deadbeat" are well known. Furthermore, there is in many cases legitimate concern over what will happen to the security. On the other side of the coin, however, is the fact that section 14 of the Conditional Sales Act confers only limited redemption rights and the buyer may end up losing all rights to the goods if he does not redeem within the twenty day period. A mortgagor, on the other hand, can redeem at any time before foreclosure or sale. The ideal solution would be to amend the section and make the rights of the conditional buyer more closely analogous to those of the chattel mortgagor.

Another problem, and one that is common to both conditional sale agreements and chattel mortgages, arises when the creditor exercises a power of sale. From a consumer protection viewpoint, there are two very important complicating factors here. First, we must remember that the sale of second-hand consumer goods will in many cases yield very little. In these cases the debtor suffers a double loss, in that he not only loses the goods but remains liable for a large deficiency. I am aware, of course, that the same thing can happen in a sheriff's sale under a writ of execution. But in secured transactions we have the additional complicating factor that the sale of the property is an extra-judicial proceeding. It is not conducted under the supervision of

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99 (1966), 56 D.L.R. (2d) 717 (Man. Q.B.).

100 (1968), 67 D.L.R. (2d) 208 (Ont., Co. Ct.).

an officer of the court. And while it is true that the secured party must act *bona fide* and use reasonable efforts to obtain a good price for the property being sold, in practice it will be difficult to prove that the secured party did not live up to his obligations.[101] Unless the amount involved is substantial, the consumer is not likely to resort to litigation in the face of such uncertainty.

Solutions to these problems are hard to come by. Saskatchewan limits a conditional seller's rights to repossession of the goods sold and denies all personal remedies against the buyer.[102] But this solution, although it undoubtedly protects consumers, can result in hardship to the seller. Some provinces require a conditional seller to make an election between suing for the purchase price without repossession or repossessing the goods sold and giving up the right to look to the purchaser for any deficiency.[103] Ontario requires a seller to obtain a court order before he can repossess goods on which the buyer has paid two-thirds of the purchase price or more.[104]

Perhaps what we should do is take a new look at creditors' rights law generally and make more attempts to concentrate on a debtor's main asset, his income, through schemes whereby the debtor is given a chance to keep his goods and pay off his debts in instalments free from constant harassment. Our present law relating to garnishment and assignment of wages leaves much to be desired from all viewpoints. Not the least of the problems is the fact that the debtor may end up losing his job because his employer does not want to be bothered with the trouble of deducting the payments from his pay cheque.

Financing Institutions

I will conclude this lecture with a brief reference to some recent developments relating to financing institutions, for it is the financing institutions that make possible our ten billion dollar consumer credit industry.

The consumer who buys goods on credit from his seller and later discovers that the goods are defective has a more effective remedy than the consumer who pays cash or buys them with a loan from a third party, because he can set off his claim for the

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101 *Bay Motors Co. Ltd.* v. *Traders Finance Corp. Ltd.* (1959), 19 D.L.R. (2d) 331 (N.B.C.A.); *J. & W. Investments Ltd.* v. *Black* (1963), 38 D.L.R. (2d) 251 (B.C.C.A.).

102 The Limitation of Civil Rights Act, R.S.S. 1965, c. 103, s. 18.

103 See, *e.g.*, The Conditional Sales Act, 1955, S. Nfld. 1955, No. 62, s. 12, as am. S. Nfld. 1962, No. 67, s. 2.

104 The Consumer Protection Act, 1966, S.O. 1966, c. 23, s. 20.

defective goods in an action against him by the seller for the purchase price.[105] This is a very important practical advantage. The problem, however, is that most dealers do not actually carry credit but rather sell their paper to financing institutions who make every effort possible to insulate themselves from any defences a buyer may have against his seller.[106] Two devices are used in order to get around the rule that an assignee takes subject to the equities.[107]

The first device is to insert in the sale agreement itself a so-called "cut-off" clause. Under such a clause the buyer agrees not to assert against the seller's assignee any defences that the buyer may have against the seller. The second device is to get the buyer to sign a promissory note in favour of the seller which later on will be endorsed to the finance company. The object of this, of course, is to obtain a holder in due course status under the Bills of Exchange Act.[108] Thus, when the dealer sells his paper to the financing institution the intended result is that the financing institution will collect the full purchase price from the buyer completely free from any claims the buyer might have against the seller, relying on the cut-off clause and its holder in due course status. It will also have the benefit of the security.

This set-up was allowed by the Supreme Court of Canada as far back as 1921 when it decided *Killoran* v. *Monticello State Bank*,[109] even though the only thing separating the promissory note from the conditional sale agreement was a perforated line. For forty years the *Killoran* case was followed without question. There was no real concern over the underlying relationship between the dealer and the financing institution. In New Brunswick the leading case is *Aetna Factors Corp. Ltd.* v. *Breau*.[110]

But in 1962, Kelly J.A., of the Ontario Court of Appeal, in *Federal Discount Corp. Ltd.* v. *St. Pierre*[111] denied a holder in due course status to a finance company because of a close connection between it and the dealer. He did not rely on bad

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105 Sale of Goods Act, R.S.N.B. 1952, c. 199, s. 50(1).

106 See generally Ivan R. and Kristine Feltham, *Retail Instalment Sales Financing — Rights of the Assignee-Endorsee — Identification of the Finance Company With the Dealer to Protect the Buyer* (1962), 40 Can. Bar Rev. 461.

107 In many cases sweeping disclaimer clauses, prepared by financing institutions for use by dealers, reduce buyer rights against sellers to a minimum in any event. See text, *supra*.

108 R.S.C. 1952, c. 15, as am. S.C. 1966-67, c. 12, S.C. 1967-68, c. 7.

109 (1921), 61 S.C.R. 528.

110 (1957), 15 D.L.R. (2d) 326 (N.B.C.A.).

111 [1962] O.R. 310; 32 D.L.R. (2d) 86 (Ont. C. A.).

faith but rather on the business relationship between the dealer and financing institution. He said:

> With the growth of the sale of household and personal goods on the extended payment plan, the promissory note, the conditional sales contract and the finance company have become inseparable parts of the procedure whereby the merchant realizes immediately cash from the extended obligation of the purchaser from him. The very existence of the seller's business depends on his ability to convert into cash these obligations and the finance company, standing ready and willing to buy them, has become not only an essential part of retail selling on the time payment plan but is in effect a department of the seller's business, exercising a measure of control over the seller's sales by the requirements laid down with regard to the negotiable paper proposed to be purchased.
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> In the course of this development an attempt has been made to project into the field of household law the law merchant originally designed for dealings between merchants. The fiction has been permitted to flourish that the finance company is a foreign and independent agency. When it does acquire the contracts which it was incorporated to buy and which it arranged to purchase before the contracts actually came into existence it attempts to shield itself behind the protection of the law merchant which can apply only, if at all, to one of the documents constituting the arrangement between the seller and the buyer; at the same time it takes unto itself all the advantages that can be drawn from the transaction out of which the note arose. It is beyond question that the promissory note is included in the documents required to be signed by the purchaser for the express purpose of enabling the finance company to avoid defences which would otherwise be available to the maker against his vendor and any assignee of his purchase obligation.[112]

The reception by other courts of Kelly J.A.'s close connection resulting in a common business venture theory has been mixed, and there is considerable uncertainty over how close the connections between the dealer and the finance company must be in order for the doctrine to apply.[113]

The question of the holder in due course status of a financing institution came before the Supreme Court of Canada again last year in *Range* v. *Belvedere Finance Corp.*[114] Unfortunately, the Court made no mention of Kelly J.A.'s close connection theory, but decided the case on another now somewhat surprising ground.[115] The Court held that where a finance company takes an assignment of both a conditional sale agreement and a promis-

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112 *Ibid.*, at pp. 321-322 (O.R.), 97-98 (D.L.R.).

113 See Crawford, *Consumer Instalment Sales Financing Since Federal Discount Ltd.* v. *St. Pierre* (1969), 19 U. Tor. L. J. 353.

114 (1969), 5 D.L.R. (3d) 257 (Can. Sup. Ct.).

115 *Cf.* Ivan R. and Kristine Feltham, *op. cit. supra*, note 106, at p. 478.

sory note, the conditional sale agreement and promissory note being separated only by a perforated line, the documentation must be read as a whole and, when read as a whole, the promise to pay was not unconditional and therefore neither the document nor any part of the document was a bill of exchange. The finance company could not then claim a holder in due course status. Pigeon J., speaking for the Court, distinguished the earlier Supreme Court decision in the *Killoran* case on the ground that the conditional sale agreement in that case contained a cut-off clause under which it was stipulated that any holder of the note was to be a holder in due course. The lesson for finance companies, of course, is to insert a cut-off clause. Indeed, perhaps all they need do is to use two completely separate pieces of paper.

It has been submitted that the only satisfactory solution is to enact legislation denying a holder in due course status and prohibiting the use of cut-off clauses in consumer transactions.[116] The main reason given for this is that financing institutions are in a much better position than consumers to exercise control over irresponsible dealers. I agree. Furthermore, we have already seen that there is a difference in the way the present law looks at sellers and lenders — for example, the different rules relating to conditional sales, chattel mortgages, and regulation of the cost of credit. It seems to me that financing institutions deliberately set up a transaction so as to get the best and avoid the worst of these two different worlds. By taking an assignment of the seller's rights the finance company gets the best of his world, which usually means that the finance company will have more rights than it would if it were a direct loan transaction. By using cut-off clauses and negotiable instruments the finance company gets the best of the lender's world, in that it does not take subject to the equities between buyer and seller. It seems to me that financing institutions should not be able to have it both ways.

AUTHOR'S NOTE

In the few months gone by since this lecture was delivered Bill C-208 has been introduced in the House of Commons. Bill C-208 would amend the Bills of Exchange Act by substantially eliminating the holder in due course status in consumer credit transactions.

The Bill does not, of course, deal with the other device relied on by financing institutions to insulate themselves from buyer de-

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116 Promissory notes fall within federal jurisdiction, but cut-off clauses fall within provincial jurisdiction. See text, *supra*, accompanying note 4.

fences, the cut-off clause. This is a matter of provincial jurisdiction. Hopefully, New Brunswick will enact legislation to prohibit the use of cut-off clauses in consumer credit transactions.

Legislation denying a holder in due course status and prohibiting cut-off clauses in consumer transactions may encourage financing institutions to rely even more heavily on disclaimer clauses. Disclaimer clauses, of course, prevent rights that assignees would take subject to from arising in the first place. See text, supra.