Consumer Products in New Brunswick—*Fidem Habeat Emptor* Part II: The C.P.W.L.A. Consumer Remedial Regime

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New Brunswick's Consumer Product Warranty and Liability Act incorporates a comprehensive legislative scheme to deal with consumer purchasing. It attempts to give effect to the reasonable expectations of today's buyers and suppliers of consumer products. In this article, the author provides a detailed commentary on the scope and application of the C.P.W.L.A. remedial regime. The N.B. legislation is compared to general sales law and enactments in other jurisdictions, with an important emphasis on the resolution of potential difficulties.

La Loi sur la responsabilité et les garanties relatives aux produits de consommation du Nouveau-Brunswick englobe un plan législatif détaillé ayant affaire au pouvoir d'achat du consommateur. Cette Loi a pour leut de donner effet aux espérances raisonnables des acheteurs et des fournisseurs de biens de consommation d'aujourd'hui. Dans cette étude, l'auteur fournit un commentaire detaillé de la portee et de l'application du régime de redressement de la L.R.G.R.P.C. La législation du Nouveau-Brunswick est comparée à la documentation sur la loi des ventes ainsi qu'aux promulgations des autres jurisdictions, avec une certaine importance accordée à la résolution des problèmes potentiels.

INTRODUCTION

In Part I of this article[1] the new *C.P.W.L.A.* express and implied warranties were discussed in detail. The analysis evidenced an underlying principle which permeated the expanded responsibilities of sellers and suppliers in connection with what is said and written about their products and the reasonable performance expectations generated in relation to quality, fitness and durability. It was suggested that this principle was, perhaps, best captured in the Latin expression *fidem habeat emptor*—let the buyer have confidence. The *C.P.W.L.A.* consumer remedial regime reflects the continued application of the *fidem habeat emptor* principle. Concurrently reflected is an equally pervasive principle best expressed in another Latin expression: *Emptores venditores que ultra modum ne disidant*—let neither buyer nor seller be unduly prejudiced. Thus, while the *C.P.W.L.A.* significantly expands

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[1]Ivankovich, "Consumer Products in New Brunswick—*Fidem Habeat Emptor* Part I: The C.P.W.L.A.—Its Scope and Warranties," (1983) 32 *U.N.B.L.J.* 123. Hereinafter this article will be referred to as Part I.

the consumer's right of rejection, this expansion is counterbalanced to prevent undue prejudice to the seller by adoption of a sixty day rejection limitation period, the seller's right to deduct for use and detioration and to rectify breaches of warranty. These rights are counterbalanced to prevent undue prejudice to the consumer. Thus, the sixty day rejection limitation period is inapplicable to "major" breaches of warranty. The right to deduct for use and detioration is counterpoised by the buyer's lien to recover payments, and the right to rectify is subject to exceptions based both on potential prejudice to the buyer and the buyer's overriding right to reject in the event of non-rectification. It is precisely because of the pervasive influence of the *Emptores venditores que ultra modum ne disidant* principle in this area of the *C.P.W.L.A.* that both buyers and sellers can have confidence in the new consumer remedial regime. This legislative conjunction of *fidem habeat emptor* and *fidem habeat venditor* is especially important when viewed in the context of the seller's limited opportunity under the *C.P.W.L.A.* to exclude or restrict *C.P.W.L.A.* remedies.

The purpose of this article is to provide a detailed commentary on the scope and application of the *C.P.W.L.A.* consumer remedial regime. The same format established in Part I shall be followed, *viz.* (1) to discuss the new *C.P.W.L.A.* remedial concepts against the background of the general sales law, and in comparison with precedent, subsequent reform proposals and enactments in other common law jurisdictions; (2) to provide a detailed analysis of the origin, purpose and scope of and the interrelationship among the various consumer remedial sections in the legislation; and (3) to comment, where appropriate, on areas of potential difficulty in the New Brunswick formulations with particular emphasis on developments in other jurisdictions which might aid in their resolution. A specific discussion of the products liability aspects of the *C.P.W.L.A.* will be deferred and dealt with within the broader context of Canadian products liability law.

I PROBLEMS UNDER THE GENERAL SALES LAW

1. INTRODUCTION

Under the *Sale of Goods Act*[1a] the remedies which may, in appropriate circumstances, be available to an aggrieved buyer are: (1) rejection of the goods,[2] (2) damages for breach of warranty,[3] non-delivery or delayed delivery,[4] and (3) specific performance of the contract.[5] Where the seller's breach of the sales contract amounts to total non-performance, non-delivery by the seller being the most obvious example, the buyer's remedies are uncomplicated. He may rescind the sales contract and, at his option, recover

[1a] R.S.N.B. 1973, c. S-1 as am. Hereinafter the Act may be referred to as the *S.G.A.*

[2]Sections 12(2) and 28 *S.G.A.*

[3]Section 50 *S.G.A.*

[4]Section 48 *S.G.A.*

[5]Section 49 *S.G.A.*

any payments made on account of the purchase price or sue for damages which, where apposite, will include the aforementioned payments. In extraordinary cases the aggrieved buyer may seek the remedy of specific performance if he can establish that damages are not an adequate remedy[6] and that the goods to be delivered are specific or ascertained.[7]

In cases where the seller's breach of the sales contract does not amount to total non-performance the buyer's remedial recourse under the *Sale of Goods Act* is far more complex. In most consumer cases the buyer's first and primary remedy for the seller's breach of contract is to repudiate the contract of sale and reject the goods. This remedy permits the aggrieved buyer to set aside a contract with a seller in whom he may have lost confidence and enables him to purchase new goods in place of defective goods which may need repair. But under the general sales law a buyer seeking this preferred remedy faces formidable problems in relation to: (1) the availability of a right to reject in any given case, (2) the duration of the right to reject, and (3) the buyer's rights and duties after rejection. Nor are problems peculiar to a buyer seeking to reject; a seller seeking to resist rejection faces two equally difficult, if not insurmountable, obstacles: (1) the buyer's right to reject the goods for breach of any condition, even if the breach is insignificant, and (2) the seller's inability in most cases to "cure" his breach.

Before one can fully appreciate the changes, both substantive and procedural, effected by the new *C.P.W.L.A.* remedial regime, it is necessary to refer specifically to these problems confronting buyers and sellers under the general sales law.

2. BUYER'S REMEDIAL PROBLEMS

A. AVAILABILITY OF THE BUYER'S RIGHT TO REJECT

Under the general sales law the availability of the buyer's right to reject goods for breach of the seller's obligations depends primarily on the character of the obligation that has been breached and not on the severity of

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[6]This is most readily accomplished where a chattel is of particular importance and of practically unique value to the plaintiff: see *Lowther* v. *Lowther* (1806), 13 Ves. 95, 33 E.R. 230; *Behnke* v. *Bede Shipping Co.*, [1927] All E.R.Rep. 689 (Eng.K.B.). Similarly, where goods are not capable of being replaced on an "available market" basis: see *Simmons & McBride Ltd.* v. *Kirkpatrick*, [1945] 4 D.L.R. 134 (B.C.S.C.).

[7]*George Eddy Co. Ltd.* v. *Corey*, [1951] 4 D.L.R. 90 (N.B.C.A.). The term "specific goods" is defined in s.1 *S.G.A.* to mean "goods identified and agreed upon at the time a contract of sale is made." The *S.G.A.* contains no definition of the term "ascertained goods" but the phrase has been judicially interpreted as referring to unascertained goods which have become more particularly identifiable after the contract has been made: see, for example, *Re Western Canada Pulpwood Co. Ltd.*, [1930] 1 D.L.R. 652 at 656, per Fullerton J.A. (Man.C.A.). Until recently it was generally thought that s. 49 was the sole source of the buyer's right to an order of specific performance and that the courts were without jurisidction to grant specific performance of a contract for the sale of goods as yet unidentified: see *In Re Wait*, [1927] 1 Ch. 606 (Eng.C.A.). But the recent case of *Sky Petroleum Ltd.* v. *V.I.P. Petroleum Ltd.*, [1974] 1 All E.R. 954 (Chan.Div.), casts doubt on this proposition. In that case Goulding J. held that the general restriction imposed by the equivalent of s. 49 *S.G.A.* was inapplicable where damages clearly would not be an adequate remedy.

the breach. A distinctive feature of the *Sale of Goods Act* is its division of contractual terms into "conditions" and "warranties".[8] The term condition, while not defined by the Act, is explained by reference to its legal effect in section 12(2):

> 12(2) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract.

The important difference, then, between conditions and warranties is that breach of a warranty only entitles the innocent party to recover damages whereas breach of a condition, expressed or implied, entitles the innocent party to rescind the contract and to claim damages or to do either. The question of when an express term of the contract is to be treated under the general law as a condition, and the difficulties inherent in the illusive test of objectively-ascertained intention were discussed in Part I.[9] In addition to express terms, certain conditions may be implied into a contract for the sale of goods by the *Sale of Goods Act*. Thus, for example, the seller's obligations with respect to the merchantability[10] and fitness[11] of his goods, and compliance with their description,[12] are all conditions under the Act with the result that the seller's duties in respect thereof must be strictly complied with by the seller and any breach of these conditions, however insignificant, will *prima facie* entitle the buyer to rescission. This, as has been noted on many occasions,[13] leads to the anomalous result that a buyer who complains of a minor breach of a condition, expressed or implied, will be entitled to reject the goods and rescind the contract if none of the limitations

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[8]The ambiguity of the words "condition" and "warranty" is discussed in Stoljar, "The Contractual Concept of Condition", (1953) 69 *L.Q.R.* 485. "Warranty", for *S.G.A.* purposes, is defined in s. 1(1) as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." The qualification introduced by the "intermediate term" approach in *Cehave* v. *Bremer Handelsgesellschaft m.b.H.*, [1976] Q.B. 44 (Eng. C.A.), is discussed *infra* at footnote 29.

[9]See Part I, *supra*, footnote 1, at pp. 144-148. See also Allan, "The Scope of the Contract," (1967) 41 *Aust. L.J.* 274 at p. 275, wherein the author concludes that it is often as easy for a court to hold that a term was a condition as that it was a warranty: ". . . It may frequently be tempting to conclude that a court has first decided a particular case simply upon its merits and then classified the statement involved in accordance with these merits to reach the desirable result." This lack of precision was particularly disturbing to Professor Williston, the draftsman of the American *Uniform Sales Act*, who concluded that although the classification process enabled the courts to "deal freely with each case as it arises and to find that words were 'intended' as a condition whenever circumstances make it desirable," the loss of predictability from such an approach was too high a price to pay: see Williston, *The Law Governing Sales of Goods at Common Law and under the Uniform Act* (Rev.ed., 1948) Vol. I, s. 183.

[10]Section 15(b) *S.G.A.*

[11]Section 15(a) *S.G.A.*

[12]Section 14 *S.G.A.*

[13]See, for example, *First Report of the Consumer Protection Project: Consumer Guarantees in the Sale or Supply of Goods* (Department of Justice, New Brunswick, 1974) at pp. 113-114. Hereinafter this report may be referred to as the *First Report*. See also the Ontario Law Reform Commission's *Report on Consumer Warranties and Guarantees in the Sale of Goods* (Department of Justice, Toronto, 1972), hereinafter referred to as the *Ontario Warranties Report*, at p. 31, and the O.L.R.C.'s *Report on the Sale of Goods* (Ministry of the Attorney-General, Toronto, 1979), hereinafter referred to as the *Ontario Sale of Goods Report*, at pp. 449-450.

imposed by the Act applies, whereas the buyer who can only establish a breach of warranty will be forced to continue with the contract notwithstanding the severity of the breach.

B. DURATION OF BUYER'S RIGHT TO REJECT

Even if the buyer is initially entitled to reject, he can lose that right in certain circumstances pursuant to section 12(4) of the *Sale of Goods Act*:

> 12(4) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

By virtue of this subsection the buyer in an ordinary consumer sale will lose his right to reject in two major ways: (1) where he has accepted the goods, or (2) where the contract was for the sale of specific goods and the property in these goods has passed to the buyer.

Where the buyer has accepted the goods, the rationale behind denying his right to subsequently reject them would, at first instance, appear to be well-founded on the basis that he has in fact agreed to retain the goods or, at least, has made an election to do so. The difficulty, however, arises from the conflict between the buyer's right, conferred by section 32(1) of the *Sale of Goods Act*, to examine the goods when they are tendered or delivered to him, and his "deemed acceptance" of those goods under the circumstances enumerated in section 33 of the Act, *viz.* (1) when he intimates to the seller that he has accepted them, or (2) when goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller,[13a] or (3) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. There is authority that in the event of a conflict between sections 32 and 33, the latter section will prevail.[14] As a result, the buyer may be placed in an untenable position with respect to his rejection rights when he is deemed to have accepted the goods even though he is unaware that the seller is in breach and even though he has not yet had a reasonable opportunity to discover that breach. The vulnerability of the buyer who indicates his acceptance of the goods to the seller in an ordinary consumer sale was the subject of pointed commentary in the *First Report of the Consumer Protection Project*:

> . . . [Take] the case where the buyer has intimated to the seller that he has accepted the goods. It can be argued that the buyer has voluntarily given up his rejection rights and there is no cause for concern. But whatever may be said as to sales generally, it is submitted that this is an unrealistic argument

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[13a] For a full discussion of the major problems posed by the "inconsistent act" rule, see *Ontario Sale of Goods Report, supra*, footnote 13, at pp.469-470.

[14] *Hardy and Company* v. *Hillerns and Fowler*, [1923] 2 K.B. 490 (Eng.C.A.).

> as far as consumer sales are concerned, for the consumer buyer is unlikely to appreciate fully the legal consequences of saying that he accepts the goods. It is one thing if he sees a defect and afterwards still says that he accepts the goods. But it is a different case entirely if he does not know of the defect and has not had a reasonable opportunity to discover it, but says he accepts the goods because they seem to be in accordance with the contract as far as he can tell.[15]

Similarly, the exigent restriction imposed by the mere lapse of time on the buyer's opportunity to examine latently-defective goods led the Ontario Law Reform Commission to conclude that ". . . the buyer's right to reject is severely circumscribed in time, even though the defect is latent and cannot be ascertained by ordinary examination or testing and does not manifest itself until a considerable time has elapsed after delivery."[16]

It is also important to remember in this context that the remedy of rescission will clearly be lost if *restitutio in integrum* is impossible, ie. if the subject matter of the contract cannot be restored.[17] Courts have, however, exhibited a willingness to make some monetary allowance for deterioration, thereby giving effect in principle to the notion of restitution even though exact restitution *in specie* cannot be made.[18] But the cases do not exhibit any uniformity in this respect.[19]

The second way in which the buyer in an ordinary consumer sale will lose his right to reject occurs where the contract is for the sale of specific goods and the property in these goods has passed to the buyer. This manner of losing rejection rights must be examined in conjunction with section 19 rule 1 of the *Sale of Goods Act* which provides in effect that property in specific goods will generally pass as soon as the contract is made.[20] In England the *Final Report of the Committee on Consumer Protection* made reference to the absurdity of the buyer's position in the ordinary consumer sale in the following terms:

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[15]*Supra*, footnote 13, at pp. 116-117.

[16]*Ontario Sale of Goods Report*, *supra*, footnote 13, at p. 451. However, recent Canadian cases suggest that courts will not easily deprive the buyer of his right to reject even if some time has passed since the initial delivery of the goods. It has been held that keeping and using goods for some time in the hope that they might be repaired by the seller does not constitute acceptance: see *Polar Refrigeration Services Ltd.* v. *Moldenhauer* (1967), 61 D.L.R. (2d) 462 (Sask.Q.B.); *Burroughs Business Machines Ltd.* v. *Feed-Rite Mills* (1973), 42 D.L.R. (3d) 303 (Man.C.A.).

[17]In order to entitle a plaintiff to rescind one of the law's requirements it must be possible for both parties to the contract to be restored to their original positions: see *Thurston* v. *Streilen*, [1951] 4 D.L.R. 724 (Man. K.B.).

[18]See, for example, *Canadian Farm Implement Co. Ltd.* v. *Alberta Foundry & Machine Co. Ltd.*, [1927] 2 D.L.R. 871 (Alta. S.C.) and the authorities cited in Fridman, *Sale of Goods in Canada*, (2nd ed.) at p. 404.

[19]Compare *O'Flaherty* v. *McKinlay*, [1953] 2 D.L.R. 514 (Nfld. S.C.), where the plaintiff was allowed to return an automobile for full return of her purchase price some fourth months and seven thousand miles after sale, and *Oscar Chess, Ltd.* v. *Williams*, [1957] 1 All E.R. 325 (Eng. C.A.), where the depreciation occasioned by seven months use made it "far too late for the buyer to reject the car."

[20]In the case of an unconditional contract for the sale of specific goods in a deliverable state, property passes when the contract is made: see *Kursell* v. *Timber Operators and Contractors Ltd.*, [1927] 1 K.B. 298 (Eng. C.A.).

> . . . 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.[21]

Because the difficulties inherent in the language of sections 12(4) and 33 of the *Sale of Goods Act* have not been eliminated by legislative amendment in any Canadian province,[22] it has fallen upon the courts to preserve the buyer's right to reject goods in appropriate circumstances despite the literal meaning of the *S.G.A.* But, while judicial casuistry has been equal to the task,[23] the resulting collection of highly technical distinctions has done little to elucidate for the aggrieved buyer the precise cricumstances under which he can avail himself of what is often his most effective, if not only remedy.

C. BUYER'S RIGHTS AND DUTIES AFTER REJECTION

Under the general sales law a buyer exercising his right of rejection must promptly[24] notify the seller of his refusal to accept the goods in performance under the contract. Section 34 *S.G.A.* provides that in these circumstances the buyer is not bound to return rejected goods to the seller:

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[21]London, H.M.S.O. 1962, Cmnd. 1781, para. 460. The conceptual difficulties were more succinctly expressed by the New Brunswick Consumer Protection Project in its *First Report, supra*, footnote 13, at p. 114 as follows: "It is difficult to imagine a restriction on rejection rights that is more ridiculous than this one can be."

[22]This has been accomplished in part in the U.K.: see sections 11(1)(c) and 35 of the *Sale of Goods Act, 1979* (U.K.) which incorporate the amendments effected by s. 4 of the *Misrepresentation Act, 1967* (U.K.). These amendments eliminate the relevancy of the passing of property to rejection rights and expressly provide that deemed acceptance is subject to the buyer having a reasonable opportunity to examine the goods to determine their conformity except in those cases where he has indicated to the seller his acceptance of the goods. For commentary, see: Ativah and Treitel, "Misrepresentation Act, 1967", (1967) 30 *Mod. L. Rev.* 369, and Ziegel, "Reform of the Law of Innocent Misrepresentation", (1962) 27 *Sask. L. Rev.* 134.

[23]See, for example, the controversial decision in *Varley* v. *Whipp*, [1900] 1 Q.B. 513 (Q.B.), where it was held that property in specific goods had not passed to the buyer because the contract was not "unconditional" within the meaning of New Brunswick's s. 19 rule 1. In *O'Flaherty* v. *McKinlay, supra*, footnote 19, it was held that the equivalent of New Brunswick's s. 12(4), by its closing words, does not disentitle a buyer to rescission where there is an implied term in the contract providing for rescission for breach of a condition. A similar result obtained in *Polar Refrigeration Services Ltd.* v. *Moldenhauer, supra*, footnote 16. In *Wojakowski* v. *Pembina Dodge Chrysler Ltd.*, [1976] 5 W.W.R. 97 (Man. Q.B.), the court allowed a plaintiff to reject an automobile some time after sale on the basis that only a "conditional" property passed which was not a passing of property for purposes of the equivalent to New Brunswick's s. 12(4). The judicial techniques, of which the foregoing examples are illustrative, have generated a considerable body of academic analysis: see, for example, Gower, "Sale of Goods—Right of Rejection", (1949) 12 *Mod. L. Rev.* 368; Smith, "The Right to Rescind for Breach of Condition in a Sale of Specific Goods Under the Sale of Goods Act, 1893", (1951) 14 *Mod. L. Rev.* 173; Ativah, "Loss of Buyer's Right to Reject in Contracts of Sale", (1965) 81 *L.Q.R.* 487.

[24]Delay, of course, runs the risk of triggering a "deemed acceptance" under the provisions of s. 33 *S.G.A.*

> **34 Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.**

After giving the seller notice of rejection, the buyer is, however, required to place the rejected goods at the seller's disposal.[25] The Act does not provide a specific answer to the question of whether the buyer is permitted to return rejected goods at the seller's expense or, alternatively, store them at the seller's expense pending recaption by the seller.[26]

A further practical difficulty confronts the buyer who has fully or partially paid for rejected goods. He does not possess, either at common law or by virtue of the *S.G.A.*, any lien on the goods for the repayment of the purchase price. Consequently, once he has rejected goods, the buyer can be required to relinquish them to the seller and relegated to pursue independently any claim he may have for money paid or damages.[27]

3. SELLER'S PROBLEMS WITH THE BUYER'S REMEDIES

A. RIGIDITY OF THE A PRIORI CLASSIFICATION

We previously examined, from the buyer's perspective, the difficulties occasioned under the general sales law where the buyer's remedies for breach of the seller's obligations are made to depend primarily on the character of the obligation that has been breached and not on the severity of the breach. But, because the buyer is initially entitled to reject for *any* breach of condition, the seller often finds himself in a most difficult position in relation to the technical-minded buyer who wants to relieve himself of a bargain that he no longer finds desirable.[28] It is not surprising then that the rigid *a priori* classification of all contractual terms in contracts for the sale of goods into conditions and warranties was recently questioned in

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[25]See *Hardy and Company* v. *Hillerns and Fowler*, *supra*, footnote 14, per Bankes L.J. at p. 496. *Cf. Kwei Tek Chao* v. *British Traders & Shippers Ltd.*, [1954] 2 Q.B. 459 at p. 488, per Devline J.

[26]But see *Tower Equipment Rental Ltd* v. *Joint Venture Equipment Sales* (1975), 9 O.R. (2d) 453; 60 D.L.R. (3d) 621 (Ont. H.C.), where the buyer rejected the goods and recovered his purchase price in addition to damages for the money spent by him in moving and storing the goods pending their recaption by the seller. It is interesting in this respect to compare sections 2-602 (2)(d) and 2-604 U.C.C., the former obliging the buyer after rejection to hold the goods with reasonable care at the seller's disposition for sufficient time to permit the seller to remove them, and the latter allowing the buyer at the seller's expense to store goods, return them to the seller or resell them.

[27]*J.L. Lyons and Company, Ltd.* v. *May and Baker, Ltd.*, [1923] 1 K.B. 685 (K.B.).

[28]The Ontario Law Reform Commission recently reiterated its criticism of such arbitrary results: see *Ontario Sale of Goods Report*, *supra*, footnote 13, at p. 146. Admittedly the temptation for a buyer to act to his economic advantage in a fluctuating market will most often arise in non-consumer cases, ie. where goods have been bought for purposes of resale or where the buyer uses the goods in large quantities as part of a manufacturing process. But, on the other hand, a consumer may regret having signed on the dotted line because he has discovered that he can make a better deal elsewhere. In such cases, as noted in Note, (1970) 69 *Mich. L. Rev.* 130 at p. 135, "the fickle consumer may react like the foiled glue speculator and try to escape his contract."

Cehave N.V. v. *Bremer Handelsgesellschaft m.b.H.*[29] Some years earlier Diplock L.J., in *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*, called attention to the impropriety of such a classification under the general law of contract:

> There are, however, many contractual undertakings of a more complex character which cannot be categorized as being "conditions" or "warranties" . . . Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from the prior classification of the undertaking as a "condition" or a "warranty".[30]

In the *Cehave* case the English Court of Appeal applied the *Hong Kong Fir* test to an express term in a contract of sale notwithstanding prior conventional wisdom which suggested that the equivalent of New Brunswick's section 12(2) *S.G.A.* required exclusive reliance on the nature of the term broken and, therefore, precluded taking into account the consequences of breach. Even if the *Cehave* case finds ultimate acceptance in Canada, the applicability of its "intermediate term" approach would appear to be limited to undesignated terms in a contract of sale. In those cases where the parties have expressly stipulated certain terms as conditions or warranties,[31] and in those cases where this has been done by the legislature,[32] the rigidity of the *a priori* classification would still prevail under the general sales law,[33] and provide the technical-minded buyer with a lawful excuse to refuse to perform his contractual obligations. Thus, for example, as in *International Business Machines Co. Ltd.* v. *Shcherban*, the buyer would be entitled under the general sales law, even after *Cehave*, to reject a machine because of a broken glass dial costing only cents to repair:

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[29][1976] Q.B. 44 (Eng.C.A.). The concept of an "intermediate stipulation" adopted by Lord Denning in the *Cehave* case was also applied in *Tradax International S.A.* v. *Goldschmidt S.A.*, [1977] 2 Lloyd's Rep. 604 (Eng. Q.B.). *Cf. Bunge Corp.* v. *Tradax Esport S.A.*, [1980] 1 *Lloyd's Rep.* 294 (Eng. C.A.).

[30][1962] 2 Q.B. 26 at p. 70 (Eng. C.A.). Note that in this case the above test was applied to the terms of a charterparty in *Field* v. *Zuen*, [1963] S.C.R. 632, the Supreme Court of Canada adopted an analytical method similar to that employed by Diplock L.J. In reference to undesignated contractual term in issue Judson J., writing for the court, stated at p. 635: "In deciding whether the remedy is rescission, with all its consequences or damages, the emphasis should be on the seriousness of the defective performance in the particular contract. Nothing in the way of clarity is gained by attaching a label to the clause."

[31]Whether a term is a condition or a warranty generally turns on the construction of the contract and it may be a condition although designated a warranty: see s. 12(3) *S.G.A.* and *Table Stake Construction Ltd.* v. *Jones* (1977), 82 D.L.R. (3d) 113 (Ont. H.C.). Similarly, it may be a warranty although designated a condition: see *Wickman Tool Sales Ltd.* v. *L. Schuler A.G.*, [1972] 1 W.L.R. 840; affirmed [1974] A.C. 235 (H.L.).

[32]All *S.G.A.* implied terms are designated as conditions except the seller's implied obligations with respect to quiet possession and freedom from encumbrances which are designated as warranties: see s. 13 (b) and (c).

[33]Admittedly it would not be inconsistent with the permissive "may" in s. 12(2) *S.G.A.* to hold that breach of an *S.G.A.* condition only gives rise to a right of rejection if the nature and consequences of the breach justify it, although no court has as yet so held.

> . . . [T]he defect in the scale complained of by the defendants was of so trifling a character that one would think that the offer of the plaintiffs to the defendants—that they (the defendants) put in the glass and charge the cost to the plaintiffs—might have been accepted. However, the duty of the plaintiffs was to supply to the defendants at Hafford a scale complete in all its parts, and it was also their duty to replace the broken glass. They did not do so, and I do not see how, in view of the provisions of s.16 [in New Brunswick s.15(b)] of the *Sale of Goods Act*, and the meaning given to the words 'merchantable quality' by the authorities on the point, any other decision can be reached than that the defendants were within their legal rights in refusing to accept the scale.[34] [insertion added]

B. SELLER'S INABILITY TO EFFECT CURE

The seller, confronted by a technical-minded buyer seeking to reject for breach of condition, encounters a further anomaly under the general sales law, *viz.* his inability to "cure" his breach of condition. The chance to cure a defect would provide the seller in many cases with an important opportunity to make good on his contractual undertaking without defeating the reasonable expectations of the buyer. But such a right is not recognized under the general sales law.[35]

The issue of the seller's opportunity to effect cure was again recently before the court in *Friskin* v. *Holiday Chevrolet—Oldsmobile Ltd.*, where counsel for the defendant automotive dealer argued that the conditions of merchantability and fitness implied under the Manitoba *Consumer Protection Act* [which are the same as those implied under the New Brunswick's *S.G.A.*] should be construed in such a way as to give the seller a reasonable opportunity to make the goods sold merchantable or reasonably fit for the purpose intended. This submission prompted Mr. Justice O'Sullivan of the Manitoba Court of Appeal to conclude:

> With respect, I think that counsel for the defendant has misconstrued the conditions. It appears that many dealers in used cars share the same misconception. Once the conditions of the contract have been breached, any question of the vendor's conduct is irrelevant and the vendor cannot abrogate the purchaser's right of rescission.
>
> . . . [O]nce it is established that there has been a breach, the plaintiff has the right to reject the goods. The defendant cannot say he has not had an opportunity to remedy the defects. The warranty is not a warranty to render fit. It is a warranty (or condition) that the goods are, at the time of sale and delivery, merchantable or reasonably fit.
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> . . . [O]nce it is found that there is a breach, the defendant cannot defend on the basis that the goods could be rendered merchantable or fit by repair.[36]

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[34][1925] 1 D.L.R. 864, per Martin J.A. at p. 870 (Sask.C.A.).

[35]For an exhaustive comparison and critique of the Anglo-Canadian and American positions, see *Ontario Sale of Goods Report*, *supra*, footnote 13, at pp. 444-465. It should be noted that the general sales law recognizes a right to cure defective tender in one type of case, *viz.* where the time for delivery has not expired: *Scythes & Co.* v. *Dods Knitting Co.* (1922), 52 O.L.R. 475 (Ont. C.A.).

[36](1977), 72 D.L.R. (3d) 289 at pp. 291-292 (Man.C.A.).

II NEW BRUNSWICK SOLUTION—A NEW REMEDIAL REGIME

1. INTRODUCTION

The *Consumer Product Warranty and Liability Act* dramatically alters the recourse available to consumers for breach of a seller's or supplier's obligations in contracts for the sale or supply of consumer products by the creation of a special consumer remedial regime. The New Brunswick Consumer Protection Project made specific reference to the primacy and difficulty of devising suitable remedies to enforce an expanded set of consumer rights. As stated in the *First Report*: "These remedies must be effective, but they must also be fair in striking a reasonable balance between the conflicting interests of the parties to the contract."[37] In order to assess the relative degree of success the New Brunswick legislation achieves in striking this reasonable balance between buyers and suppliers of consumer products, we shall examine the new remedial regime against the foregoing background of the general sales law. A comparison will be made with the remedial recourse provided consumers in precedent and subsequent reform proposals and legislative enactments in other common law jurisdictions.

2. ABOLITION OF DISTINCTION BETWEEN CONDITIONS AND WARRANTIES

The *First Report of the Consumer Protection Project*, as noted in Part I, recommended creation of a unitary warranty scheme for New Brunswick's consumer protection legislation.[38] As a result, the *Consumer Product Warranty and Liability Act* departed from the basic approach of the *Sale of Goods Act* and created two categories of warranties: (1) "express warranties" designating those obligations undertaken by the seller because of what he says orally, in writing or in advertising about his consumer product,[39] and (2) "implied warranties" designating those statutorily-imposed guarantees of the character and quality of the seller's consumer product.[40] This abrogation of the condition-warranty dichotomy encompassed two important corollaries. Firstly, it negated the rule which entitles the aggrieved buyer to rescission only in cases of breach of condition and otherwise restricts him to damages for breach of warranty. Secondly, it permitted a new legislative approach to deal with the anomalies inherent in the general sales law by virtue of section 12(4) of the *Sale of Goods Act* which, as noted above, makes the aggrieved buyer's right to rescission dependent upon the legal concepts of acceptance and passing of property. The development of a new legislative approach necessitated resolution to important questions

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[37] *Supra*, footnote 13, at p. 107.

[38] *Supra*, footnote 1, at p. 143 ff.

[39] Section 4(1) *C.P.W.L.A.*

[40] Sections 8-12 *C.P.W.L.A.*

concerning the appropriate remedies for breach of the "new-style" warranties, the most important being when a buyer should be entitled to *C.P.W.L.A.* rejection rights and under what circumstances he should lose them.

3. APPLICATION OF THE REMEDIAL REGIME

It is important to recognize that, without more, all *C.P.W.L.A.* warranties apply equally in favour of all buyers.[41] The Act does not differentiate between consumer buyers and business buyers of a consumer product.[42] Unlike the warranties, however, the remedies for breach of warranty will differ according to the type of buyer purchasing the consumer product. Section 13 of the *C.P.W.L.A.* provides as follows:

> 13 Where
>
> (a) there is a contract for the sale or supply of a consumer product and the buyer makes or holds himself out as making the contract in the course of a business; and
>
> (b) there is a contract for services or for labour and materials and a consumer product is supplied along with the services or labour;
>
> the remedies in sections 14 to 22 for breach of a warranty provided by this Act do not apply, but the remedies that would normally be available under the law for breach of the warranty shall be deemed to be remedies provided by this Act.

Thus, the new *C.P.W.L.A.* remedial regime is basically restricted to consumer buyers.[43] A businessman who purchases a consumer product for resale is restricted to the remedies otherwise provided under the general sales law for breach of warranty.[44] The word "warranty" is defined in section 1 of the *C.P.W.L.A.* in its broad promissory sense as "a term of the contract that is a promise," and it therefore encompasses conditions, warranties and intermediate stipulations in the nomenclature of the general sales law. The following example will serve to illustrate. Take the case of an intermediate supplier whose salesman negligently responds to a retailer's question concerning the approximate retail resale price of a particular consumer product. The retailer, relying on that representation, purchases a supply of the consumer product in question from the supplier's salesman. The *C.P.W.L.A.*

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[41]For a full discussion see Part I, *supra*, footnote 1, at pp. 135-139.

[42]Business buyers, however, who purchase a consumer product in the course of a business may expressly exclude or restrict any of the *C.P.W.L.A.* warranties: s. 26.

[43]The *C.P.W.L.A.* in its entirety is inapplicable to private sales: s. 2(2)(a). The position of a business buyer who purchases a consumer product in his private capacity for his personal use is fully equated with that of a consumer buyer in terms of remedial recourse. So, too, where a businessman purchases a consumer product partly for his own use and partly for use in his business, he does not "purchase in the course of a business" within the meaning of section 13 providing he acquires it "primarily for use for personal, family or household purposes": see s. 1(2).

[44]Note, however, that a businessman who suffers a "consumer loss" (defined in s. 1 to include a loss that a person suffers in a business capacity to the extent that it consists of liability that he incurs for a loss that is not suffered in a business capacity) at the instance of his purchaser retains his right of recourse against prior suppliers: see sections 23 and 26.

would, in the absence of special circumstances, deem the salesman's representation to be a warranty in the contract between the intermediate supplier and the retailer[45] without the need of resorting to the uncertainties of the collateral contract doctrine.[46] The retailer's *C.P.W.L.A.* remedies, however, will be those to which he would otherwise be entitled to under the common law and the *Sale of Goods Act*. Thus, assuming no effective section 26 exclusion or restriction, in determining the retailer's right to reject the goods, the salesman's representation would most likely be subjected to the *a priori* classification process of the *S.G.A.*[47] Even if the representation were classified as a condition, the circumstances would still have to exhibit the absence of any common law or statutory bars to rescission in order for the retailer to succeed in rejecting the consumer products.

4. C.P.W.L.A. REMEDIES

A. INTRODUCTION

In formulating a consumer remedial regime the New Brunswick legislation had to reflect a major policy choice in determining under what circumstances a consumer should be permitted to cancel the contract and reject the consumer product. Legislative experience elsewhere clearly illustrates the broad continuum of prospective resolution.

Undoubtedly it would be most munificent from the consumer's standpoint to provide an absolute right to cancel the contract and reject the consumer product without the necessity of justification. There is legal precedent in the direct sales legislation of New Brunswick[48] and the other common law provinces[49] for such an approach with the proviso of a time limitation within which the buyer must exercise rejection rights. Expanding this to all contracts for the sale or supply of consumer products would entirely relieve the consumer of the burden of establishing a breach of contract and the further uncertainties of establishing the nature of that breach. But the cost of such legislative largesse would result in equivalent degree of unfairness towards sellers of consumer products in the majority

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[45]This would be accomplished in the following manner: section 4(2) would deem the salesman's representation to have been made by the supplier and section 4(1) would make that oral statement an express warranty insofar as the retailer relied upon it and it was not unreasonable for him to do so.

[46]For an application in similar circumstances under the general sales law see: *Sodd Corporation Inc.* v. *Tessis* (1977), 17 O.R. (2d) 158 (Ont. C.A.).

[47]If, instead, the "intermediate term" approach was applied, the retailer's entitlement to rescission would initially be determined by examining both the nature of the term and the nature or extent of the breach: see discussion of *Cehave* v. *Bremer Handelsgesellschaft m.b.H.*, *infra*, at footnote 29

[48]*The Direct Sellers Act*, R.S.N.B. 1973, c. D-10 as am. For a full discussion of New Brunswick's direct sales legislation, see Dore, "Consumer Protection in New Brunswick", (1970) 20 *U.N.B.L.J.* 66 at pp. 73-76.

[49]*The Direct Sales Cancellation Act*, R.S.A. 1980, c. D-35 as am.; *Consumer Protection Act*, R.S.B.C. 1979, c. 65 ss. 13-18; *The Consumer Protection Act*, R.S.M. 1970, c. C200, ss. 59-65 as am.; *The Consumer Protection Act*, R.S.O. 1980, c. 87, s. 21; *The Direct Sellers Act*, R.S.Nfld. 1970, c. 96 as am.; *Direct Sellers' Licensing and Regulation Act*, S.N.S. 1975, c. 9; *Direct Sellers Act*, R.S.P.E.I. 1974, c. D-10; *The Direct Sellers Act*, R.S.S. 1978, c. D-28.

of cases, ie. in non-door-to-door selling situations where sellers have provided to consumers precisely what they bargained for. It is argued that consumers in these circumstances are, or should be, better prepared psychologically for their purchases and, therefore, less in need of such radical legislative intervention.[50]

Further along the continuum, and only slightly less generous from the consumer's standpoint, would be to permit cancellation of the contract and rejection of the consumer product for any breach of warranty by the seller. This indeed was the approach of the American *Uniform Sales Act* which gave the buyer a right of rejection for any breach of contract, no matter how insignificant.[51] Thus expanding the consumer's right of rejection would eliminate the necessity for the consumer to decide whether a court would regard the seller's breach as sufficiently material and provide an effective remedy in all cases where the consumer has not received precisely what he bargained for. Again, however, the cost results in an equivalent degree of unfairness towards sellers insofar as this legislative approach potentially deprives a seller in every case of breach, even in cases of a technical or insignificant breach, of the entire benefit he expected to derive from the contract. It should be pointed out that the legislative policy of favouring certainty by resolving the remedial issue in this way was never fully achieved in the United States where a slow but steady judicial retreat from this "all or nothing" approach prevailed.[52] This led the Law Reform Commission of New South Wales to conclude that "the American experience shows that even when the strict rule applies, courts have found a way around it and thereby abrogated the certainty which is hailed as its chief virtue."[53] The Commission went on to suggest that any appearance of exactness in resolving the rejection issue can only be illusory because questions of degree are necessarily involved.[54]

The foregoing leads us further along the continuum of legislative resolution. Less generous to the consumer but more favourable to the seller would be to provide the right to cancel the contract and reject the consumer

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[50]See Bridge & Buckley, *Sales and Sales Financing in Canada: Cases and Materials* (1981) at p. 43.

[51]Section 69(1) *Uniform Sales Act*, National Conference of Commissioners on Uniform State Laws (American, 1906). The Act even permitted the buyer to rescind after he was deemed to have accepted the goods: see sections 69(1)(d) and 69(3). In these circumstances, however, the buyer was unable to claim additional damages.

[52]The Law Reform Commission of New South Wales in its *Working Paper on the Sale of Goods (Warranties, Remedies, Frustration and Other Mtters)* (New South Wales, 1975) documented this retreat from the inflexible rule of rejection in the following terms at paras. 13.14 and 13.16:

> . . . Commercial usage was relied upon so to interpret the contract that no breach of warranty occurred, and where that was not possible and there was clearly a departure from the terms of the contract, albeit in a trivial or immaterial respect, resort was sometimes had to the language of section 12 of the Uniform Sales Act to deny the right of rejection.
>
> . . . This approach could not be used however if the seller's default was of sufficient import to require an adjustment of price. Instead, the American courts fell back on such concepts as waiver, custom and mercantile practice to refuse rejection in favour of adjustment of price.

[53]*Ibid.*, at para. 13.17.

[54]*Id.*

product only in the case of major as opposed to minor breaches of warranty by the seller. This legislative approach is suggestive of the concept of breach of condition in the *Sale of Goods Act* with one propitiatory difference: no longer would an *a priori* classification be required to determine whether the term breached was sufficiently important to entitle the aggrieved consumer to rescind. Instead, both the nature of the term that was breached and the consequences resulting therefrom would be examined in order to determine whether the breach was major. This, in part, is the approach adopted in the Saskatchewan *Consumer Products Warranties Act*.[55] Under that legislation only when the seller commits a substantial or non-remediable breach is the consumer ever entitled to reject the product and recover any portion of the purchase price he has paid.[56] This approach is comparatively more favourable to sellers insofar as it recognizes that a consumer should not be permitted to cancel the contract and reject the consumer product if in the circumstances the defeat could be repaired at less economic cost to both parties by requiring the consumer to retain the product and be reimbursed in damages for the deficiency. The associated cost, this time from the consumer's standpoint, is an operational unfairness in a large number of cases where, because of the quantum of reimbursement involved, the consumer who has fully paid for the product is effectively dissuaded from commencing a legal action for damages. Under a consumer remedial regime in which the primary remedy for breach of warranty lies in damages, recovery will often be at the seller's pleasure.

The *Consumer Product Warranty and Liability Act* occupies the middle ground between these last two points on the legislative continuum. The New Brunswick legislation generally provides the seller, unless the breach is major, with the opportunity to rectify his breach before the consumer can reject the consumer product. But, where the seller fails to rectify the breach, the consumer can then exercise his primary remedy—the right to reject the product—in all cases subject only to an overall 60 day time limitation (inapplicable to major breaches) and his acting within a reasonable time after discovering the breach.

We will now consider in detail the right of the seller to rectify his breach of warranty, the consumer's right to reject the consumer product, the consequences of rejection to the consumer and the seller, and the consumer's right to damages.

B. SELLER'S RIGHT TO RECTIFY THE BREACH

(i) General

The seller's willingness to repair or replace defective goods is a recurring and relevant factor in relation to the buyer's right of rejection in reform proposals and legislation. While there clearly emerges a universal trend toward substantial expansion of the seller's right to cure defective tender, opinion is divided on the

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[55]SS. 1976-77, c. 15 now R.S.S. 1978, c. C-30 as am., proclaimed effective November 6, 1977 except sections 4(1), 8, 9, 10, 13(3), 14(1), (2), 20(1), 24, 25, 26, 29, 36 proclaimed effective October 31, 1981. Other provisions contained in S.S. 1980-81, c. 18 and S.S. 1979-80, c. 17 proclaimed in force effective October 31, 1981: sections 16(2), 17.1, 34(3). Hereinafter the Act may be referred to as the Saskatchewan Act.

[56]Section 20(1)(b). For a full discussion of the Saskatchewan provision see Romero, "The Consumer Products Warranties Act (Part II)," (1980), 44 *Sask. L.Rev.* 261 at pp. 325-328.

desirable parameters of that expansion, *viz.* whether the seller's right to cure should be restricted to minor or less serious breaches of warranty or whether it should also encompass a right to cure major or more serious breaches.

Section 20 of the Saskatchewan *Consumer Products Warranties Act*, for example, restricts the seller's opportunity to "make good the breach" to those cases where the breach is "remediable and not of substantial character." In so providing, it follows the recommendations of the 1972 *Ontario Warranties Report*:

> Where the breach is remediable and the breach is not a [sic] fundamental character, the retailer or manufacturer should have a reasonable opportunity to make good the breach, including any breach in the implied warranties of title, freedom from encumbrances, and quiet possession.[57]

The Ontario Law Reform Commission was recently of the opinion, in its 1979 *Report on the Sale of Goods*, that the right to cure should be extended to include cases where the seller has committed a "substantial breach" of the contract.[58] In so recommending, it followed the precedent of the American *Uniform Commercial Code*[59] which does not restrict the type of nonconforming tender that may be the subject to cure.[60] In the Ontario Law Reform Commission's opinion the operative test should be "not the nature of the non-conformity, but whether the non-conformity can be cured without unreasonable prejudice, risk or inconvenience to the buyer."[61] Thus, section 7.7(2) of the *Ontario Draft Sales Bill*[62] confers on the seller the right to cure even a substantial breach where this can be done without prejudice to the buyer:

> 7.7(2) Except in a case of late tender or delivery amounting to a substantial breach, where the buyer,
>
> (a) rightfully rejects a non-conforming tender or delivery, whether before or after the time for performance has expired; or
>
> (b) revokes his acceptance of the goods,
>
> the seller has a reasonable time to cure the non-conformity,
>
> (c) if he seasonably notifies the buyer;

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[57]*Supra*, footnote 13, at p. 45.

[58]*Supra*, footnote 13, at pp. 463-464. Note that the 1979 *Ontario Sale of Goods Report* recommendation addressed itself to the feasibility of a general right to cure and was not restricted, as was the 1972 *Ontario Warranties Report* recommendation, to the case of a seller's right to cure in consumer sales.

[59]Hereinafter, the statute may be referred to as the *U.C.C.* All citations of the *U.C.C.* are to the 1972 Official Text.

[60]The *U.C.C.* distinguishes between cases where the seller makes a non-conforming tender before the time for performance has expired and those cases where the time for performance has expired. In the former case the seller's right to cure is absolute: section 2-508(1) stipulates that where goods are rejected because they do not conform to the contract and the time for performance has not yet expired, the seller may promptly notify the buyer of his intention to cure and may then make a proper delivery within the contract time. In the case where the time for performance has expired, the seller's right to cure is dependent upon the seller's reasonable foresight, ie. did he have reasonable grounds for belief that the tender would be acceptable: section 2-508(2) provides that where goods are rejected as non-conforming which the seller reasonably thought would, in the circumstances of the case, be acceptable with or without an adjustment in price, he is given the opportunity of making a proper tender within a further reasonable time.

[61]*Supra*, footnote 13, at p. 464.

[62]Contained in the *Ontario Sale of Goods Report, Vol. III*, *supra*, footnote 13, at pp. 9-65.

(d) if the non-conformity can be cured without unreasonable prejudice, risk or inconvenience to the buyer; and

(e) if the type of cure offered by the seller is reasonable in the circumstances.[63]

This most recent position advocated by the Ontario Law Reform Commission in the context of general sales is similar to that advanced earlier by the Law Reform Commission of New South Wales which recommended in the same context that the seller be given an opportunity which is reasonable in the circumstances to remedy any defect with the added proviso that any loss suffered by the buyer as a result of defective performance or this extension of time be recoverable by him.[64]

New Brunswick's formulation of the seller's right to cure, like Saskatchewan's, is modelled on the earlier recommendation of the Ontario Law Reform Commission contained in the *Ontario Warranties Report*. Thus, section 14(1) of the *Consumer Product Warranty and Liability Act* provides as follows:

14(1) Where the seller is in breach of a warranty provided by this Act, the buyer shall give him a reasonable opportunity to rectify the breach, unless

(a) the buyer is unable to do so, or is unable to do so without significant inconvenience; or

(b) the breach is a major breach.

The rationale for refusing to extend the seller's right to rectify to cases of major or more serious breaches is not set out in the *First Report*. Others have opined that it is presumably in the case of a major breach that the consumer might truly lose confidence in his seller and for this reason both the Saskatchewan and New Brunswick legislation rightly deny the seller a statutory right to cure in these circumstances.[65]

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[63] The *Uniform Sale of Goods Act* (adopted at the Sixty-Third Annual Meeting of the Uniform Law Conference of Canada: see Proceedings, Appendix S at pp. 185-321) incorporates a "perfect tender" rule with respect to the seller's obligations coupled with substantially the same right to cure as under the *Ontario Draft Sales Bill*: see 2.7.7(2).

[64] *Working Paper on the Sale of Goods*, *supra*, footnote 52, at paras. 13.20 and 13.23.

[65] This was the conclusion of the Alberta Institute of Law Research and Reform in its *Report on The Uniform Sale of Goods Act* (Edmonton; October, 1982): see p. 188. See also Romero, *supra*, footnote 56, at pp. 322-323. Professor Baer, on the other hand, questioned the necessity of carrying consumer protection to this extreme in a paper entitled "Consumer Protection and the Sale of Goods" (May, 1975), prepared for the Alberta Institute of Law Research and Reform:

> All of the consumer's legitimate needs are sufficiently covered in the concept of what is an effective cure. His legitimate interest is that in the end he will have a product which complies with the contract at least as to quality. It really doesn't matter how grossly defective the goods were when they were first tendered as long as they are completely cured. For instance, in the sale of a new T.V., in the end it matters little to the consumer whether the defect was a malfunctioning fine tuner or a picture tube, as long as either defect has been corrected by repair or replacement and the resulting product satifies the contract. Of course, if the repaired T.V. does not have the same qualities as a new T.V. then the defect has not been cured.

(ii) Exceptions

There are three exceptions to the seller's right to rectify contained in section 14(1). In descending order of importance they are: (1) if the breach is a major breach, (2) if the buyer is unable without significant inconvenience to provide the seller with a reasonable opportunity to rectify, and (3) if the buyer is for any reason unable to provide the seller with a reasonable opportunity to rectify.

a. Major Breach

The concept of "major breach" is not defined in the *Consumer Product Warranty and Liability Act*. The first New Brunswick case to deal with the issue was *Gauvin and LeBlanc* v. *Dryden Motors Ltd.*[66] where the plaintiffs sought to set aside a contract for the sale of a used sports car on the grounds that the car was fraudulently misrepresented to them and had serious defects. In allowing rescission, Mr. Justice Meldrum held that the phrase "major breach" in section 14(1)(b) of the *C.P.W.L.A.* meant a breach "going to the root of the contract."[67] He then curiously went on to quote the paragraph in *Halsbury* (3rd Ed.) which differentiates between conditions and warranties in a contract of sale and which concludes that "the test is whether performance of the stipulation goes to the whole consideration of the other party; if it does, the stipulation is a condition . . ."[68] The learned judge then concluded with respect to the case before him that:

> . . . [t]he representations all false, as to previous use, size and type of motor, quality of vehicle and condition of roof, even if some individually might have been termed warranties, combined make the vehicle totally unfit for the purpose for which it was bought, and in fact for which it was sold. They constitute a major breach.[69]

While there can be little quarrel with the result in *Gauvin*, the reasons for decision, with respect, exhibit a failure to appreciate or a refusal to recognize the essential nature of a major breach and the changes in this area of the law contemplated by the *C.P.W.L.A.* In one respect the reasons display a reluctance to abandon the *S.G.A.* condition-warranty dichotomy and a judicial inclination toward the comfortability of establishing what would have been a breach of condition under the *S.G.A.* and, by analogy, concluding that such would constitute a major breach under the *C.P.W.L.A.* Yet, following the recommendations of the *Ontario Warranties Report*,[70] the New Brunswick *First Report*,[71] and the precedent of the *Hong Kong Fir Shipping* case,[72] it is clear that the *C.P.W.L.A.* attempts to effect a clean break

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[66](1981), 34 N.B.R. (2d) 143 (N.B.Q.B.).

[67]*Ibid.*, at p. 148.

[68]*Ibid.*, at p. 149.

[69]*Id.*

[70]*Supra*, footnote 13, at pp. 44-46.

[71]*Supra*, footnote 13, at pp. 133-137.

[72]*Supra*, footnote 30, and accompanying text.

from the *S.G.A.* precedent by refusing to make the availability of its remedies exclusively dependent upon the nature of the broken term. In another respect the reasons put forth in *Gauvin* equate the *C.P.W.L.A.* major breach concept with the common law doctrine of fundamental breach. Indeed, the latter has been judicially defined in precisely the same terms used by Mr. Justice Meldrum, *viz.* a breach which goes to the root of the contract.[73] It would be unfortunate for New Brunswick consumers if this judicial equation ultimately prevails. It has long been recognized that circumstances amounting to fundamental breach may be quite different and in fact more serious from what might be called an "ordinary" breach of condition or warranty using the *S.G.A.* nomenclature.[74] Many situations, therefore, may arise where the breach in question, while not qualifying as a fundamental breach *per se*, may qualify under some lesser standard that has regard to both the nature of the term broken and the consequences of the breach. Equating the *C.P.W.L.A.* concept of major breach with the common law doctrine of fundamental breach will, it is submitted, have the effect of depriving the consumer in these cases of an immediate right to reject the consumer product. Neither would this equation always work in favour of expanding the seller's statutory right to rectify. Breach of the seller's title obligation has generally been regarded under the general sales law as tantamount to fundamental breach.[75] If the courts so restrict the *C.P.W.L.A.* concept of major breach, the seller could in all such cases lose his statutory right to rectify. This would not accord with the recommendation in New Brunswick's *First Report* that "the seller should be given a reasonable opportunity to rectify his breach, *including a breach of the title obligation*, unless it is a major or irremediable breach."[76] (emphasis added).

New Brunswick cases subsequent to *Gauvin* in which the "major breach" issue has arisen have done little to clarify judicial interpretation. In *Audet* v. *Central Motors Ltd.*[77] the plaintiff sought to reject a used automobile on account, *inter alia*, of an oil leak. The leak was found to be a very minor problem which could have been repaired at a cost of $2.40. Mr. Justice Stevenson quite predictably found, albeit in *obiter dicta*, that "[t]he defects in the car were not so serious that failure to remedy them would be a major breach within the meaning of the Act . . ."[78] In *Gallant* v. *Larry Wood Used*

[73]This was the definition put forth by Lord Reid in *Suisse Atlantique Societe d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61 at p. 71. (H.L.). Most recently the New Brunswick Court of Appeal in *Thomas Equipment Ltd.* v. *Sperry Rand Canada Ltd. et al.* (1982), 40 N.B.R. (2d) 271 at p. 283, noted that "[a] fundamental breach has been variously described as one that goes to the root of the contract or, an event that deprives the plaintiff of substantially the whole benefit he was to obtain under the contract or, an accumulation of defects which taken en masse constitute such a breach going to the root of the contract . . ." (per Stratton J.A.).

[74]See the cases cited in Fridman, *supra*, footnote 18, at pp. 308-314. The extent to which the court will regard a breach as fundamental, rather than as breach of condition, warranty or "intermediate" term is illustrated by *Alberta Caterers Ltd.* v. *R. Vollan (Alberta) Ltd.* (1977), 81 D.L.R. (3d) 672 (Alta. S.C.).

[75]See, for example, *Rowland* v. *Divall*, [1923] All E.R. Rep. 270 at pp. 274-275 per Atkin L.J. (Eng. C.A.); *Butterworth* v. *Kingsway Motors Ltd.*, [1954] 2 All E.R. 694 at p. 700 per Pearson J. (Eng. Q.B.).

[76]*Supra*, footnote 13, at p. 68 and p. 133.

[77](1981), 35 N.B.R. (2d) 143 (N.B.Q.B.).

[78]*Ibid*, at p. 145.

Cars Ltd.,[79] where a used vehicle was sold "as is—where is," Dickson J. rejected the plaintiff's claim for rescission of the basis of major breach after finding that the plaintiff had overused the car without due care and proper maintenance. And in *McGouey* v. *Lawson Motors Ltd.*, where the plaintiff brought an action against the defendant used car dealer for rescission on the sale of a used car which collapsed from rust 3,000 miles and approximately seven weeks after purchase, Mr. Justice Barry simply commented: "I consider that the rusted frame was a major breach of warranty entitling the plaintiff to reject or rescind."[80] As a result of these decisions the parameters of the *C.P.W.L.A.* major breach concept must await further judicial or legislative clarification. In the interim it is instructive to examine a representative sampling of related and comparable concepts contained elsewhere in proposals and legislation.

Under the Saskatchewan *Consumer Products Warranties Act*, as noted earlier, the retailer seller or manufacturer is permitted to cure where the breach is "remediable and not of a substantial character,"[81] but no such right is given where the breach "is of a substantial character or not remediable."[82] The Saskatchewan concepts of "substantial" and "non-substantial" breach, it is interesting to note, are used interchangeably with the concepts of "major" and "minor" breach by Professer Romero throughout his excellent and exhaustive articles dealing with the Saskatchewan legislation.[83] The Act itself defines "breach of a substantial chracter" to occur in the following cirsumstances:

> (i) [where] a consumer product, or the level of performance of the retail seller or manufacturer of a consumer product, departs substantially from what consumers can reasonably expect, having regard to all the relevant circumstances of the sale of the product, including the description of the product, its purchase price, the statutory warranties and express warranties of the retail seller or the manufacturer of the product; or
>
> (ii) [where] a consumer product is totally or substantially unfit for all the usual purposes of such product or for any particular purpose for which, to the knowledge of the retail seller, the product is being bought;[84]

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[79](1982), 38 N.B.R. (2d) 262 (N.B.Q.B.).

[80](1982), 42 N.B.R. (2d) 225 at p. 231 (N.B.Q.B.). While Barry J. did not make reference to any specific test in reaching this conclusion, it is interesting to speculate on whether or not the rusted frame would have constituted a major breach under the test suggested in *Gauvin*.

[81]Section 20(1)(a).

[82]*Supra*, footnote 56.

[83]Romero, "The Consumer Products Warranties Act," (1978-1979) 43 *Sask. L. Rev.* 81 and "The Consumer Products Warranties Act (Part II)," *supra*, footnote 56, and particularly pp. 319-331.

[84]Section 2(c). To date two Saskatchewan cases have dealt with the "substantial breach" issue: *Hubert* v. *Sherwood Chevrolet Oldsmobile Ltd. et al.* (1981), 8 Sask. R. 296 (Sask. Q.B.), and *Woodley* v. *Alex's Appliances Ltd.* (1982), 16 Sask. R. 24 (Sask. C.A.), revg. 13 Sask. R. 124 (Sask.Surr.Ct.), which is particularly noteworthy in that the consumer's claim for rescission was ultimately upheld on the basis that a congeries of defects amounted in the aggregate to a breach of warranty of a substantial character where the stove purchased required ten service calls for a variety of problems. See also *Zoss* v. *Royal Crevrolet, Inc.*, 11 U.C.C. Rep. 527 (Ind. Super. 1972), where a number of minor defects amounted to "substantial" nonconformity within *U.C.C.* 2-608.

The objective test inherent in the Saskatchewan definition of substantial breach, *viz.* whether the defect substantially departs from what the reasonable consumer would expect, can be compared with an alternate test of the seller's reasonable foreseeability as incorporated in the definition of "substantial breach" in section 1.1(1)24 of the *Ontario Draft Sales Bill, viz.* a breach "that the party in breach foresaw or ought reasonably to have foreseen as likely to impair substantially the value of the contract to the other party." In formulating this definition the Ontario Law Reform Commission was expressly of the view that the common law doctrine of fundamental breach imposed too stringent a test to govern the aggrieved party's right to reject nonconforming goods:

> We think it should be sufficient if the aggrieved party has been prejudiced by the breach to such a degree that it would be unreasonable to require him to continue with the contract and to confine himself to a claim in damages. He should not have to show that the breach has totally undermined the value of the bargain . . .[85]

New Brunswick's concept of major breach, like Saskatchewan's concept of substantial breach, followed a precedent recommended by the O.L.R.C. in its earlier *Ontario Warranties Report* which suggested that the seller's right to cure be restricted to those cases "where the breach is not of a fundamental character." This concept was defined in the *Report* as meaning:

> (i) That the product departs significantly in characteristics and quality from the contract description; or
>
> (ii) That the product is substantially unfit for its ordinary or specified purpose; or
>
> (iii) That the product, in its existing condition, constitutes a potential hazard to the health or property of the purchaser or any other person.[86]

Similarly, a paramount consideration in determining when the buyer may declare the contract avoided under the *United Nations International Sales Convention*[87] is whether or not the seller's breach is "fundamental". Article 25 defines that term as follows:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

For *C.P.W.L.A.* purposes, a recurring theme can be identified in these analogous formulations. Whether designated a breach of substantial char-

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[85]*Ontario Sale of Goods Report, supra*, footnote 13, at p. 518.

[86]*Supra*, footnote 13, at p. 46.

[87]*United Nations Convention on Contracts for the International Sale of Goods*, Vienna, 10 April 1980, U.N. Doc. A/Conf. 97/18. The work of the United Nations Commission on International Trade Law (Uncitral) culminated in the promulgation in 1978 of a draft Convention on contracts for the international sale of goods which was adopted at a diplomatic conference in Vienna in 1980, and which now awaits ratification by the trading nations of the world. For a detailed discussion see: Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Deventer/Netherlands Kluwer, 1982).

acter [Sask.], substantial breach [Ont.], breach of a fundamental character [Ont.], or fundamental breach [U.N.], each formulation embodies to a lesser or greater degree the principle of substantial deprivation of the benefit of the contract. In so doing each formulation is closely akin to the *U.C.C.* concept of "substantial impairment of value"[88] to the purchaser contained in section 2-608 which permits the buyer to return merchandise after he has fully accepted the goods.[89] The Code, like the *C.P.W.L.A.* in reference to "major breach", does not attempt to define "substantial nonconformity." American courts, like their New Brunswick counterparts, have been reluctant to make any general statements concerning what constitutes substantial impairment. Nevertheless, subsidiary tests have proved most helpful in the United States in determining substantiality, including a "magnitude of the defect" test,[90] a major-minor dichotomy,[91] and a concept of "ease of correcting the defect."[92] In the final analysis, however, as one court has noted "[e]ach case must be carefully examined on its own merits to determine what is a 'substantial impairment of value' . . . [W]hat may cause one person great inconvenience or financial loss, may not another."[93]

The end result of the foregoing examination suggests that the New Brunswick concept of major breach, like its analogous concepts elsewhere (defined and undefined), really concerns the issue of whether or not the consumer has been substantially deprived of the benefit of the contract because of the seller's breach of warranty. In determining this issue regard must be had to the nature of the warranty that has been breached and the consequences of that breach of warranty to the consumer.[94] Formulations

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[88]Indeed, one of the avowed purposes of the O.L.R.C. in adopting a modest definition of "substantial breach" in the *Ontario Draft Sales Bill* was "to give our courts the benefit of American jurisprudence on the Code's test of substantial impairment of value": *Ontario Sale of Goods Report, supra*, footnote 13, at p. 518.

[89]Under the *U.C.C.* the aggrieved buyer has two independent rights to return merchandise. The first right of "rejection" is set out in s. 2-601 through s. 2-605 and is geared to the period from delivery to acceptance. Once the acceptance point is passed [see s. 2-607(2)], the buyer's right to return merchandise is designated "revocation of acceptance" and is set out in s. 2-608.

[90]Note, (1970) *Mich. L. Rev.* 130 at p. 135. See also: Hawkland, "Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code", (1962) 46 *Minn. L. Rev.* 697.

[91]*Zabriskie Chevrolet Inc.* v. *Smith*, 240 A.2d 195 (N.J. Super. 1968). See also: *Wilson* v. *Scampoli*, 228 A. 2d 848 (D.C.Ct.App. 1967). The major-minor defect test attributed to *Zabriskie* has not been free from criticism: see Note, (1969) *Wayne L. Rev.* 938.

[92]See, for example, *Rozmus* v. *Thompson Lincoln-Mercury Company*, 224 A.2d 782 (Pa. Super. 1966), where the court found the plaintiff's complaints to be based on insubstantial nonconformities and refused to allow him to revoke his acceptance in circumstances where his car thumped loudly and emitted exhaust smoke on his first drive out of the showroom. The plaintiff had sought on that first day to revoke his acceptance without affording the dealer any opportunity to repair although the trouble was ultimately correctable by the adjustment of two loose engine bolts. *Cf. Audet* v. *Central Motors Ltd.*, *supra*, footnote 77. For a discussion of the judicial recognition of the ease of curability in determining the substantiality of a defect, see: Note, *supra*, footnote 90.

[93]*Tiger Motor Company* v. *McMurtry*, 224 S.2d 638 at p. 646 (Ala. Sup. Ct. 1969).

[94]This was also the conclusion of the New South Wales Law Reform Commission which recommended that a buyer should be able to reject goods and rescind the contract only where the breach of warranty is a "material breach" in the sense that "both the nature of the term and the consequences of the breach must be looked at before the right to terminate the contract arises": see *Working Paper on Sale of Goods*, *supra*, footnote 52, at para. 13.40.

elsewhere assist in focussing upon the duality of the inquiry and negative any suggestion that the concept of major breach or its counterparts can be equated with the common law concept of fundamental breach or the *S.G.A.* concept of breach of condition. Under the *C.P.W.L.A.* an aggrieved consumer may immediately reject the consumer product and is relieved of the obligation to provide his seller with a reasonable opportunity to rectify if the seller's breach of warranty constitutes a "major breach." Whatever else that concept may contemplate, it will often require something more than a breach of condition under the *S.G.A.* and may often comprise something less than a fundamental breach under the common law.

b. Significant Inconvenience to the Buyer

The second exception to the seller's right to rectify contained in section 14(1) of the *C.P.W.L.A.* occurs if the buyer is unable without significant inconvenience to provide the seller with a reasonable opportunity to rectify. Cases of overlap with the major breach exception will obviously arise if the courts, as suggested above, place significant weight on the consequences suffered by the consumer as a result of his seller's breach of warranty. A specific exception under the rubric of "significant inconvenience", however, eliminates the necessity for courts and consumers to have to decide in close cases whether or not that factor was, in the circumstances, in and of itself sufficient to tip the scale in favour of a major breach classification. Although the phrase "significant inconvenience" is not specifically defined in the Act, reference is later made to it in section 14(3) which exempts the buyer, under certain circumstances, from any obligation to return the consumer product to the seller for replacement or repair:

> 14(3) The buyer is not bound to return the product if it cannot be returned without significant inconvenience to him because of its size, weight, method of attachment or installation, or because of the nature of the breach.

Size, weight, method of attachment or installation and nature of the breach would also, it is submitted, be illustrative considerations in attempting to determine whether the buyer is excused on the grounds of significant inconvenience from having to provide the seller with a reasonable opportunity to rectify his breach under section 14(1)(a). But, at the same time, the considerations of convenience enumerated in section 14(3), while exhaustive for purposes of that subsection, are not to be viewed as exclusive considerations of convenience for purposes of section 14(1)(a). It is important to keep in mind that section 14(3) is designating those cases where the seller will have to attend at the buyer's premises or elsewhere in order to take advantage of any opportunity to cure.[95] Section 14(1)(a), on the

[95]The *C.P.W.L.A.* formulation is quite similar to section 1793.34 (3) of the *Song-Beverly Consumer Warranty Act* in the California Civil Code which, as noted by Professor Romero, *supra*, footnote 56, at p. 325, provides as follows:

> In the event a buyer is unable to return non-conforming goods to the retailer due to reasons of size and weight or method of attachment, or method of installation, or nature of the non-conformity, the buyer shall give notice of the non-conformity to the retailer. Upon receipt of such notice of non-conformity, the retailer shall, at its option, service or repair the goods at the buyer's residence, or pick up the goods for service or repair, or arrange for transporting the goods to its place of business. The reasonable costs of transporting the goods shall be at the retailer's expense . . .

other hand, enunciates the seller's statutory right to cure and the "significant inconvenience" exception simply designates another way in which the seller may lose that right in its entirety.

c. Buyer's Inability

The third exception to the seller's right to rectify contained in section 14(1) occurs where the buyer is simply unable to afford the seller a reasonable opportunity to rectify. This exception presumably addresses unusual circumstances not encompassed within the parameters of the major breach and significant inconvenience exceptions.

At first sight it is difficult to imagine why the buyer's inability to afford the seller a reasonable opportunity to cure in and of itself should be enumerated as an exception to the seller's statutory right to cure. Surely if the buyer's inability is occasioned by the very nature or consequences of the seller's breach of warranty the major breach exception is sufficient to deny the seller a statutory right to rectify in the circumstances. Similarly, if the buyer's inability is based on major condsiderations of convenience, the significant inconvenience exception should suffice. Under what circumstances then would the seller be denied the right to cure on inability grounds alone? The obvious case appears to be where the buyer because of use or consumption is simply unable to afford the seller a reasonable opportunity to cure a minor breach of warranty. A less obvious application might occur where the very time framework of the contract prevents the consumer from affording the seller a reasonable opportunity to rectify. To illustrate, take the case of a consumer who rents a colour television for a one-day period for the expressed purpose of watching the seventh and deciding hockey match in the Stanley Cup Finals. Turning on the set at gametime he is dismayed to discover the fine tuning control is defective and provides only seventy per cent of picture clarity. At this point in time the rental shop is closed and the consumer therefore finds himself unable to afford the hirer any reasonable opportunity to rectify. In these circumstances the consumer need not concern himself with whether or not the breach might later be classified as minor on the basis that it could have been rectified by minor internal adjustment. His inability within the time framework of the contract is in itself sufficient, assuming no further use, to allow him to reject the television and cancel the rental contract without affording the hirer any opportunity to rectify.

A literal application of the inability exception discloses a potential *C.P.W.L.A.* anomaly occurring where the consumer subsequently gives or resells the consumer product to a third party. Assuming a defective product occasioned by a minor breach of warranty in the original contract of sale, the subsequent purchaser or donee is permitted to bring an action for damages against the original seller under section 23 of the *C.P.W.L.A.* which, *inter alia*, abolishes horizontal privity of contract for this purpose. While the seller retains responsibility for his original contractual undertakings, he appears to lose the benefit of his original statutory right to cure

because his buyer is unable to afford him that opportunity, no longer having ownership of the consumer product.[96] In these circumstances the subsequent owner or donee may be able to sue the seller for damages without any requirement to afford him a reasonable opportunity to rectify.

(iii) Parameters of Cure

a. No definition of Permissible Cure

Given that the *C.P.W.L.A.* provides the seller in certain circumstances with reasonable opportunity to rectify his breach of warranty, there remains the question of what form that rectification may take. Alternatively stated, what constitutes a permissible cure? The Act itself does not define "rectify" and, therefore, leaves the precise parameters open. Similarly, the Saskatchewan legislation does not define what is encompassed in the seller's right "to make good the breach", although, in comments equally applicable to the *C.P.W.L.A.*, it has been suggested that a wide meaning should be attributed to the expression.[96a] The Ontario Law Reform Commission, on the other hand, thought it desirable that the permissible types of cure should be spelled out in some detail.[97] Accordingly, the *Ontario Draft Sales Bill* defines "cure" in section 7.7(1):

> 7.7—(1) In this section and in sections 7.9 and 8.8, "cure" means,
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> (a) Tender or delivery of any missing part or quantity of the goods;
>
> (b) tender or delivery of other goods or documents which are in conformity with the contract;
>
> (c) the remedying of any other defect, including a defect in title; or
>
> (d) a money allowance or other form of adjustment of the terms of the contract.

The list is admittedly generous toward sellers[98] but has the decided advantage of attempting to resolve, *inter alia*, two uncertainties that arise under the New Brunswick formulation, *viz.* the seller's right to rectify defects in title and the seller's right to substitute.

b. Curing Defective Title

Whether or not the *C.P.W.L.A.* restricts a seller to rectify physical defects in the consumer product or also includes his right to rectify a defect in title is not free from doubt. While the consumer, under section 14(1), is required to afford the seller a reasonable opportunity to rectify any breach of warranty including, as recommended in the *First Report*,[99] a breach

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[96] See section 21(1) *C.P.W.L.A.*

[96a] Romero, *supra*, footnote 56, at p. 324.

[97] *Ontario Sale of Goods Report*, *supra*, footnote 13, at p. 464.

[98] The O.L.R.C., while acknowledging any error to be on the side of generosity, emphasized that the seller would still have to establish that his proposed cure was reasonable in the circumstances: *ibid*, at p. 465.

[99] *Supra*, footnote 76.

of the title warranty in section 8(1)(a), he does not have to do so where the breach is a "major breach". As noted above, New Brunswick judicial interpretation of that phrase is unclear. If the "substantial deprivation" test is applied and a court looks to both the nature of the breach and its consequences in determining the issue, a seller who belatedly is confronted with an outstanding defect in title would undoubtedly be permitted to rectify his breach assuming no substantial deprivation to the consumer. On the other hand, if major breach, as suggested in *Gauvin*, is to be equated with breach of condition or fundamental breach under the general sales law, the seller could well be denied the opportunity to rectify because of the special importance which the courts have traditionally attached to the seller's title obligation.[100] In order to resolve any uncertainty the broad definitional approach of the *Ontario Draft Sales Bill* and the *Uniform Sale of Goods Act*,[101] containing specific inclusion of the seller's right to cure defective title, is to be preferred.

c. Right to Substitute

Whether or not the *C.P.W.L.A.* right to rectify includes, in appropriate circumstances, the right to substitute is also an area of uncertainty in the New Brunswick formulation.[102] Undoubtedly the Act provides that the right to rectify includes the right of the seller to repair or to have the consumer product repaired elsewhere at his expense:

> 14(2) Subject to subsection (3), where the seller has a right to rectify the breach pursuant to subsection (1) and requests the buyer to return the product, the buyer shall return the product to the seller or to any repair facility or service outlet that is operated or authorized by the seller, and the seller shall return the product to the buyer after he rectifies the breach, or may supply a replacement if he is entitled by law to do so.

The concluding words in section 14(2), however, appear to distinguish between rectification and substitution and, in so doing, impose a potentially severe restriction on the seller's right to rectify by means of substitution in a large number of consumer transactions. Where, for example, a consumer has chosen a mass-produced consumer product from the seller's shelf, the resulting contract is recognized under the general sales law as one for the sale of "specific goods,"[103] and the seller subsequently has no unilateral right of substitution. The prohibition under the general sales law, in the absence of special agreement, is absolute:

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[100]*Supra, footnote* 75.

[101]The definition contained in s. 7.7(1) of the *Ontario Draft Sales Bill* was adopted with minor changes in the Uniform Act: see s. 7.7(1).

[102]This is also a potential area of difficulty in Saskatchewan where the Act does not define the parameters of the seller's power to "make good the breach." Professor Romero has argued that the Saskatchewan formulation should cover, *inter alia*, "the replacement of the defective product by a new and different one": see Romero, *supra*, footnote 56, at p. 324.

[103]Specific goods are defined in the *S.G.A.*: see footnote 7.

> Specific goods are, therefore, goods which are clearly the goods to be sold under the contract. They are manifestly identified as the only goods which may be delivered by the seller in performance of his obligations. No others will do. For example, if the contract is for the sale of a particular car or horse no other may be delivered by the seller in pursuance of the contract, even if it may be argued that what has been delivered is the exact equivalent of what was contracted for by the parties.[104]

This may place New Brunswick sellers of consumer products in a precarious position. While the general sales law does not confer a right of substitution *per se*, it does permit a seller to insert in his contract a provision entitling him to repair or replace a defective product and to impose a corresponding restriction on the buyer's right to reject. Indeed, as noted by the Ontario Law Reform Commission, this has long been a common practice in contracts for the sale of consumer durables.[105] The New Brunswick seller, however, under the new legislation, is not permitted to so modify a *C.P.W.L.A.* remedy for breach of any implied warranty,[106] including the implied warranties of quality and fitness most often relied upon by consumers. In such circumstances, the seller may find his contractual replacement rights defeated by the buyer's statutory rejection rights.

One way of avoiding the problem would be to interpret the words "if he is entitled by law to do so" in section 14(2) as including entitlement under the *C.P.W.L.A.* rather than restricting the meaning to entitlement under the general sales law. In so doing, a wide meaning can then be attributed to "rectify" which would include the power of substitution in cases involving virtually identical mass produced consumer products but only where such rectification can be otherwise made under the *C.P.W.L.A.*, *viz.* in minor breach situations where the conumer will not be prejudiced by way of inability or significant inconvenience. Indeed, there is authority in the Act itself supporting this interpretive approach. It is not without significance that in restricting business buyers of consumer products to the remedies extant under the general sales law, the draftsman, in section 13, utilized the expression "remedies that would *normally be available under the law* for breach of warranty" (emphasis added). Similar wording would presumably have been utilized in section 14(2) to accomplish the same purpose if intended, ie. the seller could have been restricted to supplying a replacement if he is *normally* entitled by law to do so. The notable absence of that expression may suggest a different intention for purposes of section 14(2). Such an interpretation would serve a very desirable *C.P.W.L.A.* policy of enabling both consumers and sellers to realize more consistently their reasonable expectations in the purchase and sale of consumer products. The consumer admittedly has a reasonable expectation of receiving in good working order the consumer product that forms the subject matter of his

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[104]Fridman, *supra*, footnote 18, at pp. 64-65.

[105]*Ontario Sales of Goods Report*, *supra*, footnote 13, at pp. 461-463.

[106]Section 24. Presumably such a contractual modification permitting substitution for breach of an express warranty would be permissible under s. 25(1) assuming compliance with the fairness and reasonableness control.

contract rather than one which may be identical from the seller's subjective viewpoint.[107] However, it is difficult to see how these reasonable expectations are prejudiced if the consumer is required to accept a substitute consumer product that is, for all practical purposes, identical from the reasonable bystander's objective viewpoint.[108] This is legislatively reflected in the *Uniform Sale of Goods Act* formulation which defines "cure" to include the right to substitute "in the case of a sale of identified goods, goods which differ in no material respect from those goods."[109]

d. Time for Cure

An additional uncertainty touching the seller's right to rectify under the *C.P.W.L.A.* concerns the issue of how much patience the consumer must exercise before he can resort with impunity to rejecting the consumer product. Stated alternatively, for how long is the seller permitted to attempt his rectification and, further, is he permitted more than one attempt in which to accomplish it? Section 16(1) of the *C.P.W.L.A.* entitles the consumer to reject within certain time restraints "where the seller . . . does not rectify the breach pursuant to any opportunity that the buyer gives him under section 14 or otherwise." But the length of time which the seller may take to rectify his breach of warranty is not set out in section 14. What is required is simply that the buyer afford the seller in appropriate circumstances a "reasonable opportunity." The concept of reasonable opportunity to rectify presumably includes reasonable time in which to effect rectification of the breach. This would be in accord with the Saskatchewan provision which merely affords the seller an opportunity to make good his breach "within a reasonable period of time."[110] However, it is important to recognize that in the New Brunswick formulation, unlike Saskatchewan's, the outer parameters of the concept of reasonable time as regards minor breaches of warranty are expressly circumscribed by the sixty-day rule in section 16(1) which imposes a further restriction on the consumer in addition to rejecting "within a reasonable time after he discovers the breach." This should be a paramount consideration in any judicial attempt to delineate the temporal parameters of "reasonable opportunity to rectify" in New Brunswick.

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[107]As noted by an American court in *Zabriskie Chevrolet Inc.* v. *Smith*, *supra*, footnote 91, at p. 205, in reference to the *U.C.C.* cure provisions: "It was not the intention of the Legislature that the right to 'cure' is a limitless one to be controlled only by the will of the seller. A 'cure' which endeavours by substitution to tender a chattel not within the agreement or contemplation of the parties is invalid." Thus, for example, a buyer is not required to accept a newer and improved version of the product: *Bartus* v. *Riccardi*, 284 N.Y.S. 2d 222 (City Ct. 1967).

[108]For an economic analysis of the cure and revocation provisions of Article 2 of the *U.C.C.*, see Schwartz, "Cure and Revocation for Quality Defects: The Utility of Bargains", (1975) 16 *B.C. Indus. & Com. L. Rev.* 543. See also: Priest, "Breach and Remedy for the Tender of Non-Conforming Goods Under the Uniform Commercial Code: An Economic Approach", (1978) 91 *Harv. L. Rev.* 960.

[109]Section 7.7(1)(b).

[110]Section 20(1)(a). Professor Romero notes that the *Saskatchewan Draft Bill* originally favoured the legislative policy of certainty in setting a period of thirty days within which the seller had to make good the breach. However, he notes, the approach was later abandoned on account of "the great variety of consumer products which fall within the scope of the Act. It was thought that in many cases a thirty day period would be too long but in other cases it could be too short": Romero, *supra*, footnote 56, at p. 324.

From a theoretical standpoint a distinction may sometimes be warranted between multiple attempts to rectify the same defect and multiple attempts at rectifying different deficiencies. But, for reasons which follow, the distinction is probably insupportable under the *C.P.W.L.A.* remedial regime.

Professor Phillips, in reference to the American position has set out the argument in favour of legislatively restricting the seller's right of cure to a single attempt at curing the same defect:

> Although the law has to date shown no tendency toward restricting the seller's right of cure to a single attempt to correct the same defect, it would seem desirable to restrict the right in this manner. The remedy of cure serves a very useful and desirable policy in the law by contributing to the adjustment of disputes, but it is by no means an unmixed blessing. Attempts at cure necessarily involve trouble, inconvenience and expense, particularly for the buyer who is deprived of the goods while repair is being attempted and who can do nothing but sit tight and hope that the results will furnish him with an acceptable product rather than with a patchwork commodity that is returned only to give more trouble in the future. The buyer can always seek further cure if he desires, and if the seller is willing to attempt it then the law will support their agreement. But absent such an agreement, there seems to be no good reason why the law should force the buyer to negotiate beyond an initial unsuccessful attempt. Drawing the line at one cure attempt will tend to force the seller to do an acceptable job in repairing the goods, and perhaps more remotely it will serve to prod him into putting more acceptable products on the market in the first place. If he can do neither, then it hardly seems fair to burden the buyer with the seller's continued ineptness, and to leave the buyer in the uncertain position of not knowing when he is released from the grip of ineptitude.[111]

But, as later noted by Professor Phillips, although a reading of section 2-508 of the *Uniform Commercial Code* might lead to the conclusion that the seller is only entitled to a single attempt at curing the same defect,[112] the American judicial inclination seems to be to allow the seller to make repeated attempts.[113] A similar interpretation within the context of the *C.P.W.L.A.* could prejudice New Brunswick consumers on the basis of the limitations imposed by section 16(1) on their rejection rights in the event of non-rectification, *viz.* the obligation not only to reject within a reasonable time after he discovers the breach, but also to discover it within sixty days of delivery in all cases of minor breach. In consequence, the rationale suggested by Professor Phillips for restricting the seller to a single attempt at curing the same defect is even more compelling in its application to New Brunswick.

While different theoretical considerations may apply to the question of multiple attempts to rectify different minor deficiencies, the same prac-

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[111]Phillips, "Revocation of Acceptance and the Consumer Buyer", (1979) 75 *Com. L.J.* 354 at p. 358.

[112]The seller is permitted to make "a" conforming delivery under s. 2-508(1) or to substitute "a" conforming tender under s. 2-508(2).

[113]*Tiger Motor Co. Inc.* v. *McMurtry*, *supra*, footnote 93. See also: *General Motors Corporation* v. *Earnest*, *184 S.2d 811* (Ala. Sup. Ct. 1966) and *Annot.*, 41 *A.L.R.* 2d 1173 at pp. 1191-1196 (1955).

tical considerations confront the aggrieved consumer in New Brunswick on account of the aforementioned restrictions on his right of rejection in the event of the seller's non-rectification. For purposes of illustration the Saskatchewan case of *Woodley* v. *Alex's Appliances Ltd.*[114] is helpful. In that case the consumer experienced some ten different minor problems with a new cooking stove over a one year period. On each occasion the problem was in turn successfully cured by the seller. Mr. Justice Gerein of the District Court of Saskatchewan, in refusing to allow the consumer to reject the stove, recognized the seller's right under the Saskatchewan legislation to utilize multiple attempts to cure different minor deficiencies. While his decision was reveresed by the Court of Appeal on the ground that the "congeries of defects" amounted in the aggregate to a breach of warranty of a substantial character entitling the consumer to reject, it is nevertheless important to recognize that in Saskatchewan, unlike New Brunswick, a consumer is never permitted to reject on the sole basis of the seller's unwillingness or inability to cure a minor defect. The exclusive basis for rejection under the Saskatchewan Act is substantial breach or irremediable defect. The Act does not impose an arbitrary time restriction on the buyer's right to reject on either ground. For this reason a Saskatchewan consumer, unlike his New Brunswick counterpart, will seldom if ever be prejudiced by permitting the seller to utilize multiple attempts to cure different minor deficiencies.[115] Nevertheless, in order to avoid any uncertainty over the effect of delay, it was seen fit to incorporate in the Saskatchewan legislation additional express protection for the consumer who delays in reliance upon the seller's assurances of cure:

> The consumer shall exercise his right to reject the consumer product . . . within a reasonable period of time . . . except where the consumer delays the exercise of his right to reject because he has relied upon assurances made by the party in breach or his agent that the breach will be remedied when in fact the breach is not so remedied.[116]

In the event that New Brunswick courts refuse to restrict the seller's right to rectify to a single attempt to cure the same and/or different deficiencies, an amendment to the *C.P.W.L.A.*, in similar terms, expanding the parameters of the sixty-day limitation and reasonable time would ameliorate most consumer concerns and uncertainties.

(iv) Expenses and Damages

Section 14(4) of the *C.P.W.L.A.* specifically imposes liability upon the seller for all reasonable expenses the buyer incurs in returning the product, at the seller's request, to the seller or to any repair facility or service outlet

[114]*Supra*, footnote 84.

[115]The Saskatchewan consumer in order to subsequently reject must simply establish that any defect is not remediable or, alternatively, that the defect or the totality of the defects constitute a breach of substantial character, as long as he rejects within a reasonable period of time as defined in section 20(3): see s. 20(1).

[116]Section 20(2). The same result is accomplished by judicial interpretation in the United States: see *Gramling* v. *Baltz*, 485 S.W. 2d 183 (Ark. 1972), where the purchaser of a truck delayed his rejection of the vehicle for more than two years in reliance upon the seller's assurances that repairs could be made.

that is operated or authorized by the seller. The question arises as to what effect a successful cure has on any claim the consumer may have for damages sustained before the cure, the expense incurred by the rental of a substitute consumer product, for example.

The general provision for damages in section 15 of the Act is arguably broad enough to compensate for this type of loss on the ground that it was incurred while the seller was in breach of a warranty. On the other hand, the section is equally broad enough to compensate the consumer on the same basis for any reasonable expenses incurred in returning the consumer product to the seller for rectification. Yet, as noted above, the draftsman apparently felt the need to insert a specific provision to affix financial responsibility upon the seller. This potential problem was similarly identified in respect of the *Ontario Draft Sales Bill*[117] and led to the insertion of a specific provision in the *Uniform Sale of Goods Act* to recognize that a buyer may still have an action for damages against a seller who has successfully cured.[118] The Saskatchewan Act also avoids the problem by specifically providing that "the consumer shall be entitled to recover damages for losses that he has suffered and that were reasonably foreseeable as liable to result from the breach regardless of whether the breach is remedied."[119]

C. BUYER'S RIGHT TO REJECT THE CONSUMER PRODUCT

(i) General

The *First Report of the Consumer Protection Project* suggested three major reasons why the right of rejection rather than damages should be the cornerstone in a new remedial regime.

> . . . In the first place, the damages may not amount to enough to make it worthwhile for [the buyer] to take legal action. The power to cancel the transaction puts the buyer in a better position to compel proper performance himself without the aid of legal process. Secondly, the damages may be uncertain. For example, reasonable men can easily differ over "the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty", which is the *prima facie* rule for recovery for breach of warranty of quality. Thirdly, and in any event, the consumer buys goods for use. What he wants is the goods he contracted to receive, not something else with a monetary adjustment. To get what he wants he may have to resell these goods and buy the proper ones. But consumers as a rule are not in a very good position to dispose of goods at their best price. Sellers who are dealers are in a better position to sell the goods for their best price.[120]

The *C.P.W.L.A.* formulation of the consumer's right to reject is one of the most obvious applications of its *fidem habeat emptor* orientation; the level of

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[117]See Bridge & Buckley, *supra*, footnote 50, at p. 139. See also Uniform Law Conference of Canada, *Uniform Law Section Report on Sale of Goods* (1982) at p. 142.

[118]Section 7(4).

[119]Section 20(1)(a)(ii).

[120]*Supra*, footnote 13, at pp. 111-112. Similar interests have been identified within the broader context of sales: see *Ontario Sale of Goods Report*, *supra*, footnote 13, at p. 459.

confidence instilled by this remedy should be high, indeed. Simply stated, the consumer can expect the product, in its original or rectified form, to measure up to what has been said, written or advertised about it and to meet reasonable quality and fitness expectations or, subject to time restraints, he can reject the product and get his money back with or without a deduction for interim use.

(ii) Grounds for Rejection

The consumer's right to reject is set out in section 16 of the *C.P.W.L.A.*:

> 16(1) Where the seller is in breach of a warranty provided by this Act and does not rectify the breach pursuant to any opportunity that the buyer gives him under section 14 or otherwise, the buyer may reject the product if he does so within a reasonable time after he discovers the breach and he discovers the breach not later than sixty days after delivery of the product.
>
> 16(2) Notwithstanding that the buyer discovers the breach later than sixty days after delivery of the product, where the breach is a major breach the buyer may reject the product if he does so within a reasonable time after he ought to have discovered the breach.

It is important to reiterate that section 14 of the Act does not require the buyer to provide the seller with a reasonable opportunity to rectify in all non-major breach cases. As noted earlier, where he is unable to do so or unable to do so without significant inconvenience, the buyer is relieved of this obligation. As a result, there are really three identifiable grounds justifying the consumer's right to reject: (1) a major breach of warranty by the seller, (2) a failure by the seller to rectify after being given an opportunity under section 14 or otherwise to do so, and (3) any breach of warranty by the seller which is accompanied by the buyer's inability or inability without significant inconvenience to afford a reasonable opportunity to rectify.

a. Major Breach

In providing New Brunswick consumers with an immediate right of rejection for major, as opposed to minor, breaches of warranty, the *C.P.W.L.A.* is consonant with the universal trend of reform proposals and legislation.[121] However styled, and whether defined or undefined, the thrust of these formulations has been the creation of a unitary warranty scheme permitting examination of both the nature of the breach and its consequences in determining whether or not the breach is of sufficient severity to justify rejection. Particular problems occasioned by New Brunswick's failure to define "major breach" and the inaugural paucity of judicial clarification were earlier canvassed in reference to the seller's right to rectify. Of course, any attempted definitional or judicial clarification could only be of marginal assistance in resolving the very difficult question facing an aggrieved buyer in borderline cases, *viz.* whether or not the seller's breach of warranty is really a major breach enabling the buyer to immediately

[121]See discussion *supra*, above footnotes 81-93.

reject. The buyer's best course of action in all but the most obvious cases is to give the seller the benefit of the doubt and allow him a reasonable opportunity to rectify his breach of warranty. If this initially tilts the balance in such situations towards the seller, the consumer will not ultimately be prejudiced due to his broad right to reject in all cases of non-rectification. The flexibility inherent in the *C.P.W.L.A.* major breach concept creates, to this extent at least, an overlap between the rights of rejection and cure. But this overlap has the salutory effect of saving the contract in many cases and thus avoiding economic waste.

b. Seller's Failure to Rectify

A distinguishing feature of the *C.P.W.L.A.* is its provision of a general right to reject the consumer product if the seller fails to rectify it in accordance with any opportunity provided. This differentiates the New Brunswick legislation from the Saskatchewan Act, for example, which does not recognize the consumer's right to reject where the seller fails to make good a minor breach of warranty unless the breach is actually irremediable. If the breach can be remedied, albeit not by or through the seller, the consumer is only entitled to have the breach remedied elsewhere and, in any event, is restricted to damages.[122] The New Brunswick formulation, in conferring a right to reject in all cases of non-rectification, provides the ultimate incentive for the seller to effect cure. It recognizes that in consumer transactions, the consumer will rarely be in a better position to cure than the seller. Even then, the *Uniform Sale of Goods Act* follows the New Brunswick precedent and applies it in the broader context of general sales.[123]

One additional aspect relating to the time framework of the seller's failure to rectify is worthy of special note. Where section 14 confers upon the seller a statutory right to rectify, the buyer is required to provide him with a "reasonable opportunity" to do so. Although the buyer is not required to provide the seller with any opportunity to rectify where an exception to section 14 is applicable, he may, nevertheless, choose to do so. For example, a consumer may elect to treat the seller's major breach as minor and provide him with an opportunity to rectify. In these circumstances there appears to be no requirement that the opportunity so provided be a "reasonable opportunity." The notable absence of the word "reasonable" in section 16 suggests that the buyer's right to reject on the basis of non-rectification arises on the seller's failure to rectify pursuant to (1) any reasonable opportunity that the buyer gives him as required by section 14, and (2) any opportunity, reasonable or unreasonable, that the buyer otherwise provides. This is hardly prejudicial to the seller insofar as he has no general right to rectify other than under the Act. If the buyer

[122]Section 20(1)(a). See also Romero, *supra*, footnote 56, at p. 323.

[123]The Act basically provides that the buyer has a right to reject for any nonconformity, whether substantial or otherwise, subject to the seller's right to cure: s. 7.7. *Cf. Ontario Draft Sales Bill* which, through provisions enabling the buyer to demand the cure of minor breaches and turning these into substantial breaches where the seller fails to cure, accomplishes somewhat the same thing albeit by a more cumbersome route: see ss. 7.7(4) and 7.7(5).

affords a gratuitous opportunity to rectify in circumstances where he has an immediate right to reject, he should certainly be able to unilaterally set the parameters of the opportunity provided.

c. Buyer's Exemption From Rectification

Section 14 of the *C.P.W.L.A.* exempts the buyer from having to provide the seller with a reasonable opportunity to rectify where the buyer is unable to do so or unable to do so without significant inconvenience. In the former case, where the inability is attributable to the buyer's use or to damage independent of the seller's breach, section 17(3) provides as follows:

> 17(3) Where before rejection the product has deteriorated to a state beyond that attributable to reasonable wear and tear for the period of time that the product was used by the buyer, or has been damaged by causes that are not attributable to the seller's breach, the seller may deduct from the refund of any payments on the price or recover from the buyer, or both, an amount for compensation for the difference between the value of the product as it is and the value that it would have but for that deterioration or damage.

In providing this answer to the question of what effect the buyer's inability to return the consumer product *in specie* should have, section 17(3) substantially departs from the general sales law by negating the common law *restitutio in integrum* prerequisite to rescission and providing the opportunity for judicial uniformity in the application of monetary allowance adjustments. This represents another clear legislative assertion of the primacy of the *C.P.W.L.A.*'s consumer rejection remedy.[124]

(iii) Time for Rejection

a. Reasonable Time and The 60 Day Rule

The *C.P.W.L.A.* imposes a time framework within which the aggrieved consumer must exercise his rejection rights. Section 16 distinguishes between rejection rights exercised on the basis of non-rectification of a minor breach of warranty and rejection rights exercised on the basis of a major breach. In the former case the consumer can only reject the product if (1) he rejects within a reasonable time after he discovers the breach and (2) he discovers the breach not later than sixty days after delivery of the product. In the latter case the consumer must similarly reject within a reasonable period of time after he discovers the breach but, if that initial discovery occurs outside the 60 day period, the consumer can still reject as long as he does so within a reasonable time after he ought to have discovered it.

These provisions incorporate the recommendations of the *First Report of the Consumer Protection Project*[125] and, in so doing, represent the *C.P.W.L.A.* resolution to the "acceptance" and "passing of property" problems inherent in the rescission remedy under the *Sale of Goods Act*.[126] This resolution, it

[124]*Cf.* Tetley and Bridge, "Consumer Product Warranty and Liability Act, 1978" (1979) 1 *Prod. Liab. Int.* 166, wherein the authors opine that the basic *C.P.W.L.A.* remedy is damages.

[125]*Supra*, footnote 13, at p. 128.

[126]See discussion, *supra*, above footnotes 13-23.

should be noted, goes much further than simply abolishing the passing of property test and making deemed acceptance in the *S.G.A.* subject to the buyer's reasonable opportunity for examination.[127] Instead, it imposes, albeit on an arbitrary basis, a definite time period for rejection in minor breach situations and provides a contingent extension of that time period in the case of major breaches of warranty. The policy choice inherent in this legislative formulation gives recognition to the fact that if rejection occurs early, the relatively small degree of prejudice suffered by the seller is outweighed by the importance of providing the consumer with an uncomplicated[128] and effective remedy. Alternatively, the longer it takes the consumer to reject, the more likely the seller[129] will be prejudiced by the return of the consumer product and the greater need, therefore, to restrict rejection to very serious latent defects which were reasonably discovered.[130]

While the *C.P.W.L.A.* formulation achieves the objective of eliminating, or at least ameliorating, much of the uncertainty that would otherwise attach to the issue of what constitutes acceptance, it also raises a new area of difficulty, *viz.* the determination of what constitutes rejection "within a reasonable time" after discovery of the breach. The *C.P.W.L.A.* does not define the concept of reasonable time. The Saskatchewan Act, however, which also requires that a buyer who is entitled to reject do so within a reasonable period of time,[131] has clarified the meaning of that requirement in the following terms:

> . . . a reasonable period of time shall run from the time of delivery of the product to the consumer and shall consist of a period of time sufficient to permit such testing, trial or examination of the consumer product as may be normally required by consumers of that product and as may be appropriate considering the nature of the product, for the purpose of determining the conformity of the product to the obligations imposed under this Act on the party in breach.[132]

This statutory clarification also itemizes relevant considerations for New Brunswick purposes, providing the *C.P.W.L.A.* distinction between patent and latent defects and the role of examination and trial use are kept in mind.

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[127]See text accompanying footnote 22.

[128]Compare, from the standpoint of certainty, section 8.2(2)(d) of the *Uniform Sale of Goods Act* which provides that the buyer loses his right to reject where the nonconformity is of a minor character and *a substantial period* has elapsed after delivery (emphasis added).

[129]Nor is prejudice in these circumstances exclusive to the seller. As noted by Professor Romero, the longer the consumer retains the consumer product, the more difficult it will be for him to prove that the product was defective at the time of sale: See Romero, *supra*, footnote 56, at p. 329. See also Phillips, *supra*, footnote 111, at p. 356.

[130]A policy of waiver of rights by the consumer seems to underlie the *C.P.W.L.A.* treatment of major latent defects, ie. a consumer should not be able to sit on his rights to the possible if not probable detriment of the seller when he could, by the exercise of reasonable diligence, have discovered the defect and rejected the consumer product at a significantly earlier time.

[131]Section 20(2).

[132]Section 20(3).

b. Examination and Trial Use

Examination and trial use will usually bring to light patent defects. In a sense the *C.P.W.L.A.* requires that it be carried out within 60 days of delivery or else the consumer is restricted to an action for damages. During this 60 day period, however, the consumer need only be concerned with "reasonable time" beginning to run from the point of actual discovery.[133] The *C.P.W.L.A.* treatment of latent defects, on the other hand, distinguishes on the basis of the quality of the breach. Latent defects constituting a minor breach of warranty are treated exactly the same way as patent defects and are subject, as a result, to the 60 day rule. But latent defects which rise to the level of a major breach may entitle the consumer to reject, notwithstanding the 60 day rule, providing he does so within a reasonable time after he ought to have discovered the breach. The net effect, therefore, is that "reasonable time" in relation to rejection based on latent major defects will run from the time of *actual* discovery within the 60 day period following delivery of the consumer product and from the time of *constructive* discovery thereafter.

A difficult and related problem posing relevant temporal dimensions will involve distinguishing between the discovery of defect(s) and the discovery of the fact that the defect or a combination of defects rise(s) to the level of a major breach. In this respect the American experience is revealing. Section 2-608 of the *Uniform Commercial Code*, as noted earlier, permits the buyer to reject goods even after acceptance on grounds analogous to major breach providing his revocation of acceptance occurs "within a reasonable time after he discovers or should have discovered the grounds for it."[134] American courts, in applying the provisions, seem often to have given the benefit of doubt to the buyer.[135]

In summary, if the consumer is to preserve his rejection rights under the *C.P.W.L.A.* the length of permissible examination or trial use periods will vary depending upon whether the defect is patent or latent, and, if latent, whether the defect amounts to a major breach of warranty.

c. Effect of Third Party Interests

The general rule in section 21(1) provides that the consumer is not entitled to reject the consumer product if he is unable to give it back to

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[133]Of course, if the consumer product is used and the buyer examined the product prior to sale or supply, the seller is not liable for defects which the type of examination made by the buyer ought to have revealed: s. 10(2)(c). For a full discussion on the effect of examinations under the *C.P.W.L.A.* see Part I, *supra*, footnote 1, at pp. 172-177.

[134]The *U.C.C.* provisions are arguably more vigourous than their *C.P.W.L.A.* counterparts insofar as the revocation must not only be effected within the permissible time frame but must also occur before "any substantial change in condition of the goods which is not caused by their own defects": s. 2-608(2).

[135]See, for example, *Tiger Motor Company* v. *McMurtry*, *supra*, footnote 93 [acceptance revoked after 11 months and 30 unsuccessful attempts]; *Fablok Mills, Inc.* v. *Cocker Machine & Foundry Co.*, 310 A.2d 491 (N.J. Super. 1973) [two years a reasonable time to revoke acceptance of knitting machine]; *Dopieralla* v. *Arkansas Louisiana Gas Co.*, 499 S.W. 2d 610 (Ark. Supr. Ct. 1973) [40 months a reasonable time to revoke acceptance of an air-conditioning unit]. *Cf. Polar Refrigeration Services Ltd.* v. *Moldenhauer*, *supra*, footnote 23.

the seller free from any right against it in favour of a third party. This covers the obvious case of resale by the consumer and, it resolves in the seller's favour any doubt in the less obvious or unusual cases. Thus, for example, during the currency of a valid workman's lien against the consumer product or a valid writ of *fieri facias* filed against him, the consumer would be disentitled from rejection. The major exception to the general rule occurs where the consumer grants a security interest to a third party. This will not preclude rejection unless the amount secured by the security interest exceeds the amount the buyer may recover.[135a]

(iv) Notice of Rejection

While the *C.P.W.L.A.* does require that the consumer exercise his rejection rights promptly, it is silent as to the formalities of rejection and merely provides that the rejection is not effective until the seller receives actual or constructive notice that the consumer does not accept the product.[136] A question arises as to what extent the consumer is required to give reasons for his rejection.

At common law the aggrieved buyer is permitted to rescind his contract with insufficient or no reasons provided there existed at the time sufficient grounds to justify rescission.[137] This can be compared with the position under the *Uniform Commercial Code* which imposes a duty on the buyer to particularize his grounds of rejection. Section 2-605 (1) provides in part:

> 2-605.(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach
>
> (a) where the seller could have cured it if stated seasonably;

This legislative formulation recognizes that where an unstated defect is curable, failure to note that defect when rejecting can seriously prejudice the seller's right to effect cure. This rationale is equally appropriate to the seller's statutory right to rectify as conferred under the *C.P.W.L.A.* A seller obviously cannot rectify effectively if he is wholly uninformed as to the cause of the trouble. It is submitted that if the seller's right to rectify is to reflect the reasonable expectations of the parties and to constitute an effective *C.P.W.L.A.* counterbalance to the buyer's right to reject, the buyer

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[135a] Section 20, as am. According to the draftsman the rationale for this exception is that the security interest can be discharged with the money due from the supplier, and to this end s. 20(2) permits the seller to pay off the third party with that money: see Dore, "The Consumer Product Warranty and Liability Act", (1982) 31 *U.N.B.L.J.* 161 at p. 169. In this case there will be no liability for the cost of borrowing beyond what has accrued up to that time. For other minor exceptions to the general rule, see s. 21(2), as am.

[136] Section 16(3).

[137] "[It] is clear . . . that [parties] are not, by their rejection of the tender on an insufficient ground, precluded from supporting the rejection on other and valid grounds": per McCardie J. in *Manbre Saccharine Co.* v. *Corn Products Co.*, [1919] 1 K.B. 198 at p. 204, as quoted in *Ontario Sale of Goods Report, supra*, footnote 13, at p. 478. See also: *British & Beningtons Ltd.* v. *North Western Cachar Tea Co.*, [1923] A.C. 48 (H.L.).

should be required to provide the seller with reasonable information in the circumstances regarding the problem to be rectified or his grounds for rejection. This result could be accomplished by amendment or judicial interpretation. Both the *Ontario Draft Sales Bill*[138] and, with modification, the *Uniform Sale of Goods Act*[139] contain provisions comparable to U.C.C. 2-605(1)(a). These would serve as useful precedents for legislative resolution in New Brunswick. Alternatively, the same result could be accomplished if New Brunswick courts were willing to impose such a duty of disclosure upon the buyer within the parameters of his obligation to provide the seller with a "reasonable opportunity to rectify." The elasticity of those parameters could and should recognize all relevant factors including reasonable disclosure of defects and symptoms, within the knowledge of the consumer and his willingness to co-operate in any attempt by the seller to rectify, itself including, where appropriate, the provision of additional information on request.

(v) Consequences of Rejection

a. Buyer's Duties Upon Rejection

Under the general sales law a buyer is under no duty to return rejected goods to the seller; it suffices if he simply notifies the seller that he rejects them and places them at the seller's disposal.[140] The *First Report* recommended no change in this principle for New Brunswick's consumer legislation.[141] the *C.P.W.L.A.*, however, departs from this recommendation and, although not requiring the consumer in all cases to return the consumer product upon rejection to the seller,[142] requires him to do so at the seller's request. In such cases the requirement imposed by section 22(2) is to return the rejected product to the seller or to any repair facility or service outlet that is operated or authorized by the seller unless: (1) the consumer would be significantly inconvenienced in returning it,[143] or (2) the consumer has not received, in accordance with section 18, a refund from the seller

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[138]Section 8.5(1).

[139]Section 8.6(1) of the *Uniform Sale of Goods Act* only precludes a buyer from relying on the unstated defect to justify rejection. This reflects the concern that the words "or to establish breach" in the Ontario formulation might be given a broad meaning so as to encompass all claims for damages: see Uniform Law Conference of Canada, *Uniform Law Section Report on Sale of Goods* (1982), at p. 165. The Uniform Act also contains an added provision that precludes the seller's failure to particularize the seller's nonconformity unless the seller is "unduly prejudiced": see s. 8.6(3).

[140]See discussion, *supra*, above footnote 26.

[141]*Supra*, footnote 13, at pp. 136-137. The Saskatchewan Act fully implemented a similar recommendation and merely provides that where a consumer product is rejected, "the consumer shall have no responsibility to deliver the product to the party in breach and it is sufficient if the consumer informs the party in breach that he rejects it": s. 23(b).

[142]The general requirement is merely that the buyer allow the seller to take back the consumer product: s. 22(1). *Cf.* s.22 Sask. Act.

[143]Just as the buyer is excused on the gounds of significant inconvenience [s. 14(3)] from having to return the consumer product upon request to afford the seller a reasonable opportunity to rectify, he is similarly excused upon rejection from returning the consumer product at the request of the seller and the exclusive considerations of convenience are identical: s. 22(2).

of payments made.[144] The rationale behind this change appears to recognize that insofar as recaption by the seller is concerned, in consumer sales[145] it is often the buyer who is in a better position to arrange for return of the product. In such cases, it is argued, the seller should be permitted to require return as long as the requisition is without prejudice to the consumer. The *C.P.W.L.A.* safeguards in that respect include, in addition to the significant inconvenience and buyer's lien exceptions already noted, express provision for passing along to the seller all reasonable expenses that the consumer incurs in effecting return at the seller's request.[146]

The consumer is further required, by section 22(4), to take reasonable care of the rejected consumer product until he either (1) allows the seller to take it back, or (2) returns the product in accordance with the seller's request. This formulation raises two potential problems which could have been expressly resolved. The first problem concerns how long the buyer must wait after he's notified the seller that he has rejected the consumer product before it can be said that he has "allow[ed] the seller to take it back." Is notification with the arbitrary imposition of a time frame sufficient to thereafter exonerate the buyer for a failure to take reasonable care of the rejected product, or is a reasonable time frame implied? The *Uniform Commercial Code*, in a precedent followed in both the *Ontario Draft Sales Bill*[147] and the *Uniform Sale of Goods Act*,[148] resolves this problem by codifying the common law position and specifically providing that the buyer is obliged to hold the goods with reasonable care "for a time sufficient to permit the seller to remove them." The second problem concerns the ultimate responsibility for the buyer's incidental expenses necessitated by this obligation to take reasonable interim care of the rejected consumer product. Again the *U.C.C.*, in a precedent similarly followed,[149] expressly imposes financial liability upon the seller for the buyer's reasonably incurred expenses.[150]

b. Buyer's Right to Recover Payments and/or Damages

Under the general sales law the prerequisite of a total failure of consideration disentitles a buyer from recovering the pruchase price once he has received any benefit under the contract.[151] The *First Report of the Con-*

[144]See discussion, *infra*, on buyer's lien, above footnotes 156-164.

[145]Unlike commercial sales, for example, where the buyer can generally place the rejected goods at the seller's disposal throughout normal business hours, consumer sales would much less frequently afford this opportunity.

[146]Section 22(3).

[147]Section 8.2(2)(b).

[148]Section 8.3(b).

[149]See s. 9.13 of the *Ontario Draft Sales Bill* and s. 9.14 of the *Uniform Sale of Goods Act*.

[150]Section 2-711(3). It should be noted that each of the Acts also provides that the buyer's "security interest" (buyer's lien) includes these expenses in addition to any payments on price.

[151]*Ockenden* v. *Henley* (1858) E.B. & E. 485, 492. See also section 56(2) *S.G.A.* which provides that "Nothing in this Act shall affect the right of the buyer . . . to recover money paid where the consideration for the payment of it has failed."

sumer Protection Project, following the precedent of the *Ontario Warranties Report*,[152] recommended that upon rejection the consumer should be entitled to (1) a refund of the purchase price subject to an allowance for the benefits received, and (2) any other damage which he may have suffered, subject to the usual tests of foreseeability.[153] These recommendations, reflecting a universal trend in reform proposals and legislation,[154] were incorporated without modification in the *C.P.W.L.A.*[155]

It should also be noted at this juncture that the *C.P.W.L.A.* takes cognizance of potential refund problems that arise where the buyer's consideration has included a trade-in. Section 19(2) specifically provides that in such circumstances the seller or the buyer may elect to treat the trade-in as if it were money, the amount of which is "deemed to be the monetary value of such consideration at the time it was given." The deeming provision recognizes and resolves the practical difficulties that would otherwise arise given existing consumer sales techniques which often inflate or deflate trade-in monetary values in direct proportion to inflated or deflated retail selling prices.

c. Buyer's Lien Rights

Under the general sales law the buyer who rightfully rejects goods has no right to hold on to them as security for repayment of purchase monies or for other damages. As noted in the *First Report*, this legal requirement of having to give back the goods before being entitled to any refund operates as a powerful practical deterrent to the exercise of consumer rejection rights.[156] The *Report* recommended, therefore, that the New Brunswick consumer should have a lien for "any portion of payments made on account of the purchase price that he is entitled to recover."[157] Noting the difficulty of estimating various unliquidated claims,[158] the *Report* went on to expressly recommend against any lien for general damages. The *C.P.W.L.A.*,[159] like

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[152]*Supra*, footnote 13, at p. 46.

[153]*First Report, supra*, footnote 13, at pp. 134-135.

[154]See, for example, the Saskatchewan Act: ss. 20(1)(b) and 23(c); *Ontario Report on Sale of Goods, supra*, footnote 13, at p. 516; *Ontario Draft Sales Bill*: ss. 9.12-9.14; *Uniform Sale of Goods Act*: ss. 9.13-9.15. *Cf. N.S.W. Working Paper on Sale of Goods, supra*, footnote 52, at para. 13.39.

[155]See sections 15, 17(2), and 18(1).

[156]*Supra*, footnote 13, at p. 112.

[157]*Ibid.*, at p. 132.

[158]The following quotation from *Raver* v. *Webster* (1856), 3 Iowa 502 at p. 512 was cited in the *First Report*, at pp. 131-132, to support its reluctance to extend the buyer's lien to encompass a general claim for unliquidated damages:

> To give a party the right to demand payment or security for the claim he may hold against another, presupposes almost necessarily, that his claim or demand is either in fact ascertained and settled, or that it may be approximated at least, by fixing a value on those things, or those services, which in every community, have some estimated or marketable worth. Else, on what basis would he proceed in demanding payment or security? Or if payment or security should be offered, for what amount? By whom or how, is the amount to be ascertained? If the defendant is willing to comply, where is the data from which the computation is to be made?

[159]Section 18(1).

the Saskatchewan Act,[160] adopts this reasoning in its entirety and so restricts the buyer's lien to security for the return of the purchase price. The lien rights conferred by the *Uniform Commercial Code* were cited in the *First Report* as a precedent for its recommendation.[161] The *U.C.C.* lien rights, however, are much broader and include, in addition to payments on price, a number of unliquidated claims against the seller, *viz.* expenses reasonably incurred in the inspection, receipt, transportation, care and custody of the goods.[162] The incorporation of unliquidated claims to this degree appears to have presented little difficulty to date in the United States. Both the *Ontario Draft Sales Bill* and the *Uniform Sale of Goods Act* follow the broader *U.C.C.* precedent,[163] even to the extent of entitling the buyer not only to retain possession of the goods but also, in due course, to resell them.

The Ontario Law Reform Commission, notwithstanding its recommendation to follow the *U.C.C.* precedent, expressed some doubt concerning the practical importance of the buyer's lien rights in consumer sales:

> . . . It may well be of value to a merchant buyer who has storage facilities, who knows his rights, and knows where to find a market to enforce his lien if this becomes necessary. It seems less likely that a non-merchant buyer would often avail himself of the lien right: consumers as a group are usually only too happy to return to the seller goods that have proved unsatisfactory. However, it is generally agreed that the law should be evenhanded in conferring lien rights on buyers and sellers, and it seems equally reasonable to expect that the conferral of the buyer's lien right should not depend on the frequency with which this right is likely to be invoked by the buyer.[164]

In this respect it is important to recognize that in the exercise of his *C.P.W.L.A.* buyer's lien, the consumer is never looking toward ultimate resale of the consumer product. Resale, if any, will be the seller's responsibility, and therefore the main advantage of the *C.P.W.L.A.* buyer's lien is the effective inducement it provides for the seller to promptly refund the consumer's payments. For this reason its efficacy should not be measured by the frequency with which the lien is invoked by New Brunswick consumers but, rather, by the frequency with which it does not have to be invoked.

d. Deduction for Benefits, Damage and Deterioration

Under the general sales law a buyer who retains goods for more than a short period of time may be held to have accepted them and consequently restricted to a claim for damages.[165] The *Sale of Goods Act* makes no provision

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[160]Section 23(d).

[161]*Supra*, footnote 159. The *U.C.C.* precedent was also followed in Saskatchewan: see Romero, *supra*, footnote 56, at p. 329.

[162]Section 2-711(3). The Law Reform Commission of New South Wales recommended, albeit in the wider context of general as opposed to consumer sales, that the buyer should have a lien on goods to this extent: see *Working Paper on Sale of Goods*, *supra*, footnote 52, at para. 13.39(g).

[163]*Supra*, footnote 149.

[164]*Ontario Sale of Goods Report*, *supra*, footnote 13, at p. 482.

[165]See discussion, *supra*, above footnotes 13-19.

for any restitutionary claim by the seller for benefits received by the buyer during what the draftsman must have contemplated would be the relatively short period between delivery and rejection. While this time period in appropriate circumstances has been protracted by judicial reaction to the complexities of twentieth century merchandising,[166] the *C.P.W.L.A.* provisions on rejection and cure have extended it to unimagined lengths and frequency of occurrence. By expanding the permissible grounds and time frame for rejection, the *C.P.W.L.A.* makes it far more likely that, prior to rejection, the consumer will have derived some benefit from the rejected consumer product, and the seller will have suffered some prejudice in having to take back a used consumer product whose resale value and re-salability is seriously affected by such use.[167] The Act, therefore, attempts to counterbalance potential prejudice to the seller with the following provision:

> 17(2) The seller may deduct from the refund of any payments on the price or recover from the buyer, or both, an amount that is equitable in the circumstances for the benefit, if any, that the buyer derived from use of the product.[168]

It should be noted that section 17(2) as originally enacted excluded the seller's right to deduct for any benefit derived from use during the first ten days following delivery. The rationale for this exclusion was set out in the *First Report*:

> The one exception that we would make to the seller's right to recover in restitution for the value of the net benefit received by the buyer from use of the goods is the case where the buyer exercises his rejection rights within a very short period after receiving the goods. To give the seller a right to recover in this case, although certainly desirable in theory, is in our opinion apt to cause severe practical problems through disputes as to what value should be placed on such benefits. Since the amount of money involved in this case should be small, and considering some of the reasons for granting rejection rights in the first place, it does not seem unreasonable to make this exception. Otherwise there is great danger that an unscrupulous seller who has already been paid might deduct or threaten to deduct from the refund an inflated amount which he claims represents the benefit to the buyer. Such a practice could in many cases defeat for all practical purposes the consumer's right to reject . . .[169]

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[166]The Alberta Institute of Law Research and Reform, in its *Report on the Uniform Sale of Goods Act*, *supra*, footnote 65, at p. 168, noted that the draftsman of the *S.G.A.* "did not anticipate the twentieth century explosion in the selling of consumer and complex manufactured goods and the way in which this persuaded courts to extend the period in which a buyer could inspect goods, or could allow a seller to iron out teething problems."

[167]The *C.P.W.L.A.* prohibits the sale of consumer products as new when they have been used: s. 9.

[168]See also s. 17(3), the text of which is contained *supra*, above footnote 124, providing compensation to the seller for depreciation, damage, and unreasonable wear and tear. *Cf.* section 23(c) Saskatchewan Act which permits a seller to set off "an amount that is equitable for the use of the product providing that in determining the amount no regard shall be taken of the depreciation of the product unless it is otherwise provided for in the regulations." For a full discussion see Romero, *supra*, footnote 56, at p. 331.

[169]*Supra*, footnote 13, at p. 130.

Removal of this exclusion by amendment in 1980[170] should not result in substantial prejudice to consumers due in large part to the mechanics of the seller's deduction as it relates to the buyer's lien for return of his purchase monies. The Consumer Protection Project's major concern, as noted above, related to the value to be placed on the buyer's benefits and the potential for unscrupulous sellers to defeat the consumer's rejection rights by inflating that value. Special *C.P.W.L.A.* provisions to help resolve such disputes do much to allay this concern. Where the seller claims the right to deduct from the consumer's refund an amount for benefits, damage or depreciation, he is not entitled to return of the consumer product unless he (1) pays the consumer any amount that is not in dispute, and (2) deposits the amount in dispute with a court and gives the consumer a copy of the receipt for the deposit.[171] If the seller doesn't bring an action to realize his claim within fifteen days after making the deposit, the money will be paid out to the consumer.[172]

The *C.P.W.L.A.* attempt to avoid prejudice to the seller by allowing him compensation for any benefits received by the buyer through use of the consumer product may still be perceived by many sellers as less than satisfactory. In the United States, where a seller is permitted to recover from the buyer in restitution for the fair value of any benefit conferred as a result of the buyer's use, the normal method for measuring that value is to calculate the rental value of like goods for the relevant period of use.[173] In the vast majority of such cases, the benefit value to the buyer will be substantially less than the disproportionately high initial depreciation which the consumer product has endured, ie. the difference between the fair market value of a new vs. used consumer product. Any attempt, however, to reflect all of this depreciation in an assessment of benefit to the buyer is untenable.

D. DAMAGES

Where the seller is in breach of any *C.P.W.L.A.* warranty the buyer may recover damages.[174] Similarly, even where he rejects the consumer product, the buyer may recover damages from the seller in addition to recovering any payments that he has made on the price.[175] In either case

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[170]S.N.B. 1980, c. 12, s. 4.

[171]This is the combined effect of ss. 18(1) and (3).

[172]Section 18(5). Otherwise, where an action is commenced, the money is paid out at the direction of a judge of the court.

[173]*Byrd* v. *Moore Ford Company*, 157 S.E.2d 41 (Ga. App. 1967). Of course, in many cases, the benefit received by the buyer from a defective consumer product could be substantially less depending upon the nature of the breach of warranty.

[174]Section 15. It should also be kept in mind that the abolition of privity of contract in section 23 of the *C.P.W.L.A.* permits any person who is not a party to the contract but who suffers a consumer loss because of the breach to recover damages subject to the same reasonable foreseeability rules: see Part I, *supra*, footnote 1, at pp. 138-139.

[175]Section 17(1).

the damages recoverable are those which were "reasonably foreseeable at the time of the contract as liable to result from the breach of warranty." The identical expression is used in all references to the remedy of damages in the Saskatchewan Act.[176] This wording merely restates the common law remoteness of damages rule originally enunciated in *Hadley* v. *Baxendale*[177] and reproduced in the *Sale of Goods Act*. Section 50(2), reflecting the first branch of Baron Alderson's rule in *Hadley* v. *Baxendale*, provides that the seller's *prima facie* liability is the "estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."[178] The second branch of the rule in *Hadley* v. *Baxendale* deals with losses arising from unusual circumstances of which the parties were aware and the buyer's right to claim such "special damages" is reserved, albeit obscurely, by section 51 of the *S.G.A.* The tendency of modern cases is to view the two branches of the *Hadley* v. *Baxendale* rule as exhibiting a unitary test of reasonable foreseeability,[179] and the *C.P.W.L.A.* and Saskatchewan formulations merely provide legislative recognition of this proclivity.[180]

In conclusion it should also be noted that the *C.P.W.L.A.* definition of "loss" is consonant with the cases which have analysed and applied the above test.[181] It establishes that, within the ambit of reasonable foreseeability, a seller in breach of warranty may be liable for "loss or damage of any kind, including economic loss, damage to property and personal in-

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[176]Sections 20(1)(ii), 24, 26(3), and 27, Sask. Act.

[177](1854), 9 Exch. 231. That cornerstone of consequential damages proclaimed that the aggrieved party could recover damages:

> . . . such as may fairly and reasonably be considered either arising naturally, ie. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

The rule in *Hadley* v. *Baxendale* was recently authoritatively restated in *Koufas* v. *Czarnikow (The Heron II)*, [1969] 1 A.C. 350 (H.L.), and *H. Parsons (Livestock) Ltd.* v. *Uttley Ingham & Co.*, [1978] 1 All E.R. 525 (Eng. C.A.). For an exhaustive analysis of the *Hadley* v. *Baxendale* foreseeability rule and subsequent refinements, see *Ontario Sale of Goods Report, supra*, footnote 13, at pp. 491-494. See also: Swinton, "Foreseeability: Where Should the Award of Contract Damages Cease?" Study 3 in Reiter and Swan (eds.), *Studies in Contract Law* (1980), 61; *Canlin Ltd.* v. *Thiokol Fibres Canada Ltd.*, (1983), 40 O.R.(2d) 687 (Ont.C.A.).

[178]The same test appears in s. 48(2) *S.G.A.* as the measure of damages in the event of non-delivery.

[179]The trend emerged with the judgment of Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd*, [1949] 2 K.B. 528, at p. 539 (Eng. C.A.), which combined the two branches into one entitling and aggrieved buyer "to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach." More recently in *Koufas* v. *Czarnikow (The Heron II)*, *supra*, footnote 177, at p. 385, Lord Reid said that he did not "think that it was intended that there were to be two rules or that two different standards or tests were to be applied." Indeed, it is not always easy to distinguish between the two branches of Baron Alderson's rule and one writer comments that "the modern restatement of the rule as a totality is a salutary trend": see *McGregor on Damages*, (14th ed., 1980) at p. 195.

[180]More recent formulations have provided likewise: see s. 9.16(2) of the *Ontario Draft Sales Bill* and s. 9.18(2) of the *Uniform Sale of Goods Act* which continue to hold the seller liable for all substantially foreseeable damages falling within the *Hadley* v. *Baxendale* formula and refined by *Koufas* v. *Czarnikow (The Heron II)*, *supra*, footnote 177, *viz.* that the loss is not too remote if it was "liable to result" or "not unlikely to result": see *Ontario Sale of Goods Report, supra*, footnote 13, at p. 493.

[181]See Romero, *supra*, footnote 56, at p. 332.

jury."[182] This definition clearly establishes that, notwithstanding the broadened parameters of the seller's potential liability effected by the *C.P.W.L.A.*, that liability extends fully into the area of consequential damages. The rationale favouring full protection of the buyer's expectation interest, as set out in the *First Report*, clearly reflects a policy choice based on the economic grounds of avoiding misallocation of resources:

> . . . [A] very inespensive but defective product may be responsible for very serious damage to person, property or pocketbook. This kind of risk is much more difficult to evaluate than is the risk involved in having simply to replace a defective product, but if it is difficult for the businessman to evaluate, it is even more difficult for the consumer to evaluate. Again, we fail to see why the burden of this loss, which is caused by the defective product, should be borne by the individual consumer. It is really a cost of the production, sale and use of goods of that type and should be reflected in the price of the product. If the true costs are not reflected in the price then, as economists would say, there is a misallocation of resources. If the true costs are reflected in the prices, and it is found that consumers are unwilling to pay these prices and that the product cannot be sold, all we can say is that we are not convinced that consumers and society will be the worse for it. It is also sometimes said that such liabilities would inhibit the development of new products and innovative ideas. In economic terms, however, we fail to see why these new products should not bear their costs rather than having them borne by the individual consumer . . .[183]

III PERMISSIBLE EXCLUSION OR RESTRICTION

1. INTRODUCTION

The *C.P.W.L.A.* treatment of the disclaimer issue illustrates again the Act's *fidem habeat emptor* orientation assuaged somewhat by the *Emptores venditores que ultra modum ne disidant* principle. The implied warranties are statutory guarantees of quality, fitness and durability and, as such, are based on the reasonable expectations of the parties. No exclusion or restriction of the warranties or remedies for breach is permitted. On the other hand, while the seller cannot exclude or restrict *C.P.W.L.A.* express warranties, he can exclude or restrict the *C.P.W.L.A.* remedies for their breach. In order to prevent prejudice to the consumer, he is only permitted to do so to the extent that it is fair and reasonable. This should have the effect of preventing such things as hidden disclaimer clauses, clauses whereby the seller sets himself up as the sole judge of whether a consumer product is defective, etc. The consumer can have confidence that the seller cannot avoid this aspect of the *C.P.W.L.A.* by manipulating the form in which he makes his promise.

Where an exclusion or restriction of remedy is effective between the seller and consumer, the seller will not be prejudiced by inability to assert

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[182]Section 1(1). Note that the Saskatchewan Act, unlike the *C.P.W.L.A.*, goes further in permitting consumers to recover exemplary damages for a "wilful and knowing" violation of the Act: see s. 28 Sask. Act.

[183]*Supra*, footnote 13, at pp. 148-149. Of course the full protection of the buyer's expectation interest is subject to foreseeability rules and the duty to mitigate.

that effectiveness against a third party who suffers a "consumer loss". At the same time, if the seller's exclusion or restriction is found to be ineffective between the seller and consumer, the seller should not be prejudiced by being unable to rely on the ineffectiveness of a similar agreement vis-a-vis his own suppliers, given the *C.P.W.L.A.* philosophy of tracing back liability for the breach of warranty. Thus, evidentiary presumptions are provided to assist the seller for this purpose. Also in this respect, the disclaimer provisions generally recognize that a seller should not be prejudiced by the successful and permissible exclusion of *C.P.W.L.A.* warranties and remedies in a contract with his supplier where the seller later incurs liability for a consumer loss.

2. *IMPLIED WARRANTIES AND C.P.W.L.A. REMEDIES*

Section 52 of the *Sale of Goods Act* recognizes the principle of freedom of contract and permits a seller to exclude or modify the implied conditions and warranties that the Act would otherwise impose. The *Ontario Warranties Report* noted the predilicton of retail sellers to take advantage of this option and enumerated the different types of disclaimer clauses predominating written consumer contracts:

> (1) Clauses excluding all representations, warranties and conditions, express or implied, statutory or otherwise, and substituting in their place the supplier's own warranties of quality and performance.
>
> (2) The same types of clauses as in (1) but without substitutional warranties.
>
> (3) Clauses which do not exclude the implied warranties and conditions but which limit the measure of damages recoverable from the seller.
>
> (4) Clauses which exclude all claims for consequential damages.
>
> (5) Clauses which describe the goods as being sold on an "as is" basis or "with all faults".
>
> (6) Clauses which require all complaints involving the goods to be lodged within a restricted period.
>
> (7) Clauses in which the buyer acknowledges that he received the goods in good condition and that they conform to the terms of the contract.[184]

In general the consumer who signs a printed form contract containing one or more of these disclaimer clauses will be bound thereby notwithstanding that he neither read nor was expected to read the contract.[185] As stated in New Brunswick's *First Report*, the result in many cases is that "the buyer loses rights that the law meant him to have and has his reasonable expectations defeated (the implied terms, after all, are based upon reasonable expectations) by reason of a clause in a contract which he is not even aware of, or if he is, which he is not able to change."[186] Modern judicial antipathy

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[184]*Supra*, footnote 13, at p. 47.

[185]A recent stricter test for the incorporation of disclaimer clauses into contracts may be emerging: see *Tilden Rent-A-Car Co.* v. *Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.).

[186]*Supra*, footnote 13, at p. 145.

towards such disclaimer clauses and the consequent judicial ingenuity employed in striking them down using the constructional approach and the doctrine of breach of fundamental obligations have been documented elsewhere.[187] Also prominent in this regard, and likewise documented elsewhere,[188] are various statutory provisions preventing attempts to contract out of the *S.G.A.* implied terms in consumer sales.[189]

The *First Report of the New Brunswick Consumer Protection Project* examined positions favoured by other law reform agencies and adopted in the consumer protection legislation of other jurisdictions. It noted that differences, where extant, were largely based on whether a ban should be total or whether some exceptions should be permissible and, following the approach in a majority of these precedents, it negatived possible exceptions based upon the type of implied term,[190] type of goods,[191] and type of liability.[192] The major policy reasons put forth in support of disallowing any limitation of liability included the fact that the implied terms are based on the reasonable expectations of the consumer, the reality of a lack of consumer bargaining power, the seller's preeminent opportunity to detect patently defective consumer products and the seller's superior position to appreciate the risk of latent defects and to make arrangements for consequent protection.[193] The recommendation of an absolute prohibition against contracting out of or otherwise restricting the implied *C.P.W.L.A.* warranties and remedies for their breach was implemented without modification in section 24 of the *C.P.W.L.A.*. This prohibition should not, however, be viewed in isolation from the flexibility of the *C.P.W.L.A.* quality and fitness warranties. It will not have the effect of preventing a seller from selling a defective consumer product to a consumer without incurring

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[187]See *Ontario Warranties Report*, *supra*, footnote 13, at pp. 50-53.

[188]*Ibid.*, at pp. 53-61.

[189]See *Sale of Goods Act*, R.S.B.C. 1979, c. 370, s. 20; *The Consumer Protection Act*, R.S.M. 1970, c. C200, s. 58(1); *Consumer Protection Act*, S.N.S. 1975, c. 19, s. 1, adding s. 20C; *The Consumer Protection Act*, R.S.O. 1980, c. 87, s. 34(2); Saskatchewan Act, s. 7 as am. See also *Supply of Goods (Implied Terms) Act, 1973* (U.K.), s. 4; *Unfair Contract Terms Act, 1977* (U.K.), s. 6; *Consumer Transactions Act, 1972* S.S.A. 1972, No. 135, ss. 8, 10.

[190]The *First Report* recommended that New Brunswick's consumer protection legislation follow the universal approach of reform jurisdictions banning the contracting out of merchantability in consumer transactions and the near-universal approach of imposing an absolute ban on the contracting out of the implied term as to title (*Cf.* U.K. *Supply of Goods (Implied Terms) Act, 1973*, ss. 1, 4) and fitness: *supra*, footnote 13, at pp. 171-173.

[191]The recommendation was largely predicated on the fact that the new implied warranties put forth in the *First Report* were sufficiently flexible to accommodate the difference in the obligations imposed on the seller of new vs. used consumer products: *ibid.*, at pp. 173-174. *Cf.* the special treatment accorded second-hand dealers under s. 6(2) Sask. Act.

[192]Notwithstanding the broadened parameters of the seller's potential liability for breach of the implied warranties which it recommended, the *First Report* favoured the imposition of strict rather than fault-based liability: *supra*, footnote 13, at pp. 141-149, 176, and advocated full protection of the consumer's expectation interest by denying exclusion claims for consequential losses over and above the purchase price of the consumer product: see text accompanying footnote 183.

[193]*First Report*, *supra*, footnote 13, at pp. 146-147.

liability for the defect. Rather, what it will prevent, and is intended to prevent,[194] is the seller placing the risk of any and all defects upon the consumer.

3. EXPRESS WARRANTIES AND C.P.W.L.A. REMEDIES

A. GENERAL

The *First Report*, following the precedent of the *Ontario Warranties Report*,[195] had no difficulty recommending prohibition on contracting out of the express warranties[196] and section 24 of the *C.P.W.L.A.* adopts this recommendation. Again, however, the importance of viewing the prohibition within the context of the Act rather than in isolation must be emphasized.[197] While a seller is indeed prohibited under section 24 from excluding or restricting an express warranty extant at the time of contract, he can still prevent it from arising in the first place either by not making the representation which later matures into a *C.P.W.L.A.* express warranty or, if made, by clearly retracting it prior to the time of contractual formation so that the buyer's non-reliance or unreasonable reliance can be established.[198]

The Consumer Protection Project had difficulty with its recommendation concerning whether the New Brunswick legislation should allow the seller to place any limitation on the remedies for breach of an express warranty. It ultimately concluded, following the recommendations of the *Ontario Warranties Report*,[199] that the prohibition should be absolute on the basis that the reasons supporting minimum standards in the implied terms area also applied to support minimum standards in the express terms area[200] and that an absolute prohibition would simplify understanding, comparison and control for both consumers and the courts.[201] While an absolute prohibition approach was adopted in the Saskatchewan Act,[202] the *C.P.W.L.A.*

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[194]*Ibid.*, at p. 141.

[195]*Supra*, footnote 13, at p. 62.

[196]*First Report*, *supra*, footnote 13, at pp. 177-178.

[197]*Ibid.*, at p. 178.

[198]Section 4(1) *C.P.W.L.A.* For a full discussion see Part I, *supra*, footnote at pp. 148-156.

[199]*Supra*, footnote 195.

[200]*First Report*, *supra*, footnote 13, at pp. 179-184.

[201]*Ibid.*, at pp. 185-188.

[202]See s. 7(1) Sask. Act which was repealed and replaced by S.S. 1979-80, c. 17, s. 4, effective on proclamation. Until proclamation s. 7(1) currently reads:

> Subject to subsection (2) of section 6, every agreement or bargain, verbal or written, express or implied, that the provisions of this Act or the regulations shall not apply, or which in any way limits, modifies or abrogates or in effect limits, modifies or abrogates any such right or remedy, is null and void.

Note, however, the exception in s. 6(2) as regards sales by second-hand dealers: see *Macleod* v. *Ens* (1982), 135 D.L.R.(3d)365 (Sask.C.A.).

formulation departed from the recommendation put forth in the *First Report*. Section 25 of the Act provides as follows:

> 25(1) Subject to subsection (4), where there is a contract for the sale or supply of a consumer product, the parties may agree to exclude or restrict any remedy provided by this Act for breach of an express warranty, but such agreement shall be ineffective to the extent that it is shown that it would not be fair or reasonable to allow reliance on such agreement.
>
> 25(2) Where the person alleging that an agreement referred to in subsection (1) is ineffective was himself unable to rely on a similar agreement made between him and another person in relation to the product because it was not fair or reasonable for him to rely on that agreement, then unless reliance on the agreement referred to in subsection (1) is shown to be fair and reasonable in the circumstances, that agreement is ineffective to the same extent that the similar agreement was ineffective.
>
> 25(3) In determining whether it would be fair or reasonable to allow reliance on an agreement to exclude or restrict any remedy provided by this Act for breach of an express warranty, regard shall be had to all the circumstances of the case.
>
> 25(4) Where there is a contract for the sale or supply of a consumer product by description, the parties cannot agree to exclude or restrict any remedy provided by this Act for breach of an express warranty that forms part of the description of the product.
>
> 25(5) For the purposes of subsection (4), a sale or supply of a consumer product shall not be prevented from being a sale or supply by description by reason only that the product is a specific product that is seen, examined, tested or selected by the buyer.
>
> 25(6) The right of any person claiming under section 23 is limited to the extent of any exclusion or restriction of remedy that the parties agreed to in the contract and that is effective under this section.

If ease in the application of a rule is a correlative of simplicity in its statement, the Saskatchewan approach is indeed preferable. But, as will be seen, the initial *C.P.W.L.A.* obfuscation may be fully warranted as a legislative attempt to provide some scope for exclusion or restriction by the seller while imposing certain checks and balances in response to major concerns voiced in the *First Report*.

B. RESOLUTION OF PARTICULAR PROBLEMS

(i) Overlap Between Express Description and Implied Warranties

If the seller is not permitted to limit the remedies for breach of an implied warranty but is permitted to limit the remedies for breach of an express warranty, anomalous results could ensue.[203] The problem may be illustrated as follows. In one part of the contract the seller undertakes to supply the buyer with a consumer product of a particular description, eg. carrot seeds; in another part of the contract the seller seeks to limit the consumer's remedy to a return of purchase price in the event the seed supplied is not carrot seed. If description was exclusively an express war-

[203] See *First Report*, *supra*, footnote 13, at p. 184.

ranty, the seller could presumably limit the remedy pursuant to s.25(1). The difficulty arises insofar as the description also triggers reasonable expectations under the implied warranty of requisite quality,[204] the remedies for breach of which the seller is not free to exclude or restrict. Subsection 25(4) eliminates potential conflict by prohibiting any exclusion or restriction of *C.P.W.L.A.* remedies for breach of an express warranty that forms part of the description of the consumer product. Any residual categorization problems inherent in the sale of "specific" consumer products has been eliminated by subsection 25(5).[205]

(ii) Insuring Fairness and Reasonableness

One of the quintessential issues in consumer protection legislation is how to reconcile the primordial principle of freedom of contract with the need to impose limits on that freedom in order to achieve balance and basic fairness. Anglo-Canadian courts have traditionally refused to tackle the problem of over-reaching head on by simply denying enforcement of a contract or clause on the simple ground that it was too harsh to countenance. While a doctrine of unconscionability has more recently emerged in the caselaw,[206] judicial mechanisms may be unsuitable for disposing of any but the simplest examples of contractual unconscionability.[207] American courts, on the other hand, have been provided with clear statutory authority to monitor sale contracts for basic fairness.[208]

The *First Report* devoted considerable attention to this problem and, following the *Ontario Warranties Report* precedent,[209] recommended that the New Brunswick consumer protection legislation contain a general unconscionability provision to combat the inequality of bargaining power in consumer sales.[210] This prescient[211] recommendation of a general fairness and

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[204]Description is important in the determination of requisite quality because the "reasonable" quality warranted under s. 10(1)(a) is dependent upon, *inter alia*, the seller's description of the consumer product.

[205]While sales of specific goods can be sales by description providing the seller undertakes responsibility under the contract for the identity of the subject matter, the issue is not entirely free from doubt in New Brunswick: see *First Report*, *supra*, footnote 13, at pp. 74-76 for a full discussion of *Godsoe* v. *Beatty* (N.B.C.A.) and its anomalous implications.

[206]See, for example, *Lloyd's Bank* v. *Bundy*, [1975] Q.B. 326 (Eng. C.A.), which has been applied in Canada in the sale of goods context: *Harry* v. *Kreutziger* (1978), 95 D.L.R. (3d) 231 (B.C.C.A.). For a general discussion of the doctrine of unconscionability see Waddams, "Unconscionability in Contracts", (1976) 39 *Mod. L.R.* 369. See also: *Ontario Sale of Goods Report*, *supra*, footnote 13, at pp. 153-156.

[207]See Hasson, "Unconscionability in Contract Law and in the New Sales Act—Confessions of a Doubting Thomas," (1979-80) 4 *Can. Bus. L.J.* 383. See also: Reiter, "Unconscionability: Is There a Choice? A Reply to Professor Hasson," (1980) 4 *Can. Bus. L.J.* 403; Leff, "Thomist Unconscionability," (1980) 4 *Can. Bus. L.J.* 424.

[208]See *U.C.C.* 2-302.

[209]*Supra*, footnote 195.

[210]*Supra*, footnote 13, at pp. 159-165.

[211]See the unconscionability provisions contained in sections 5.2 of the *Ontario Draft Sales Bill* and the *Uniform Sale of Goods Act*. The major difference between the Ontario and Uniform formulations concerns whether a court should be able to raise the issue of unconscionability on its own motion; the former answers the question affirmatively, the latter negatively.

reasonableness control was not adopted *per se* in the *C.P.W.L.A.* The legislation does, however, in subsection 25(2), subject the seller's purported exclusion or restriction of *C.P.W.L.A.* remedies for breach of an express warranty to this test. And subsection 25(3) provides that in determining this question regard shall be had to all the circumstances of the case. Some legislative guidelines for a general fairness and reasonableness control were provided in the *First Report*. It is submitted, these would be, *mutatis mutandis*, appropriate but not exhaustive considerations notwithstanding the limited application of that control in the *C.P.W.L.A.*, ie. to determine the effectiveness of a seller's exclusion or restriction of the *C.P.W.L.A.* remedies for breach of an express warranty:

> (a) whether the consumer knew or ought to have known of the term in question, and understood or ought to have understood its effect;
>
> (b) whether the consumer freely consented to the term in question;
>
> (c) whether the consumer had an opportunity to obtain different terms from that in question from the seller or from someone else, and knew and was able to take advantage of this opportunity;
>
> (d) if the term places a risk on the consumer, which party was in practice in the better position to mitigate the effect of the risk dealt with by the term, for example, by insuring against that risk;
>
> (e) whether the seller took undue advantage of the consumer's position or the consumer's lack of knowledge, ability or experience;
>
> (f) whether the term or the contract appears to be excessively one-sided in favour of the seller.[212]

Thus, for example, in the absence of very special circumstances, fairness and reasonableness would require any limitation to be clearly disclosed to the consumer before the contract is made,[213] and would prevent the seller from setting himself up as the sole judge of whether a consumer product is defective.[214] The fairness and reasonableness test would take into consideration such things as whether the consumer product was manufactured, processed or adapted to the special order of the consumer.[215] Likewise it would examine the degree to which the seller has taken advantage of the inability of the consumer to protect his interests because of physical or

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[212]See *First Report, supra*, footnote 13, at pp. 167-168. The sources providing precedents for these guidelines are enumerated in footnote 33, at p. 167. *Cf.* the non-exhaustive enumerations contained in ss. 5.2(2) of the *Ontario Draft Sales Bill* and the *Uniform Sale of Goods Act*. See also s. 55(3) of the *Sale of Goods Act, 1979* (U.K.) which allows the courts to strike down any clause in a commercial contract which the court finds to be "unreasonable": *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.*, [1982] 3 W.L.R. 1036 (Eng. C.A.).

[213]See s. 6(2) of the Sask. Act which permits the exclusion or modification of statutory warranties by second-hand dealers but only if it is "brought to the notice of the consumer and its effect made clear to him . . ." See also: *Consumer Transactions Act, 1972*, S.S.A. 1972, No. 135, s. 10(3).

[214]See *First Report, supra*, footnote 13, at p. 180. *Cf.* Sask. Act, s. 17(3)(a), which prohibits any clause purporting to make a warrantor the sole judge of a warranty claim.

[215]*Cf.* Subsection (e) of Schedule 2 "Guidelines" for Application of Reasonableness Test under the *Unfair Contract Terms Act, 1977* (U.K.).

mental infirmity, illiteracy, inability to understand the language of an agreement,[216] lack of education, financial distress or similar factors.[217]

(iii) Evidentiary Burdens

Who should bear the evidentiary burden of establishing the fairness and reasonableness of an attempted exclusion or restriction of the *C.P.W.L.A.* remedies for breach of an express warranty? The *First Report* recommended that the onus should be on the seller to justify the fairness and reasonableness of the limitation.[218] This recommendation was not enacted in the *C.P.W.L.A.* insofar as section 25(1) gives effect to the attempted exclusion or restriction unless "it is shown [by the consumer] that it would not be fair or reasonable to allow reliance on such agreement." This is unfortunate, given the failure of the *C.P.W.L.A.* to prevent the seller from misrepresenting to the consumer what his rights are by the continued use of unfair or unreasonable disclaimer clauses,[219] and the failure of the *C.P.W.L.A.* in any circumstance to require the seller to inform the consumer of his rights.[220] In the above context it is important to note that where the seller is himself unable to rely on a disclaimer clause because it is established to be unfair or unreasonable by the consumer, he carries, pursuant to subsection 25(2), a different evidentiary burden in a contemporaneous or subsequent action against his supplier where the contract contains a similar provision. This is essential to the "tracing" policy adopted by the *C.P.W.L.A.*[221] Thus, for example, once a clause is shown to be unfair or unreasonable as between retailer and consumer, it is presumed via this subsection to be unfair or unreasonable as between retailer and wholesaler unless it is shown by the wholesaler to be fair and reasonable. The net effect then, in the circumstances, is to shift the evidentiary burden in order to promote this "tracing" policy.

Finally, subsection 25(6) addresses the issue of disclaimer clauses in non-privity cases, ie. to what extent should a seller be able to avail himself

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[216]*Cf. First Report, supra*, footnote 13, at p. 210, wherein the Consumer Protection Project recommended that written consumer contracts should be required to be expressed in the same official language as that principally used in the oral negotiations.

[217]See s. 5.2(2)(a) of the *Ontario Draft Sales Bill* and s. 5.2(2)(g) of the *Uniform Sale of Goods Act*.

[218]*First Report, supra*, footnote 13, at p. 190. In so recommending, the Consumer Protection Project followed the precedent of the *Misrepresentation Act, 1967* (U.K.), s. 3.

[219]The *First Report* recommended, as did the *Ontario Warranties Report* (*supra*, footnote 195), that the use of such clauses should be prohibited: *supra*, footnote 13, at p. 205. The Sask. Act, which basically prohibits exclusion or modification of any statutory warranties or remedies, also prohibits and creates a statutory offence for the use of purported disclaimers: see s. 7(2) as am. by S.S. 1979-80, c. 17, s. 4 and s. 17(3)(b).

[220]While the *First Report* did not recommend the imposition of such an obligation by way of a general requirement, it saw no reason why, in the case of written contracts, the document should not state that its terms are *in addition* to any rights or remedies the consumer may have under the *C.P.W.L.A.*: *supra*, footnote 13, at p. 206.

[221]To further the same purpose section 26 of the Act effectively enables a retailer who incurs liability to a consumer for breach of a *C.P.W.L.A.* implied warranty to trace back and recover indemnity from his supplier, who in turn can trace back and recover indemnity from his supplier etc. notwithstanding purported, and otherwise permissible, exclusions or restrictions in the sales documentation.

of an effective exclusion or restriction of remedies against a third party who suffers a "consumer loss"? While the answer provided is clear enough, *viz.* that the seller is able to assert against the third party any effective exclusion or restriction, its application deserves further comment in regard to express representations or promises made directly by a prior seller to the consumer himself. This may best be illustrated by the case of a television commercial or newspaper advertisement sponsored by the manufacturer and containing express warranties with no remedial qualifications,[222] followed by the consumer's purchase of the product from his retailer under a written contract restricting the *C.P.W.L.A.* remedies for breach of express warranty. Whether or not the retailer has adopted or is deemed[223] to have adopted the manufacturer's statements, he is free to exclude or restrict the *C.P.W.L.A.* remedies for breach of express warranties under section 25(1) subject to the fairness and reasonableness control. Assuming that exclusion or restriction is effective vis-à-vis the consumer and his retailer, the consumer may still be able to succeed against the manufacturer under section 23 of the *C.P.W.L.A.* The consumer, in circumstances where the advertisements were run prior to the contract between manufacturer and retailer (given a direct distribution chain), can sue notwithstanding lack of privity, for breach of the manufacturer's warranty in the contract between the manufacturer and retailer. In that contract for the sale or supply of consumer products, the manufacturer's advertisements constitute express warranties from the manufacturer to the retailer whether or not the retailer himself relied on the advertisements, unless it would have been unreasonable for him to so rely.[224] Of course, the manufacturer and retailer could agree to exclude or restrict any *C.P.W.L.A.* warranty or remedy in their contract pursuant to section 26 of the Act. In the circumstances presented, the only exclusions or restrictions which would be effective in the consumer's action against the manufacturer would be in relation to the section 13 remedies for breach of express warranty and these would also be subject to the fairness and reasonableness control imposed by subsection 25(1).

(iv) Curbing Manipulation of Promissory Form

Express warranties pose a difficulty that implied warranties do not, because remedies depend upon the form in which promises are made and because promises may be made in different forms. The *First Report* offered the following illustration to emphasize the potential importance of form in determining the success or failure of a seller, even in the face of an absolute prohibition, who purports to limit the buyer's remedial recourse for breach of an express warranty:

> For example, a seller who guaranteed that the goods were in perfect condition but went on to purport to limit his liability to fifty per cent of the cost of repairing any defects would be unsuccessful in his purported limi-

[222]See s. 4(1)(c). For a full discussion see Part I, *supra*, footnote 1, at pp. 152-156.

[223]See s. 4(2).

[224]*Supra*, footnote 222.

> tation, and would be liable for the full cost of repairs and other consequential damages caused by the goods being defective. But a seller could achieve the limitation he desired by recasting the form in which he makes his guarantee so that, instead of making a promise that the goods are in perfect condition, he promises that if they are not in perfect condition then he will pay fifty per cent of the cost of repairing any defects. By making his promise in this form, the seller would not run afoul of the rule prohibiting the limitation of remedies and yet would be successful in limiting his liability to fifty per cent of the repair cost and consequential damages arising only from breach of the obligation to pay fifty per cent of the repair costs. The result would be that the "smart" seller who used the right formula could effectively limit his liability, while the unsuspecting seller who used the wrong formula would fail in his attempt at limitation, even though in substance both of them were out to accomplish the very same thing, limited liability. It would be wrong to say "I promise X but I limit my liability to Y", but it would be all right to say "If X does not occur then I will do Y".[225]

In order to avoid such haphazard results and in an effort to achieve uniform standards, the *C.P.W.L.A.*, following a recommendation of the Consumer Protection Project,[226] contains an appropriate deeming provision which provides that any promise that the seller makes if the consumer product fails to meet the specifications set forth in a promise is a promise that the consumer product will meet the specifications set forth:

> 6 Any express warranty given by the seller to the 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 shall be deemed to include an express warranty that the product is not defective or will not break down, malfunction or fail to meet his specifications, as the case may be during the term of the express warranty.[227]

This provision should effectively prevent the seller from excluding or restricting the remedies for breach of a *C.P.W.L.A.* express warranty through the sole means of manipulating the form in which the promise is made.

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[225]*Supra*, footnote 13, at pp. 181-182.

[226]*Ibid.*, at p. 182.

[227]Section 6 as am. by S.N.B. 1980, c. 12, s. 2 proclaimed effective January 1, 1981.