Consumer Products in New Brunswick — *Fidem Habeat Emptor* Part I: The C.P.W.L.A. — Its Scope and Warranties

IVAN F. IVANKOVICH*

The inability of the Sale of Goods Act to meet modern consumer protection needs prompted enactment of New Brunswick's Consumer Product Warranty and Liability Act. The new Act incorporates a comprehensive legislative scheme to deal with all aspects of consumer warranties attempting 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. and critically examines the express and implied warranties it creates. The New Brunswick legislation is analyzed against the background of the general sales law which it reacts against or clarifies and in comparison with precedent and subsequent reform proposals and enactments in other jurisdictions.

L'incapacité de la Loi sur la vente d'objets de répondre aux besoins modernes de protection du consummateur a incité la disposition Loi sur la responsabilité et les garanties relatives aux produits de consommation. Cette nouvelle Loi englobe un plan législatif détaillé ayant affaire à tous les aspects de garanties consommatrices, dans le but de faire effet aux espérances raisonnables des acheteurs et des fournisseurs de biens de consommation d'aujourd'hui. L'auteur, dans son étude, fournit un commentaire détaillé de la portée et de l'application de la L.R.G.R.P.C. ainsi qu'une critique des garanties explicites et implicites que la Loi crée. La législation du Nouveau-Brunswick est analisée d'après la documentation sur la loi des ventes dont elle regit contre ou dont elle clarifit. De plus, on compare la Loi aux propositions de réformes précédentes et ultérieures ainsi qu'aux dispositions dans d'autres juridictions.

INTRODUCTION

When the definitive history of New Brunswick consumer protection law is written, the first part will be devoted to the rise and fall of the apodictic doctrine of *caveat emptor* — let the buyer beware. While judicial development in the interpretation of the implied conditions of merchantability and fitness for purpose under the *Sale of Goods Act*[1] has admittedly diminished the

*B.A. (Canisius), M.B.A. (Wisconsin), LL.B. (U.N.B.). Associate Professor, Department of Industrial and Legal Relations, Faculty of Business, University of Alberta.

[1] R.S.N.B. 1973, c. S-1 as am., s. 15. Hereinafter the Act may be referred to as the *S.G.A.*

preeminence of this once-proud doctrine, a recent legislative development has dealt it a fatal blow in New Brunswick.

When the *Sale of Goods Act* was originally passed by the British Parliament in 1893 it contained a number of provisions which reflected the reasonable expectations of buyers and sellers at the time. This, of course, was long before the advent of branded and nationally-advertised products, standard-form contracts containing hidden disclaimers and sophisticated distribution chains moving consumer products from manufacturer to ultimate user. It is not surprising, then, that the balance between buyer and seller which prevailed in 1893 has been substantially eroded in more recent years by the emergence of radically different methods of manufacturing, distribution and marketing and that an Act, perhaps appropriate to its former milieu, is arguably ill-equipped to meet the needs of consumer protection today. With the enactment and proclamation of the *Consumer Product Warranty and Liability Act*,[2] a "new deal" has been negotiated for New Brunswick consumers.

The C.P.W.L.A. re-establishes the paramountcy of the reasonable expectations of buyers and sellers for the 1980's and beyond. The basic principle embodied in this new legislation is that of *fidem habeat emptor* — let the buyer have confidence — confidence in what sellers and suppliers say, write and advertise about their consumer products and confidence that those products will meet the reasonable expectations that have been generated in relation to quality, fitness and durability. New and potent weapons are provided through the creation of express and implied warranties to buyers and others confronted with defective and/or dangerous consumer products. But warranties are only as strong as the remedies available to enforce them and, in this respect, the abolition of privity of contract, the creation of a new remedial regime, and the imposition of strict liability of a supplier of defective products that pose a safety hazard go a long way toward providing meaningful redress.

When the C.P.W.L.A. was enacted in 1978, New Brunswick became the second jurisdiction in Canada, after Saskatchewan,[3] to deal in a comprehensive legislative scheme with all aspects of consumer warranties. The Act itself was largely based upon a warranty study initiated by the Law Reform Division of the Department of Justice in 1972. The New Brunswick Consumer Protection Project, under the direction of then-Professor Karl

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[2]S.N.B. 1978, c. C-18.1, proclaimed effective January 1, 1980 except s. 6 which was proclaimed effective January 1, 1981, as am. S.N.B. 1980, c. 12. Hereinafter the Act may be referred to as the *C.P.W.L.A*

[3]*The Consumer Products Warranties Act*, S.S. 1976-77, c. 15 now R.S.S. 1978, c. C-30 as am., proclaimed effective November 6, 1977 except ss. 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: ss. 16(2), 17.1, 34(3). Subsection 7(2), which has never been proclaimed in force, was repealed and replaced by S.S. 1979-80, c. 17, s.4 effective on proclamation and unproclaimed as of November 1, 1982. Hereinafter the Act may be referred to as the Saskatchewan Act.

J. Dore, released its first report in 1974.[4] Subsequent reports were released in 1975[5] and 1976.[6] An excellent article, entitled "The Consumer Product Warranty and Liability Act," by Mr. Dore, now Director of Consumer and Corporate Affairs for the Province, appeared in the last issue of U.N.B.L.J.[7] It was exclusively descriptive in nature and provided interested parties with the benefit of a draftsman's overview of the Act and its provisions.

My purpose in this article is to provide a detailed commentary on the scope and application of the C.P.W.L.A. I propose (1) to discuss its major concepts against the background of the general sales law which the legislation reacts against or clarifies, and in comparison with precedent and 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 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.

In Part I of this article the scope of the consumer protection legislation and a detailed analysis of its express and implied warranties is presented. Part II, to appear subsequently, will deal with the C.P.W.L.A. remedial regime and products liability.

SCOPE OF THE C.P.W.L.A.

Before one can fully appreciate the dramatic substantive changes which the *Consumer Product Warranty and Liability Act* makes to the general sales law governing the supply of consumer products in New Brunswick, it is necessary to differentiate in a comprehensive manner between the type of transactions and persons that fall outside its scope and that are, therefore, subject only to regulation by the common law and other legislation.[8] In order to accomplish this purpose, I propose to examine the type of transaction (*viz.* "sale or supply") and type of product (*viz.* "consumer product") which the Act seeks to regulate, the type of persons the Act seeks to protect (*viz.* buyers and persons suffering a "consumer loss"), and the type of suppliers affected by the Act (*viz.* "distributors") and how they are affected.

[4]*First Report of the Consumer Protection Project: Consumer Guarantees in the Sale or Supply of Goods* (Department of Justice, Law Reform Division New Brunswick, 1974). Hereinafter this report may be referred to as the *First Report.*

[5]*Second Report of the Consumer Protection Project: Consumer Guarantees for Automobiles and Mobile Homes* (Department of Justice, Law Reform Division New Brunswick, 1974).

[6]*Third Report of the Consumer Protection Project: Volume 1: Sale of Goods (Concluded)* (Department of Justice, Law Reform Division New Brunswick, 1976).

[7]Dore, "The Consumer Product Warranty and Liability Act," (1982) 31 U.N.B.L.J. 161.

[8]It should be noted at this point that the *C.P.W.L.A.* is not a self-contained code covering all the law dealing with the sale or supply of consumer products. Rather the *C.P.W.L.A.* rights and remedies are additional to any other existing rights and remedies unless expressly or impliedly inconsistent therewith: see s. 28. In the event of conflict, the *C.P.W.L.A.* rights and remedies will prevail: see s. 2(4).

I Type of Transaction

1. Problems Under The General Sales Law

General sales law does not treat the distribution of goods and services within any comprehensive legislative or common law framework. Distinctions were early recognized between contracts of sale of goods and contracts for the provision of labour and materials,[9] the former subjected to the provisions of the *Sale of Goods Act* and, in particular, the contractual formality requirements in s. 5, the latter exempt. Further distinctions were recognized based upon the particular legal device utilized to supply goods to the user, *viz.* the distinction between sales and other closely related transactions (near-sales): barter[10] and hire-purchase.[11] Although a judicial tendency can be detected toward broadening the category of sale,[12] and toward extension of the principles of sales law to near-sales,[13] there are, nevertheless, obvious limits upon these judicial attempts toward harmonizing the law of sales and near-sales. The resulting divergence of applicable law can present the person supplied with defective goods considerable uncertainty in pursuing redress.[14]

2. The C.P.W.L.A. Solution — "Sale or Supply"

In responding to the question of whether New Brunswick's consumer protection legislation should be confined to contracts for the sale of goods or whether it should also apply to other contracts relating to goods, the *First Report of the Consumer Protection Project*[15] clearly recognized the need to remove anomalous distinctions between sales and near-sales. The efficacy of increased consumer protection would be inhibited if these anomalies were not removed and suppliers of consumer products were permitted to

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[9]See *Clay* v. *Yates* (1856), 1 H.&N. 73, 156 E.R. 1123; *Robinson* v. *Graves*, [1935] 1 K.B. 579 (C.A.). See also *Brunswick Glass Co. Ltd.* v. *United Contractors Ltd.* (1975), 12 N.B.R. (2d) 631 (Co. Ct.) where a contract for custom-made electric doors for a retail store was held to be a contract for labour and materials rather than a contract of sale of goods.

[10]See *Harrison* v. *Luke* (1845), 14 M.&W. 139, 153 E.R. 423. See also Atiyah, *The Sale of Goods* 6th ed., 1980), at 5-6.

[11]See *Helby* v. *Matthews*, [1895] A.C. 471 (H.L.).

[12]See *Messenger* v. *Greene*, [1937] 2 D.L.R. 26 (N.S.S.C.) where the plaintiff was a storekeeper who agreed to supply provisions to the defendant on a running account basis in return for quantities of pulpwood. The exchange was categorized by the Court as back-to-back sale transactions with a mutual set-off of the two prices.

[13]In *Young & Marten, Ltd.* v. *McManus Childs, Ltd.*, [1969] 1 A.C. 454, the House of Lords stressed the undesirability of drawing unnecessary distinctions between contracts of sale and contracts for labour and materials with regard to the implied duties of the supplier.

[14]Of particular concern within the consumer context would be divergence in the content of any implied terms applicable to the goods supplied and the rules governing payment and remedies on default.

[15]*Supra*, footnote 4 at 204.

use legal devices other than sale to accomplish the same purpose without attracting the incremental responsibilities which the new consumer protection legislation would impose. Following the recommendation of the Ontario Law Reform Commission's *Report on Consumer Warranties and Guarantees in the Sale of Goods*,[16] the C.P.W.L.A assimilates sales and near-sales by making the Act applicable to the sale or supply of a consumer product,[17] and defining "contract for the sale or supply of a consumer product" in s. 1(1) of the Act to mean:

> (a) a contract of sale of a consumer product, including a conditional sale agreement;
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> (b) a contract of barter or exchange of a consumer product;
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> (c) a contract of lease or hire of a consumer product, whether or not there is an option to purchase it; or
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> (d) a contract for services or for labour and materials if a consumer product is supplied along with the services or labour;

A. Conditional Sale Contracts

The specific inclusion of a conditional sale agreement is presumably only for added clarity. Any doubt as to whether a conditional sale is a contract of sale[18] would appear to have been resolved by the New Brunswick Court of Appeal in *General Motors Acceptance Corp. of Canada Ltd.* v. *Hubbard.*[19]

B. Contracts for Lease or Hire

Expanding the definition of "contract for the sale or supply of a consumer product" to include contracts of lease or hire now brings these categories of near-sales within the ambit of the Act. The rationale for including the hire-purchase type of contract is that such transactions are often intended to effect a sale on credit but, because of the way in which the transaction is cast, there may be no legal obligation to purchase—a necessary incident to contracts of sale.[20] The reason, however, for including a straight lease or hire of a consumer product is less compelling because the definition does not recognize the importance of a time factor in elevating the status of a lease to that of near-sale. The warranties and remedies created by C.P.W.L.A. are equally applicable to short and long term leases

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[16]Department of Justice, Toronto 1972 (hereinafter referred to as the *Ontario Warranties Report*) at 26.

[17]S. 2(1).

[18]See *Kozak* v. *Ford Motor Credit Company and J. and D.'s Used Cars Ltd.*, [1973] 3 W.W.R. 1; (1971), 18 D.L.R. (3d) 735 (Sask. C.A.).

[19](1978), 87 D.L.R. (3d) 39 (N.B.C.A.).

[20]See *Helby* v. *Matthews*, *supra*, footnote 11, where it was held that a transaction in which the seller was not obliged to sell and the purchaser to purchase did not constitute a sale even though the intent of the transaction was to effect a sale on credit.

of consumer products. In this respect it is interesting to note that Saskatchewan took the same approach[21] as New Brunswick in refusing to adopt the *Ontario Warranties Report* recommendation that only leases for substantial terms be included in the definition of sale.[22] The Saskatchewan rationale, put forth by Professor Romero, was that ". . . it was considered that the non-excludable statutory warranties could be quite valuable to a person who hires a consumer product for a short period of time and suffers a substantial loss, and that the sections of the Act dealing with remedies were flexible enough to cover the problems of short leases."[23]

C. Contracts for Services or Labour and Materials

The inclusion within the definition of "contract for the sale or supply of a consumer product" of a contract for services, or for labour and materials if a consumer product is supplied along with the services or labour, serves an important purpose. It avoids the difficulty in borderline cases of applying the "substance of the contract" test[24] in order to distinguish whether the contract is one of sale of goods or one for labour and materials, a distinction which can achieve great importance. The seller's obligations under the *Sale of Goods Act* in respect to the merchantability[25] and fitness for purpose[26] of his goods are absolute. In the absence of an effective disclaimer clause they are not dependent upon negligence and they extend to liability for latent defects in the goods supplied.[27] In a contract for labour and materials, on the other hand, the tradesman is generally not liable in the absence of negligence on the grounds of having impliedly undertaken only to exercise reasonable care and skill in the selection of materials.[28] The consumer products supplied under this type of contract will now attract the C.P.W.L.A. warranties and remedies. This will similarly affect a contract for the supply of consumer products which are to be installed or fitted into a building or construction, a contract which is also normally regarded under the general sales law as a contract for labour and materials.[29] In these contracts the Courts have drawn a distinction between liability for loss caused by the inadequacy of the service/labour component[30] and liability

[21]Saskatchewan Act, *supra*, footnote 3, s. 2(m)(ii).

[22]*Supra*, footnote 16, at 26.

[23]Romero, "The Consumer Products Warranties Act," (1978-79) 43 Sask. L. Rev. 81 at 114.

[24]*Robinson* v. *Graves*, *supra*, footnote 9. See also *Preload Co. of Canada Ltd.* v. *City of Regina* (1958), 24 W.W.R. 443, 13 D.L.R. (2d) 305; affirmed [1959] S.C.R. 801, 20 D.L.R. (2d) 586.

[25]*S.G.A.* s. 15(b).

[26]*S.G.A.* s. 15(a).

[27] See *Godley* v. *Perry*, [1960] 1 W.L.R. 9 (H.L.). See also *McMorran* v. *Dominion Stores Ltd.* (1977), 14 O.R. (2d) 559, 74 D.L.R. (3d) 186 (Ont. H.C.).

[28]See Atiyah, *supra*, footnote 10, at 16. *Cf. Dodd and Dodd* v. *Wilson and McWilliam*, [1946] 2 All E.R. 691 (K.B.D.).

[29]See *Young & Marten Ltd.* v. *McManus Childs Ltd.*, *supra*, footnote 13.

[30]See *Brunswick Construction Ltee.* v. *Nowlan et al.* (1974), 8 N.B.R. (2d) 76; 49 D.L.R. (3d) 93 (S.C.C.).

for loss caused by a defective product supplied under the contract.[31] Liability in the service/labour component is generally dependent upon negligence whereas liability for supplying defective goods generally is not, due to the courts' willingness to imply warranties analogous to those in sale contracts. Even though the C.P.W.L.A. preserves this fundamental distinction between the respective liabilities, two significant changes to the existing law can be detected: (1) the imposition of severe restrictions on the tradesman's ability to exclude or restrict warranties and remedies, and (2) the increased ability of the consumer to establish express terms in respect of the product component and possibly the service/labour component of the contract. Each of these will be discussed in turn.

Prior to the C.P.W.L.A., even if the Court would imply SGA-type conditions and warranties to consumer products supplied in these circumstances, it still would have been possible for the tradesman to negative such an implication or avoid its repercussions by the use of disclaimer clauses. The tradesman will no longer be able to exclude or restrict the C.P.W.L.A. warranties which will attach to the supply of the consumer product(s).[32] Though the unique C.P.W.LA. remedies are inapplicable to this type of contract,[33] and the consumer consequently relegated to the remedies normally applicable under the law for breach of contract, additional restrictions in this respect are imposed upon the tradesman. Whereas, by contract he could formerly exclude or restrict these ordinary remedies, the tradesman is now unable to do so in respect of remedies for breach of implied warranties[34] and he is only able to do so to the extent that it is fair or reasonable in respect of remedies for breach of express warranties.[35]

The second major change effected by the Act in the services/labour and materials contract involves the parol evidence rule and its applicability in determining the express terms of both the consumer product component and, possibly, the service/labour component of such contracts. While the C.P.W.I..A. as a whole applies to the type of contract under discussion, is restricted to the product supplied under the contract.[37] The potential for confusion in determining contractual terms[38] in written contracts of this

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[31]See *Hart* v. *Bell Telephone Company of Canada Ltd.* (1979), 26 O.R. (2d) 218 (Ont. C.A.).

[32]S. 24.

[33]S. 13(b).

[34]S. 24.

[35]S. 25(1). It is important to note that this result is brought about because the remedies ordinarily available under the general law are deemed by s. 13 to be "remedies provided by this Act." As such, they are subject to the restrictions imposed by s. 24.

[36]See, for example, s. 4(1) and ss. 8-12.

[37]S. 1(1) definition of "product".

[38]There is, of course, no corresponding confusion in regard to the available remedies for breach of a warranty whether related to the consumer product or the services/labour component as the unique *C.P.W.L.A.* remedies are inapplicable in either case: see s. 13. Presumably the common law and *S.G.A.* rules will govern the buyer's remedies and in this respect it should be kept in mind that "warranty" is used in s. 13 in the wider sense of "term" pursuant to the definition in s. 1(1), thereby encompassing both conditions and warranties.

type is supplied by section 5 which abolishes the parol evidence rule and permits oral evidence for the purpose of establishing an express warranty.[39] The question that ultimately arises is whether parol evidence can be adduced to establish oral contractual terms relating to the services/labour component that are incompatible with those terms actually expressed in the written contract.[40] As previously indicated, the express warranties provided by section 4 are restricted to statements made "in relation to the product." Section 5 does not, it would appear, contain any such restriction in relation to permissible oral evidence. First, the section applies "when there is a written contract" and "contract" is defined in the Act to mean "a contract for the sale or supply of a consumer product",[41] which in turn is defined to include the type of contract under discussion, *viz.* a "contract for services or for labour and materials if a consumer product is supplied along with the services or labour."[42] Thus, section 5 permits oral evidence in this type of contract "to establish an express warranty notwithstanding that it adds to, varies or contradicts the written contract." Second, the definition of "warranty" in section 1(1) as "a term of the contract that is a promise" is not restricted to promises in relation to the consumer product which is supplied. Consequently, it is certainly open to a court to interpret the abolition of the parol evidence rule in section 5 as applying to all express statements made in respect to both aspects of the services/labour and materials contract rather than restricting application of the abolition exclusively to oral statements made in relation to the consumer product. This interpretation would avoid the difficulty of applying two different evidentiary rules to oral statements made by the tradesman in respect of the same contract.

II Type of Product

1. "Common Use" Test

It remains now to fully discuss the type of product that is covered by the C.P.W.L.A. Because, by section 2(1), the Act is applicable to "every sale or supply of a consumer product," the definition of "consumer product" in section 1(1) is crucial to the discussion:

> "consumer product" means any tangible personal property, new or used, of a kind that is commonly used for personal, family or household purposes;

The test for a consumer product adopted by the Act is not the use of the specific product purchased, but, rather, the common use for that kind of

[39] For the text of s. 5, see *infra*, accompanying footnote 141.

[40] This problem is avoided in the Saskatchewan Act by defining "sale" in s. 2 as including this type of contract and by deeming in s. 8, *inter alia*, "any promise . . . relating to the sale . . . to be an express warranty." By s. 9 of the Saskatchewan Act parol evidence is permitted to establish the existence of an express warranty.

[41] S. 1(1).

[42] *Supra*, at 6.

product. Under this test, a product may fall within the Act if it is commonly used for personal, family or household purposes notwithstanding that the aggrieved buyer is purchasing for a commercial purpose. By adopting the "common use" test the Act is clearly attempting to avoid the difficulties associated with more subjective formulations.[43] The definition adopted also makes it immaterial with respect to the general application of the Act whether the seller knows or is in a position to know the particular use to which the buyer proposes to put the consumer product.[44]

The "common use" test is recurrent in consumer protection legislation.[45] The definitions in both the New Brunswick and Saskatchewan[46] Acts were adopted in part from the definition of "consumer product" in the *Magnuson-Moss Warranty Act*[47] as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes . . ." In this respect, it is instructive to note that the U.S. Federal Trade Commission has issued a final interpretation[48] of what it considers to be the proper standard in applying the "normal use" test to determine whether a given product is a consumer product:

> This means that a product is a "consumer product" if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by an individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.[49]

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[43]See, for example, U.C.C. 9-109 wherein goods are defined as "consumer goods" if they are *used* or bought for use *primarily* for personal, family or household purposes. In *Commercial Credit Equip. Corp.* v. *Carter*, 516 P. (2d) 767; 13 U.C.C. Rep. 1212 (Wash., 1973), the Washington Supreme Court, in classifying a private plane as "consumer goods," quoted with approval the observation that "the recently retired 'Queen Mary' could qualify as consumer goods if purchased by a billionaire for his own personal use and one recalls that the late Henry Ford, at one time, bought up entire factories for his personal museum." *Cf.* the definition of "consumer product" in the *Magnuson-Moss Warranty — Federal Trade Commission Improvement Act*, Pub. L. No. 93-637 (1975), 15 U.S.C. s. 230(1), as "any tangible personal property . . . which is *normally* used for personal, family or household purposes . . ." Even though the formulation appears to be more objective, this has not prevented a U.S. court from concluding that the determination of whether an aircraft is a "consumer product" covered by the Act depends upon the actual use to which the aircraft is put: see *Balser* v. *Cessna Aircraft Company*, 512 F. Supp. 1217. (N.D. Ga. 1981).

[44]This will, however, be important to the issue of the seller's ability to exclude or restrict *C.P.W.L.A.* warranties and remedies pursuant to s. 26.

[45]See, for example, s. 55(7) of the *Supply of Goods (Implied Terms) Act 1973*, (U.K.) c. 13, wherein "consumer sale" is defined with reference to a sale of goods of a type *ordinarily* bought for private use or consumption; see also s. 7 of the *Commercial Transactions (Miscellaneous Provisions) Act, 1974* (N.S.W.) wherein the definition is formulated with reference to goods which are of a kind *commonly* bought for private use or consumption.

[46]S. 2(e) defines "consumer product" as "any good *ordinarily* used for personal, family or household purposes . . ." For a discussion of the Saskatchewan sources, see Romero, *supra*, footnote 23, at 108.

[47]*Supra*, footnote 43.

[48]The F.T.C. explanatory statements are merely interpretive of the statute and do not control a Court's independent interpretation thereof.

[49]*Interpretation of Magnuson-Moss Warranty Act*, 16 C.F.R. 700; 42 FR 36114, July 13, 1977.

It would appear to be obvious that under the definition of "consumer product" in the C.P.W.L.A. any item which has gained a degree of popularity with the general public, although it may be commonly used for commercial purposes, will easily be classified as a consumer product and its sale or supply will be regulated by the provisions of the Act. Examples of this type of product abound: four-wheel drive vehicles, typewriters, small power-tools, photographic film are merely illustrative. To some, it might appear equally obvious that an item such as a farm tractor is not encompassed within the C.P.W.L.A. definition. The decision in *Greene* v. *D.R. Sutherland Ltd. et al.*[50] illustrates the fallacy of such reasoning and stresses the importance of considering the question as one of fact, being dependent upon all of the circumstances. In that case, the plaintiff had purchased a used International Tractor equipped with a front end loader, front blade and bucket from the defendant company. Mr. Justice Creaghan did not accept the general proposition that a farm tractor could not be a "consumer product":

> It was argued by Mr. Cooper that the Act did not include farm tractors. I cannot accept such a general submission. The evidence of the plaintiff establishes that he has owned tractors for a number of years, so have some of his neighbors including the defense witness Stuart Wall. Tractors are commonly used to plow long private driveways, for assistance in private wood cutting and personal farming. The use depends on various circumstances, where a person resides, that is in a rural as opposed to an urban area, whether it is in a snow belt and many other factors. I am satisfied that some tractors are of a kind now commonly used for personal purposes, even though the same unit is manufactured for and used for industrial or public as opposed to personal purposes. As stated it is a question of fact . . .[51]

In the result, however, it was held that the C.P.W.L.A. was not applicable to the plaintiff's purchase because the farm tractor in question was not a "consumer product" within the test cited. The fact that the particular model purchased by the plaintiff was more powerful by fifty percent and substantially larger and heavier than the usual farm tractor was, it is submitted, determinitive of the issue.

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[50](1982), 40 N.B.R. (2d) 27 (Q.B.).

[51]*Ibid.*, at 30. It is interesting to compare this approach with that taken by the U.S. Federal Trades Commission in its interpretation of the applicability of the *Magnuson-Moss Warranty Act* to the sale of agricultural products in 16 D.F.R. 700; 42 FR 36114, July 13, 1977: "Agricultural products such as farm machinery, structures and implements used in the business or occupation of farming are not covered by the Act where their personal, family, or household use is uncommon. However, those agricultural products normally used for personal or household gardening (for example, to produce goods for personal consumption, and not for resale) are consumer products under the Act."

2. *Fixtures and Accessions*

Some of the recent consumer protection legislation makes specific provision in the definition of "consumer product" for potential difficulties occasioned by the law of fixtures[52] and/or accessions.[53] The definition of "consumer product" in the Saskatchewan Act, for example,[54] "includes any goods ordinarily used for personal, family or household purposes that are designed to be attached to or installed in any real or personal property, whether or not they are so attached or installed."[55] According to Professor Romero, these words were included in the definition in order to preserve the rights of subsequent owners of consumer products:

> Under section 4 of the Act the rights of the original consumer who buys a consumer product from a retail seller are transferred to subsequent owners of that product. For example, let us assume that A buys an air conditioner from a retailer. Soon thereafter A sells it to B and later the air conditioner turns out to be defective. Under the Act, B, the subsequent owner, can sue the retail seller for breach of the statutory warranties of fitness for purpose and acceptable quality, as long as there was a breach of those warranties in the sale by the retailer to A. What would be the position if A had attached the air conditioner to his house and then had sold the house to B? Under the present law of fixtures once a chattel is permanently attached to realty in order to improve such realty, the chattel ceases to exist as a separate entity so that when B buys the house, legally speaking he does not acquire a separate air conditioner and without the provision under discussion, B would not be a "subsequent owner" of the air conditioner protected by the section. As section 2(e)(i) states that the definition of "consumer product" "includes any goods . . . that are designed to be attached to or installed in any real or personal property, whether or not they are so attached or installed" the common law of fixtures is overruled so that a consumer product continues being one even after it is permanently attached to real property.[56]

An inclusion, similar to that of Saskatchewan, in the C.P.W.L.A. definition of "consumer product" would provide a higher degree of clarity, but whether such a change is actually necessary to avoid fixture or accession problems

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[52]The term "land" in its legal signification includes anything fixed to the land: *quicquid plantatur solo, solo credit*. The question that usually arises for consideration with regard to articles attached to premises is whether the attachment is such that they are to be regarded as fixtures. This is a question of fact which principally depends upon two factors: (1) the mode and extent of the annexation, and (2) the object and purpose of the annexation: See 27 *Halsbury's Laws of England* (4th ed.) at para. 143 and authorities cited therein.

[53]A common law principle similar in nature to the law of fixtures is the doctrine of accession which applies to chattels which are attached to other chattels. The doctrine has yielded different results in the same fact situations. This has been because of the attempt, on the one hand, to give it a consistent meaning, regardless of the purpose for which it is invoked or of the relationship of the litigating parties; and because of the attempt, on the other hand, to give it a functional direction to take account of the purpose to be served and the character of the claims for which its support is sought. For a compendium of Canadian, Australian and American authorities see Guest, "Accession and Confusion in the Law of Hire Purchase," (1964) 27 M.L.R. 505.

[54]See also the definition of "consumer product" in the *Magnuson-Moss Warranty Act*, *supra*, footnote 43, which defines "consumer product" as ". . . including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed."

[55]S. 2(e)(i).

[55]*Supra*, footnote 23, at 109.

is questionable. In order to illustrate, let us continue further with Professor Romero's example where A has sold the house (including the air conditioner) to B. In order to take advantage of Saskatchewan's statutory warranties of fitness for purpose and acceptable quality, B, as the subsequent owner of the air conditioner, must be a person who derives his "property or interest *in the [consumer] product* from or through the consumer A."[57] In the absence of the specific inclusion in the Saskatchewan definition of "consumer product", B would be faced with a difficult, if not insurmountable, hurdle. If the relevant time for B's acquisition of any Saskatchewan warranty rights is at the time of his contract with A, it could be argued that by that time the consumer product (air conditioner) ceased to exist as a separate entity and, as a result, B merely acquired an interest in real property from A, thereby preventing entitlement to the protection afforded a "subsequent owner" in the Saskatchewan Act. Notwithstanding the absence of a similar inclusion in the New Brunswick definition of "consumer product", a subsequent owner would, it is submitted, be at least equally protected. This is because of section 23 of the C.P.W.L.A. which abolishes horizontal and vertical privity of contract,[58] and allows *anyone* who suffers a consumer loss to sue *any* seller who is in breach of any C.P.W.L.A. warranty, notwithstanding that the person who suffers the consumer loss is not a party to the contract which the seller has breached. Again utilizing the foregoing example, B, in New Brunswick, would be able to sue A's retailer for breach of that retailer's contract with A, *viz.* the C.P.W.L.A. warranties of fitness for purpose[59] and quality[60] which were implied in the contract between A and his retailer. Even if B, at the time of his contract with A, acquired only an interest in real property, his rights against A's retailer, unlike the position in Saskatchewan, are not dependent upon whether or not B acquired a "consumer product" at the time of his contract with A. Rather, applying section 23, they merely depend upon whether or not B has suffered a "consumer loss" because of the retailer's breach of warranty in his contract with A. "Consumer loss" is broadly defined, *inter alia*, as "a loss that a person does not suffer in a business capacity."[61] It is submitted, therefore, that while the inclusion of words in the definition of "consumer product" to avoid the potential difficulties of fixtures is essential in some jurisdictions, their inclusion in the C.P.W.L.A. would be surplusage and could only be justified from the standpoint of added clarity. The same arguments apply, *mutatis mutandis*, to the problem of accessions.

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[57]S. 4, Saskatchewan Act.

[58]A full discussion of the doctrine and the changes effected by the *C.P.W.L.A.* will follow in the second part of this article.

[59]S. 11.

[60]S. 10(1)(a).

[61]S. 1(1) definition of "consumer loss."

III Type of Persons Protected

1. Buyers

A. The Problem — Should There Be Full Protection For Business Buyers?

One of the primary purposes of the New Brunswick Act was to regulate the express and implied warranties given to individuals with respect to the goods they acquired for personal use. Different legislative schemes could have been utilized to narrow the application of the C.P.W.L.A. in order to accomplish this purpose. As an obvious example the legislation could have been restricted exclusively to "consumer sales" and, by use of definitions, protection could have been denied to the business buyer.[62] The difficulty with this type of legislative approach, as noted,[63] is that in the purchase of consumer products by businessmen, particularly small businessmen, there often exists the same inequalities in expertise and bargaining power as are found in the case of "traditional" consumers and transactions involving "consumer" goods in the narrow sense.

B. The C.P.W.L.A. Solution — Some Protection For Business Buyers

The C.P.W.L.A. solution to this problem is novel and it is an accurate statement to suggest that the transactional scope of the Act does not coincide with the "consumer transaction" of common parlance. Application of the Act extends to *every* transaction for the sale or supply of a consumer product.[64] The general application of the Act, therefore, focuses on the nature of the product as opposed to the nature of the transaction. The extent of protection afforded by the Act to the purchaser, however, is dependent upon the nature of the transaction and the type of loss suffered by the purchaser of the consumer product. Some explanation is in order.

Clearly, when the "traditional" consumer purchases a consumer product, the C.P.W.L.A. applies and the full protection of the warranties and remedies contained in the Act is extended to the purchaser. When a businessman,[65] on the other hand, purchases a consumer product, it is necessary to examine the capacity in which he purchased the product and the type of loss which he suffered in order to determine the extent of C.P.W.L.A.

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[62]See, for example, *The Consumer Protection Amendment Act, 1971*, Stat. Ont. 1971, (Vol. 2), c. 24, s. 2, adding s. 44a to *The Consumer Protection Act*, R.S.O. 1970, c. 82 wherein the definition of "consumer sale" is defined to exclude, *inter alia*, a sale "(a) to a purchaser for resale; (b) to a purchaser whose purchase is in the course of carrying on business."

[63]See *First Report of the Consumer Protection Project, Part I*, *supra*, footnote 4, at 200. See also *Ontario Warranties Report*, *supra*, footnote 16, at 56-57.

[64]S. 2(1).

[65]"Business" is defined in s. 1(1) of the Act to include "a profession and the activities of any government department or agency, of any municipality or agency thereof, and of any Crown Corporation."

protection. It is, of course, obvious that if a businessman purchases a consumer product in his private capacity for his personal use, his position is fully equated with that of the "traditional" consumer and he is entitled to the full protection of the Act. What is not so obvious is that limited protection is given to the businessman who purchases a consumer product in the course of a business. Initially, it is important to recognize that, without more, all C.P.W.L.A. warranties are fully applicable. In this case, however, the contract may expressly exclude or restrict any of these warranties or the remedies for breach thereof.[66] But, at the same time, it is important to note that section 26 of the Act provides that any such exclusion or restriction shall be "ineffective with respect to any consumer loss for which the seller would be liable if no such agreement had been made." Consumer loss, as noted previously, is defined in the Act to include, *inter alia*, "a loss that a person does not suffer in a business capacity." The end result, therefore, is that a businessman who purchases a consumer product in the course of his business and who, in using the product, suffers a loss in his private capacity is as fully protected, subject to the difference in applicable remedies, as the "traditional" consumer. Finally, where the businessman purchases a consumer product, an automobile for example, partly for his own use and partly for use in his business, he does not purchase the automobile "in the course of a business" within the meaning of the Act providing he acquires it "primarily for use of personal, family or household purposes."[67] In this case, the position of the business buyer may be fully equated with that of the "traditional" consumer. Of course, as is discussed later, a businessman who purchases a consumer product for resale and who suffers a consumer loss at the instance of his purchaser retains his right of recourse against prior suppliers.

C. *Does The C.P.W.L.A. Go Far Enough?*

The Consumer Protection Project recognized the importance of identifying the type of person who is in need of consumer protection in wider terms than the "traditional" consumer,[68] and, indeed the transactional scope of the C.P.W.L.A. encompasses much more than the "traditional" consumer purchase. But does the legislation go far enough? The Act extended only very limited protection to purchasers buying other than for private use or consumption. The sale of an automobile to a solicitor for exclusive use in his practice or the sale of an electric typewriter to a small businessman primarily for office use is, I submit, indistinguishable as a matter of equity and common sense from a sale to a private purchaser.[69] Yet the C.P.W.L.A.

[66]S. 26. Note that the applicable *C.P.W.L.A.* remedies are those under s. 13.

[67]S. 1(2).

[68]See *First Report of the Consumer Protection Project, Part I, supra*, footnote 4, at 199-202.

[69]This was recognized in the *Third Report, supra*, footnote 6, at 130, which recommended an absolute prohibition against contracting out of the statutory express and implied warranties.

extends only limited protection to such buyers. Similarly, a purchaser engaged in a business may purchase consumer products not for the purpose of resale or processing but for a purpose completely incidental to the carrying on of the business (*eg.*, for lighting or heating purposes). These kinds of situations, it is submitted, are really indistinguishable on any reasonable grounds from those involving "private" use of the consumer product in question. Yet, again, the Act appears to provide only limited protection to purchasers in these circumstances if the loss suffered is categorized as a loss suffered in a business capacity.

In addressing the issue of the extent of protection that should be afforded the business buyer, an equally anomalous situation is presented by the acquisition of consumer products by many farmers and fishermen for agricultural or fishing purposes. They, too, receive only the limited protection afforded to the buyer who buys in the course of a business under the C.P.W.L.A. It is interesting to note that the Saskatchewan Act has accorded full protection to such purchasers.[70] Certain reasons have been cited[71] why the inclusion of this protection for farmers and fishermen under the Saskatchewan statute was considered desirable from a policy standpoint: (1) the fact that Saskatchewan was an agricultural province and farmers formed a significant portion of the consuming public, and (2) the fact that many farmers and fishermen were in substantially the same position as more traditional consumers in their capacity to judge the quality of agricultural and fishing products. This legislative rationale would be equally applicable in supporting an extension of C.P.W.L.A. protection to New Brunswick's farmers and fishermen.

2. *Persons Suffering A "Consumer Loss"*

An examination of the type of persons protected under the Act would be incomplete without a preliminary reference at this point to the pervasive effect brought about by section 23 and the fundamental changes it injects into the doctrine of privity of contract.[72] As a result of this and other sections, C.P.W.L.A. protection extends far beyond the realm of traditional buyers of consumer products. Three additional categories of persons can, in appropriate circumstances, claim protection: (1) direct users of defective consumer products, (2) bystanders affected by another's use of defective consumer products, and (3) subordinate suppliers of defective consumer products.

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[70]This is accomplished by expanding the definition of "consumer product" in s. 2(e)(ii) to include ". . . any goods bought for agricultural or fishing purposes by an individual or by a family farming corporation . . .". In this repsect such farmers and fishermen are in a favoured position *vis-à-vis* the more "traditional" consumer whose purchases fall within the Saskatchewan Act only if they are "goods ordinarily used for personal, family or household purposes": see s. 2(e)(i).

[71]See Romero, *supra*, footnote 23, at 111-112.

[72]*Supra*, footnote 58.

A. Direct Users

Section 23 abolishes "vertical" and "horizontal" privity of contract rules. Thus, whenever a seller is in breach of a C.P.W.L.A. warranty, any user of the consumer product who suffers a reasonably foreseeable consumer loss can now recover damages against the seller for his breach of contract, even though that user was not a party to it. Any category of direct user will qualify for section 23 protection for his reasonably foreseeable consumer loss as long as there was, at some point in time, a contract for the sale or supply of a consumer product and a seller thereunder who was in breach of a C.P.W.L.A. warranty. Thus, protection is extended, *inter alia*, to such individuals as donees, borrowers, and subsequent purchasers from the original buyer. Where the user is unable to satisfy one of the prerequisites for section 23 protection (for example, the recipient of a free manufacturer's sample), he may, nevertheless, be entitled to the product liability protection given by section 27. That section renders any supplier of a consumer product strictly liable[73] for any reasonably forseeable consumer loss where the product supplied "is unreasonably dangerous to person or property because of a defect in design, materials or workmanship." Section 27 protection, unlike that afforded under section 23, is not dependent upon the existence at any time of a contract.[74]

B. Bystanders

The protection extended by section 23 is wide enough to encompass injuries suffered by a bystander as a result of another person's use of a defective consumer product. The bystander's loss would certainly qualify as a "consumer loss" within the broad definition under the Act.[75] The bystander would then only have to establish that at some point in time there was a contract in existence for the sale or supply of the consumer product, that the seller was in breach of a C.P.W.L.A. warranty in that contract, and that the consumer loss which he suffered was reasonably foreseeable. Consider the case of a bystander, for example, who is injured by a private motorist whose automobile went out of control because a defective tire, which the motorist had recently purchased, sustained a blowout. In addition to any tort remedies available to the injured bystander, contractual protection might also be extended, by virtue of section 23, in these circumstances. Assuming the motorist purchased his tires from a retailer and the C.P.W.L.A. warranties, therefore, were applicable to that contract, the retailer may be in breach of the implied warranties of fitness for purpose,[76] quality[77] and durability.[78] The C.P.W.L.A. would afford the

[73]S. 27(4).

[74]*Ibid.*

[75]See text accompanying footnote 61.

[76]*Supra*, footnote 59.

[77]*Supra*, footnote 60.

[78]S. 12.

innocent bystander a contractual course of action for breach of warranty against the retailer or, in appropriate circumstances, against superordinate suppliers. When one considers that this warranty liability is strict, the additional protection given the bystander by section 23 becomes truly significant. Also, in the unusual circumstance where no contract for the sale or supply of a consumer product can be established, the bystander might, nevertheless, fall within the product liability protection of section 27 if he can establish that the tires were "unreasonably dangerous" because of a defect in design, materials or workmanship.

C. Subordinate Suppliers

The above hypothetical clearly illustrates the need for the C.P.W.L.A. to extend protection to all subordinate suppliers in the distribution chain to enable them to recover indemnification in respect of these broad consumer loss liabilities from their prior suppliers, hereinafter referred to as superordinate suppliers. Only in this way can the statutory liability for the consumer loss be traced back to the ultimate source. By a combination of the definition of "consumer loss"[79] and the inability of superordinate suppliers to contract out of liability to subordinate suppliers for these losses,[80] the Act enables subordinate suppliers in the distribution chain, as a general rule, to be fully indemnified. Thus, in the foregoing example, if the bystander was successful against the retailer under section 23 for breach of an implied warranty, the retailer would have recourse against any superordinate supplier in the distribution chain and likewise for each subordinate supplier until, in the normal case, the loss was ultimately traced back to its source, *viz.* the manufacturer. In this respect, it is important to remember that even if all contracts superceding the retail purchase of the tire by the motorist contained exclusionary clauses permitted by section 26, the exclusions would generally be ineffective because each subordinate supplier would have suffered a "consumer loss" within the C.P.W.L.A., *viz.* "a loss that a person suffers in a business capacity to the extent that it consists of liability that he or another person incurs for a loss that is not suffered in a business capacity."[81]

IV Type of Suppliers Affected

1. Distributors

While the definition of "seller"[82] in the C.P.W.L.A. would appear to encompass all persons contracting to sell or supply consumer products, it

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[79]*Infra*, footnote 81.

[80]See discussion *infra*, at 24-25.

[81]S. 1(1) definition of "consumer loss."

[82]S. 1(1).

is important to note that the Act itself does not apply to any particular contract for the sale or supply of a consumer product unless the seller is also a distributor of consumer products of that kind or holds himself out as such.[83] "Distributor" is defined in section 1(1) of the Act as follows:

> "distributor" means a person who supplies consumer products as part of his regular business and, without limiting the generality of the foregoing, includes a producer, processor, manufacturer, importer, wholesaler, retailer or dealer.

The effect of these provisions is to exclude strictly private sales as well as analogous commercial situations where the seller is selling a consumer product outside the course of his regular business, *eg.*, an automotive dealership selling its showroom carpeting, or an accounting firm[84] selling its office typewriter or microwave oven.

It should be pointed out that the Act goes further than simply exempting such transactions from its scope. In addition, private sellers, in the absence of fraud, are protected from indemnification claims other than those involving defective title.[85] According to the draftsman, the purpose of this added protection is to prevent a dealer who is buying goods from a private seller to obtain an indemnity from him for any warranty liability that the dealer would incur to his own buyer when he resells.[86]

A 1975 Massachusetts case best illustrates the potential of section 3. In *Best Buick, Inc.* v. *Welcome*,[87] the consumer purchased a new Buick automobile and traded in his "1970 Mercedes-Benz". This trade-in vehicle was described by the consumer, in good faith, as a 1970 Mercedes-Benz and, indeed, he had himself purchased the car as a 1970 model, and all of his papers had listed it as such. In actual fact the car was a 1968 model and the dealer was successful in recovering damages for breach of warranty to reflect the difference in price between the two models. The opposite result will now definitely occur in New Brunswick.[88]

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[83]S. 2(1)(a). A precedent for this approach is contained in the *Sale of Goods Act*: see s. 15, which exempts implied conditions of merchantability and fitness for purpose in the case of private sales. Note that the *C.P.W.L.A.* also exempts sales by trustees in bankruptcy, receivers, liquidators, sheriffs and persons acting under an order of the court: see s. 2(1)(b).

[84]The definition of "business" in s. 1(1) includes a profession: *supra*, footnote 65.

[85]S. 3 of the Act states: "Notwithstanding any agreement to the contrary, a person who incurs any liability in relation to a consumer product, other than liability under s. 8 of this Act, cannot recover indemnification or damages in respect of that liability from or against any seller or supplier of that consumer product who is not a distributor of consumer products of that kind and does not hold himself out as such, unless he incurs the liability because of that person's fraud."

[86]See Dore, *supra*, footnote 7, at 163.

[87]18 U.C.C. Rep. 75 (Mass. App., 1975).

[88]While s. 3 addresses the issue directly, the identical result might have been reached on these facts in the absence of the *C.P.W.L.A.* if a court concluded that the dealer was substantially more knowledgeable about cars that the consumer and did not, therefore, really base his bargain on anything the consumer said: see *Oscar Chess, Ltd.* v. *Williams*, [1957] 1 All E.R. 325; 1 W.L.R. 370 (Eng. C.A.).

It should also be noted at this point that because of the C.P.W.L.A., definitions of "distributor" and "seller," and more particularly their definitional reliance upon the supply aspect, many New Brunswick auctioneers may find themselves subject to increased liabilities under the Act.[89] Contracts made by auctioneers who regularly sell consumer products of a particular kind as well as those who sell different kinds of consumer products on an on-going basis, under circumstances that imply the likelihood of repetition with regard to the products in question, will attract C.P.W.L.A. express and implied warranties. In this event, the auctioneer will find his ability to exclude or restrict those warranties that do arise, or the remedies for their breach, radically different from what was available to him under the general sales law.[90] His position is rendered precarious when one further considers the auctioneer's inability to extract an effective indemnification from private sellers.[91]

2. *How Distributors Are Affected*

A problem that has to be addressed in any legislative scheme of consumer protection granting increased rights to buyers is how to structure the corresponding increase in sellers' obligations and potential liabilities. Common sense and fairness dictate that a subordinate supplier, such as a retailer, should not have to shoulder all the increased responsibilities to the consumer while certain of his superordinate suppliers are permitted to insulate themselves from liability by recourse to the privity of contract doctrine[92] or through the effective use of disclaimer clauses.[93]

The foregoing problem has been addressed in the C.P.W.L.A. through a policy of tracing legal liability directly or indirectly back to the source of the problem. The modifications to the privity of contract doctrine brought about by sections 23 and 27 of the Act[94] provide the consumer in many cases with direct recourse against any superordinate supplier in the dis-

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[89]There is American authority to support this view: see, for example *Regan Purchase & Sales Corp.* v. *Alex R. Primavera*, 328 N.Y.S. 2d 490 (1972), 10 U.C.C. Rep. 300, where an auctioneer was held to give the implied warranty of merchantability in U.C.C. 2-314 (1) under the same type of test as is contained in s. 2(2)(a) *C.P.W.L.A.* It is also interesting to compare the English approach contained in s. 3 of the *Supply of Goods (Implied Terms) Act, 1973* (U.K.) which added a new s. 14(5) to the U.K. *Sale of Goods Act* providing that where a sale by a private seller is effected through an agent acting in the course of business, the conditions of merchantability and fitness are implied unless reasonable steps have been taken to inform the buyer before the contract is made that the sale is on behalf of a private seller or unless the buyer is otherwise aware of that fact.

[90]A full discussion of exclusion clauses will follow in the second part of this article.

[91]*Supra*, footnote 85.

[92]*Supra*, footnote 58.

[93]The implied conditions of merchantability and fitness for purpose can be excluded by any seller under s. 52 of the *Sale of Goods Act*: see *Peters* v. *Parkway•Mercury Sales Ltd.* (1975), 9 N.B.R. (2d) 288, affirmed 10 N.B.R. (2d) 703; 58 D.L.R. (3d) 128 (N.B.C.A.).

[94]See preliminary discussion, *supra*, at 19-21.

tribution chain. In any case where the consumer has initiated action solely against a retailer for breach of C.P.W.L.A. warranty, the liabilities of superordinate suppliers may be indirectly affected. In this respect there is a key distinction between the express and implied warranties created by the Act.

Each seller is responsible for the express warranties which he gives or is deemed by section 4 to have given to the buyer. It may be that subordinate suppliers can establish equivalent express warranties in contracts with their superordinate suppliers: a statement, for example, in respect of quality printed on the carton of the consumer product.[95] In these cases the ultimate responsibility is traced back to the original source of the warranty because all subsequent contracts in the distribution chain contain the same express warranty,[96] and the remedies[97] for its breach cannot be excluded or restricted by superordinate suppliers unless it is fair and reasonable to do so.[98] On the other hand, most express warranties will be given by a seller exclusively to his buyer: an oral statement, for example, in answer to a buyer's question. In these circumstances the resulting C.P.W.L.A. express warranty would only extend to that particular contract and, of course, the liability of superordinate suppliers would be unaffected, without more, by breach of that express warranty.

In contrast, all suppliers in the distribution chain will be affected by the implied warranties created by the C.P.W.L.A.. A scheme of standardized and parallel obligations in respect of the statutorily-implied warranties was seen as essential to furthering the "tracing" policy adopted by the C.P.W.L.A..[99] While section 26 permits superordinate suppliers to exclude or restrict any C.P.W.L.A. implied warranty or remedy[100] for its breach, the exclusion or restriction is rendered ineffective regarding damages which the subordinate seller has incurred because of a "consumer loss." This effectively enables the 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, on the same basis, notwithstanding any purported section 26 restrictions or exclusions in the sales documentation. This supplier, in turn, can trace back and recover indemnity from his supplier *etc.*, with the responsibility ultimately being traced back to the superordinate supplier who is the source of the problem.

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[95]See s. 4(2)(b) and discussion *infra*, at 37-40.

[96]The existence of this express warranty cannot in these circumstances be negatived by superordinate suppliers: see s. 26.

[97]The applicable *C.P.W.L.A.* remedies are those under s. 13.

[98]This is brought about because the seller's ability, under s. 26, to exclude or restrict any remedy for breach of an express warranty is subject to the fairness and reasonableness control imposed under s. 25.

[99]See *Third Report of the Consumer Protection Project, Vol. I, supra*, footnote 6, at 195.

[100]*Supra*, footnote 97.

APPLICATION OF THE C.P.W.L.A.

The foregoing commentary and analysis has been concerned with delineating the scope of the *Consumer Product Warranty and Liability Act.* It now remains to consider in detail the application of the C.P.W.L.A. to those transactions and persons within its scope. The Act has brought about dramatic and substantive changes in the law regulating the sale or supply of consumer products in the following ways: (1) by creating a comprehensive series of express and implied warranties in contracts for the sale or supply of consumer products; (2) by providing special consumer remedies for breach of those warranties; (3) by limiting the supplier's ability to exclude or restrict the warranties and remedies created by the Act; (4) by radically modifying the common law doctrine of privity of contract; and (5) by expanding products liability rules to impose strict liability on suppliers of unreasonably dangerous, defective consumer products.

Discussion of the express and implied warranties created by the C.P.W.L.A. follows. The remaining changes will be the subject of the second part of this article.

I Warranties

The C.P.W.L.A. designates all of the seller's contractual undertakings as "warranties."[101] It is through this unitary warranty scheme that the legislative objective of *fidem habeat emptor* is implemented. The Act creates two categories of warranties: (1) "express warranties" which refer to the obligations undertaken by the seller because of what he says orally, in writing, or in advertising about his consumer product;[102] and (2) "implied warranties" which refer to the statutorily-imposed guarantees of the character and quality of the seller's consumer product.[103]

1. Express Warranties

A. Introduction

The Ontario Law Reform Commission recently noted the unreality of viewing contracts of sale as discrete phenomena, embodying an offer and an acceptance supported by consideration, occurring within an easily identifiable time frame, and isolated from all distracting influences:

> This legal model gives a very incomplete picture of what frequently happens in practice. If the parties have entered into a formal contract, it may well have been preceded by lengthy negotiations. Further, whether or not there is a written

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[101]"Warranty" is defined in s. 1 to mean "a term of the contract that is a promise."

[102]See s. 4.

[103]See ss. 8-12.

> contract, the decision by the seller or the buyer to enter into contractual relations will often be influenced by representations of one kind or another, whether conveyed verbally or through such written media as advertisements, sales literature, catalogues, or personal correspondence . . .[104]

A fundamental question facing the law reformer in the consumer protection area is the classification of these various representations. Policy considerations abound: should everything said by the seller be incorporated into the contract thereby rendering a seller strictly liable to the buyer for its accuracy; should there be any room for the seller's puffery, for the seller's opinion, for the seller's "sales pitch"; should all representations made by the seller assume equal importance insofar as triggering the buyer's rejection rights and/or his rights to claim damages if the representation is untrue; should the measure of damages be the same in all cases? The answers to these and similar questions contained in the New Brunswick legislation display with clarity a conscious policy shift away from the traditional concepts of objectively ascertained consensualism[105] to the new horizons of reasonable reliance. The extent of this very significant shift in focus cannot be fully appreciated without some brief commentary on the state of the general sales law in classification of the seller's representations and the correlative remedies of the buyer.

B. *Problems Under The General Sales Law*

The general principles of contract law in the sale of goods area contemplate a hierarchical series of obligations imposed upon a seller for what he says about his goods.[106] Essential to this system is the classification, into one of a number of different categories, of all representations about the character or quality of the goods made by the seller to the consumer for the purpose of inducing him to enter into the contract. The basic classification discriminates between those representations embodying designated, "terms" of the contract, for which the seller is taken to assume contractual liability; and those representations which are not terms of the contract, designated "mere representations," for which the seller is not taken to assume contractual liability even though they may have induced the consumer to enter into the contract with him. The legal consequences flowing from a misrepresentation by the seller are fully dependent upon whether that misrepresentation is classified as a term of the contract or a mere representation. This, in turn, depends upon the intention of the parties, objectively ascertained.[107] Cases need hardly be stated which illus-

[104]Ontario Law Reform Commission, *Report on the Sale of Goods*, Vol. I (Ministry of the Attorney-General, Toronto 1979) at 135.

[105]The objective theory of contract renders paramount the manifest, as opposed to the actual, intention of the parties in determining what the terms of the contract are: see *Saint John Tug Boat Co. Ltd.* v. *Irving Refinery Ltd.*, [1964] S.C.R. 614 (S.C.C.).

[106]See *First Report of the Consumer Protection Project, Part I, supra*, footnote 4, at 40-44.

[107]The classic definition of warranty is one which is often incorrectly attributed to Holt C.J.: "An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended": see *Pasley* v. *Freeman* (1789), 3 Term R. 51, at 57 *per* Buller J.

trate the rule that express promises or agreements to warrant, made by the seller at the time of sale are warranties by application of this objective test. The problem has occurred in defining what statements, not made in the form of express warranties or promises, are "intended" to be terms of the contract. To assist in this determination, the Courts have developed ancillary or subsidiary tests in an effort to arrive at the intention of the parties: *inter alia*, the point of time at which the representation was made,[108] whether, in the event of a written contract, the oral representation was included in the writing,[109] whether the representor stated a fact which he was in a position to know more about than the representee.[110] While the distinction between terms and mere representations is entirely one of fact and, therefore, dependent upon the circumstances of each individual case, the effect on the remedies available to the consumer is one of law. Assuming the seller's representation has been held to be a term of the contract a further classification is necessary in order to establish the consumer's right to a particular contractual remedy.[111]

A distinctive feature of the *Sale of Goods Act* is its division of contractual terms into "conditions" and "warranties".[112] The important difference between the two is that breach of a warranty only entitles the innocent party to recover damages, whereas breach of a condition entitles the innocent party to rescind the contract and to claim damages, or to do either.[113] Whether a term is to be regarded as "collateral to the main purpose of the contract"[114] and, therefore, a warranty or as "going to the root" or "of the essence" of the contract[115] and, therefore, a condition, again depends on

[108]*Bouchard* v. *South Park Mercury Sales Ltd. and Hughes*, [1978] 3 W.W.R. 78 (Man. Q.B.). Representations made at or shortly before the time of contract have a greater likelihood of being held to be terms of the contract than do conflicting representations made earlier in time: see *King* v. *Foote*, [1961] O.R. 489; 28 D.L.R. (2d) 337 (Ont. H.C.).

[109]The exclusion of an oral statement from the writing may suggest that it was not intended to be a contractual term: see *Routledge* v. *McKay*, [1954] 1 All E.R. 855; [1954] 1 W.L.R. 615 (Eng. C.A.).

[110]*Dick Bentley Productions, Ltd.* v. *Harold Smith (Motors) Ltd.*, [1965] 2 All E.R. 65; [1965] 1 W.L.R. 623 (Eng. C.A.). *Cf. Oscar Chess, Ltd.* v. *Williams, supra*, footnote 88.

[111]In the ensuing discussion only the buyer's rights to rescission and/or damages are referred to. The remedies of specific performance and injunction are not germane to the issues raised.

[112]Whether the *Sale of Goods Act* requires the *a priori* classification of all express terms in a contract of sale into conditions or warranties has recently been questioned: see *Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H.*, [1976] Q.B. 44 (Eng. C.A.).

[113]See *S.G.A.* ss. 12(2), 50(1). This leads to the anomalous result that a buyer who complains of a minor breach of a condition will be entitled to reject the goods and rescind the contract, whereas a buyer who can only establish a breach of warranty will be forced to continue with the contract notwithstanding the severity of the breach. See, for example, *I.B.M.* v. *Shcherban*, [1925] 1 D.L.R. 864 (Sask. C.A.), where the buyer was held entitled to reject a machine because of a broken glass dial costing only cents to repair.

[114]"Warranty" is defined in s. 1(1) *S.G.A.* as meaning: "an agreement with reference to goods that 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."

[115]"Condition" is not defined in the *S.G.A.* In *Wallis, Son and Wells* v. *Pratt and Haynes*, [1910] 2 K.B. 1003, at 1012, Fletcher Moulton L.J. stated that conditions "go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all."

the elusive test of the parties' intention, objectively ascertained. This test, and the classification process embraced by it, has come under increasing attack in recent years.[116] When the parties enter into a contract they generally do not contemplate its breach, but rather, its performance. As a result, the search for and imputation of an intention that they must be presumed to have had, but which in actual fact they did not, is usually illusory:

> A reading of the cases can only leave one with the impression that the test is unworkable and the decision as to the grade of importance arbitrary. Too often the court appears to decide whether the remedy sought would be appropriate in all the circumstances, and then classifies the statement appropriately; and one is left with no more reason than the bald assertion that it does or does not appear that the importance of this statement to the parties was such as to justify the relief sought. In most of the cases it is difficult to see how more reason than that could be given to justify what has inevitably come to depend in large measure on the subjective reaction of the judge.[117]

A representation by the seller, on the other hand, that is not held to be a term of the contract but a mere representation inducing the contract presents a different set of considerations and classifications. Some of these mere representations have no legal effect whatever.[118] Of those that have legal effect, it is necessary to categorize the manner in which the representation was made by the seller, *viz.*: innocently, fraudulently or negligently, in order to establish the consumer's remedies, if any, for the misrepresentation. An innocent misrepresentation only affords a right to rescission but not to damages,[119] whereas fraudulent[120] or negligent[121] misrepresentations afford the right to rescission and/or damages. While uncertainty is the rule if the consumer is trying in advance to accurately predict

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[116]See, for example: *First Report of the Consumer Protection Project, Part I, supra*, footnote 4 at 11-12; *Ontario Warranties Report, supra*, footnote 16, at 28-31; Law Reform Commission of New South Wales, *Working Paper on the Sale of Goods, (Warranties, Remedies, Frustration and Other Matters)* (New South Wales, 1975), para. 3.44; *Ontario Sale of Goods Report, supra*, footnote 104, at 145-150.

[117]Allan, "The Scope of the Contract" (1967), 41 *Aust. L.J.* 274 at 276.

[118]Ineffective in law are those representations classified as dealers talk or "puffs". In *Crooks* v. *Davis* (1857), 6 Gr. 317, at 322, Spragge V.C. says: "Great latitude appears to be allowed to sellers, in setting forth the advantages and attractions of the property they offer for sale, and when the representations are not in regard to title, but in relation to matters which are objects of sense, and as to which an intending purchaser would, if prudent, examine for himself, the courts are unwilling to relieve the purchaser from his bargain." See also: *Rasch* v. *Horne*, [1930] 1 W.W.R. 816 (Man. C.A.). Equally ineffective are representations which are matters of opinion, unless given fraudulently and in a form which suggests that the seller is not merely giving an opinion but is purporting to assert something which is known to him, and unknown to the buyer, as a matter of fact: see Fridman, *Sale of Goods in Canada*, (2nd ed.) at 164.

[119]See *Leaf* v. *International Galleries, Ltd.*, [1950] 2 K.B. 86; [1950] 1 All E.R. 693 (Eng. C.A.). The buyer's protection is further eroded when one considers just how easily this right to rescission may be lost: see *First Report of the Consumer Protection Project, Part I, supra*, footnote 4, at 23-24 and 114-119.

[120]See *Put On Products Ltd.* v. *Johnson* (1978), 22 N.B.R. (2d) 400 (Q.B.D.).

[121]The principle established in *Hedley Byrne & Co.* v. *Heller and Partners*, [1964] A.C. 465 (H.L.) has been applied in New Brunswick: see *Peters* v. *Parkway Mercury Sales Ltd., supra*, footnote 93. See also: *Belanger* v. *Fournier Chrysler Dodge* (1979), 25 N.B.R. (2d) 673 (N.B.C.A.).

the appropriate remedy, there are surprisingly few reported instances where injustice has patently prevailed. Professor Allan has attributed this result to the ability of the Courts rather than to the general state of the law:

> In many cases one is left with the impression that on the evidence it would have been as easy for the court to hold that a statement was made *animo contrahendi* as that it was not, to hold that a term was a condition as that it was a warranty, or to invoke the notion of collateral contracts as to reject it. 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. Courts should not however be forced into artificial casuistry in order to do justice; and each new decision adds a further precedent to the law until a body of highly technical distinctions has been amassed which renders the task of advising clients a fine exercise in speculation.[122]

The consumer's task of establishing a seller's representation as a term of the contract is not complete upon his demonstrating what the parties have said to one another. In addition to the foregoing morass the consumer often faces another formidable barrier in cases where his contract with the seller has taken written form — the parol evidence rule.[123] When applicable, it precludes the consumer from giving evidence of the seller's oral promises and representations made during contractual negotiations unless he can either bring himself within one of the established exceptions to the rule[124] or convince the court to otherwise avoid the consequences of its application.[125] In addition to these difficulties, the consumer's problems may be further compounded where the written agreement purports, in a so-called "no authority" clause, to exclude the authority of the seller's agents or

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[122]Allan, *supra*, footnote 117, at 275.

[123]An often cited statement of the rule is: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract." See *Goss* v. *Lord Nugent* (1833), 110 E.R. 713 (K.B.) *per* Denman C.J. at 716. For a New Brunswick application see *Berlin Machine Works Ltd.* v. *Randolph & Baker Ltd.* (1917), 45 N.B.R. 210 (N.B.C.A.), where the written contract in dispute contained the clause, "It is agreed . . . that this contract is not modified or added to by any agreement, not expressly stated herein," and evidence of an oral collateral agreement was held inadmissible on the basis of the parol evidence rule. This type of clause, it should be noted, has achieved widespread use in purchase agreements for automobiles, conditional sale agreements involving other types of consumer durables and in many manufacturers' written warranties: see *Ontario Warranties Report, supra*, footnote 16, at 29-30.

[124]Because of the unfair and unrealistic results that can be occasioned by a strict application of the rule, it is not surprising that a number of exceptions have developed to exclude its operation. For a compilation of the exceptions and the Canadian authorities in support thereof, see Fridman, *Law of Contract in Canada* (1976), at 246-248 and the First Supplement (1980), at 74-76.

[125]Other devices have been utilized by the courts to circumvent the parol evidence rule. One of the most inventive has been the collateral contract, whereby the seller's representation is excluded by the rule from forming part of the main contract but allowed to stand on its own as part of a separate contract, collateral to the main contract: see *Francis* v. *Trans-Can. Trailer Sales Ltd.* (1969), 6 D.L.R. (3d) 705 (Sask. C.A.). This device is not, however, without obstacles from the plaintiff's standpoint. In *Hawrish* v. *Bank of Montreal*, [1969] S.C.R. 515; 2 D.L.R. (3d) 600 (S.C.C.), it was held that collateral contracts will not be effective to contradict written contracts. Also, the plaintiff's ability to establish a collateral warranty based on statements made in a manufacturer's advertisement has recently been questioned: see *Lambert* v. *Lewis*, [1981] 1 All E.R. 1185 (H.L.). For a full discussion, see Bridge, "Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain," (1982) 6 *C.B.L.J.* 184 at 209-217.

employees to make variations in the written contract without the written consent of the seller.[126]

The rationale for the parol evidence rule has largely focussed on commercial concerns: the certainty it affords in cases where the contract was preceded by prolonged negotiations, the ease of proof and interpretation of the contractual terms, and the predicatability offered to third parties relying upon the written document. The applicability of this rationale to consumer contracts was questioned in the *First Report of the Consumer Protection Project*:

> . . . in consumer cases it cannot be doubted that a too ready application of the parol evidence rule is bound to produce unfair and unrealistic results. This is because many (perhaps most) written contracts are drawn up by the seller alone and are neither read over nor expected to be read over by the consumer before he signs the contract. To hold that standard form documents preclude a consumer from relying on an oral promise as a term of the contract, even when the document contains a clause stating that it represents the entire contract and that there are no other terms, is to allow a seller to make and break promises with impunity, notwithstanding that he made the promise to induce the sale, that he knows the consumer will rely on the promise, that the consumer did rely on the promise, and that the consumer paid for the performance of the promise. It is to place all the legal importance on the piece of paper although the parties themselves obviously placed importance on the oral promises as well. It is, therefore, with respect, to arrive at a decision that is unjust and unrealistic.[127]

Similarly, the insertion of "no authority" clauses allow sellers to benefit from the advantages of conducting business through sales personnel without shouldering the legal responsibilities that should go with it.[128] As such, these clauses also represent sellers' attempts to limit, by express provision in the contract, the area of contractual agreement. From the consumer's standpoint, all too often their effect is to arbitrarily limit the real intention of the parties as it would otherwise have been found.

C. *The C.P.W.L.A. Solution — An Expanded Concept of Express Warranty*

The C.P.W.L.A. has completely abandoned the system of contractual classification that existed under the general sales law; *viz.*, the condition-warranty dichotomy, and replaced it with the single classification of warranty. Most importantly, from the standpoint of the seller's potential liability for what he says, writes and advertises about his consumer products, the Act expands ths single classification of warranty in such a way as to eliminate the distinction between misrepresentation and warranty and the effect this distinction previously had upon the buyer's remedies. The remedy for any

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[126]See *Cypress Disposal Ltd.* v. *Inland Kenworth Sales (Nanaimo) Ltd.* (1975), 54 D.L.R. (3d) 598 (B.C.C.A.).

[127]*Supra*, footnote 4, at 15-16.

[128]*Ibid.*, at 21.

breach of warranty is now treated as a separate issue.[129] In contracts for the sale or supply of consumer products governed by New Brunswick law, it is generally no longer necessary to distinguish between contractual representations and representations which merely induced the contract. In respect of the latter, the Act has eliminated the distinction between fraudulent and negligent misrepresentations on the one hand and honest, non-negligent misrepresentations on the other. In all cases the only inquiry is whether an express warranty under the C.P.W.L.A. was given by the seller. In determining this question the traditional test of intention has been replaced by the test of reasonable reliance. The rationale for these sweeping changes in a seller's responsibilities for what he says or promises about his consumer products was convincingly set out in the *First Report of the Consumer Protection Project*:

> In our opinion, however, the reforms should go further, at least as far as consumer transactions are concerned. We favour the more radical approach adopted in the United States and recommended by the Ontario Report, whereby all operative representations would be treated as terms of the contract. Under this approach, a seller who makes a representation of fact to induce a sale, and which does in fact induce it, would be strictly liable to the consumer for the accuracy of the representation; if the representation was inaccurate; the consumer would be entitled to receive protection for his expectation interest.
>
> Our reasoning is as follows. A seller makes representations to influence the consumer's decision on whether to buy and, if so, at the price requested. The consumer, if he does rely on the representation, pays his price on the basis that the representation is true. For example, other things being equal, a seller can get more money from a 1973 model car than he can get for a 1972 model car. If the seller states that a particular car is a 1973 model, when in fact it is a 1972 model, and the consumer relies on this statement, the consumer will pay more than he would if the true facts were known. The fact that the seller honestly believed that he was speaking the truth, and that he took care in making his statement, does not change one iota the fact that although the seller set his price on the basis of the representation, and the buyer paid his price on the basis of the representation, the buyer does not receive what he paid the seller for, a 1973 model. We believe the business advantages derived from representations should be accompanied with full legal responsibility for their accuracy . . .[130]

It remains now to examine: (1) the precise parameters of a C.P.W.L.A. express warranty, (2) what happens in the event of conflict in the seller's oral, written and advertising statements, and (3) the scope remaining for the seller's "puffs" and "sales pitch".

(i) The Parameters of Express Warranty

In formulating the parameters of the seller's liability for the statements he makes about his product, the New Brunswick legislation had to reflect a policy choice as to how far consumers should be protected at the expense of limiting the seller's sales techniques. Prior and subsequent legislative

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[129]A full discussion of the *C.P.W.L.A.* remedial regime will follow in the second part of this article.

[130]*Supra*, footnote 4, at 47-48.

experience in other jurisdictions clearly illustrates the wide range of potential parameters. At one end of the spectrum, a seller could be held responsible for the literal meaning of any statement he makes, directly to the consumer or in advertising, about his product, irrespective of whether the consumer relied upon such representation in effecting his purchase, or even whether it would be reasonable for him to rely upon it. This, for example, was the approach adopted in the Manitoba *Consumer Protection Act*[131]. It places the highest obligation upon the seller which conversely, provides the highest protection to the consumer for the accuracy of the seller's statements. Further along the spectrum is the imposition of liability for any statement about the product, providing there is some degree of reliance by the consumer on the statement in effecting his purchase. This brings into focus the closely related issue of reasonable reliance, *viz.* whether the seller's liability should be restricted to those cases where it would be reasonable for the consumer or, alternatively, for any consumer to rely upon the seller's statement. The Saskatchewan approach, for example, is to impose liability upon the seller for any statement made directly to a consumer, or in advertising, provided it is such as would be relied upon by a reasonable consumer. No actual reliance by the complainant consumer is required.[132] On the other hand, the approach adopted in the *Ontario Draft Sales Bill* is to impose liability upon the seller, at least in respect of representations made directly to the buyer, only if the additional requirement of actual reliance is established.[133] Alternatively, some degree of actual reliance could be required in all cases.[134]

Section 4(1) of the C.P.W.L.A. sets out New Brunswick's resolution to this question:

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[131]R.S.M. 1970, c. C200, s. 58(8) as added by S.M. 1971, c. 36, s. 8, as am. by S.M. 1972, c. 51, s. 3:

Every oral or written statement made by a seller, or by a person on behalf of a seller regarding the quality, condition, quantity, performance or efficacy of goods or services that is

(a) contained in an advertisement; or

(b) made to a buyer;

shall be deemed to be an express warranty respecting those goods or services.

[132]S. 8 of the Saskatchewan Act states:

Express warranties — (1) Any promise, representation, affirmation of fact or expression of opinion or any action that reasonably can be interpreted by a consumer as a promise or affirmation relating to the sale or to the quality, quantity, condition, performance or efficacy of a consumer product or relating to its use or maintenance, made verbally or in writing directly to a consumer or through advertising by a retail seller or manufacturer, or his agent or employee who has actual, ostensible or usual authority to act on his behalf, shall be deemed to be an express warranty if it would usually induce a reasonable consumer to buy the product, whether or not the consumer actually relies on the warranty.

[133]See s. 5.10 of the *Ontario Draft Sales Bill*, contained in O.L.R.C., *Report on the Sale of Goods*, Vol. III (Ministry of the Attorney-General, Toronto 1979). It is interesting to note in this respect the shift toward a recognition of the increasing importance of advertising that has occurred in the Ontario Law Reform Commission's position from the *Ontario Warranties Report*, *supra*, footnote 16, at 29, which adopted s. 12 of the American *Uniform Sales Act* and its requirement of actual reliance in all cases, to the position of not requiring actual reliance when the representation is made to the public, as recommended in the *Ontario Sale of Goods Report*, *supra*, footnote 104, at 141-142, and incorporated in s. 5.10.

[134]Under the general sales law the question of reliance is essential in determining whether something said or written is a representation or has become a warranty: see *Naken* v. *General Motors of Canada Ltd.* (1979), 92 D.L.R. (3d) 100 (Ont. C.A.).

In every contract for the sale or supply of a consumer product the following statements are express warranties given by the seller to the buyer:

(a) any oral statement in relation to the product that the seller makes to the buyer, unless the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's statement;

(b) any written statement in relation to the product that the seller makes to the buyer, whether or not the buyer relies on the statement, unless the circumstances show that it would be unreasonable for him to rely on the statement; and

(c) any statement in relation to the product, however made, that the seller makes to the public or a portion thereof, whether or not the buyer relies on the statement, unless the circumstances show that it would be unreasonable for the buyer to rely on the statement.

In reconciling the reliance issue, the New Brunswick formulation is located somewhere between that of Saskatchewan and the *Ontario Draft Sales Bill*. Saskatchewan in all cases requires no actual reliance; the *Ontario Draft Sales Bill* requires it in respect of both oral and written representations made by the seller directly to the buyer; the C.P.W.L.A. requires actual reliance only in respect of oral statements made by the seller to the consumer. In the event of these oral representations, it will be a rare case where the New Brunswick consumer will not be able to establish at least partial reliance.[135] The essential question will inevitably revolve around whether or not this reliance was unreasonable. The same result will not necessarily occur in the case of written statements made by the seller either directly to the buyer or by way of advertisement. A consumer will seldom read, prior to the time of sale, all of the writing on the product, its container, or its packaging, or rely on advertisements accompanying it.[136] Similarly, as noted by the Ontario Law Reform Commission, often a consumer will not see a manufacturer's performance warranty until after the sale either because it is contained inside the packaging or because the seller provides it to the consumer after the time of sale.[137] It should be noted, in both of the above cases, that the New Brunswick Act, unlike the *Ontario Draft Sales Bill*,[138] deems the express warranty to have been made by the seller.[139]

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[135]In most cases the consumer should be able to invoke the same type of presumption that he is able to raise in reference to the implied condition under s. 15(a) *S.G.A.*: see *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85, *per* Lord Wright at 99. This presently is the American position under U.C.C. 2-213 where the onus is upon the seller to rebut the presumption that his representation was "part of the basis of the bargain": see *Rogers* v. *Crest Motors, Inc.* 516 P.2d 445 (Colo. App. 1973). In any event, under the *C.P.W.L.A.*, assuming reliance would be reasonable in the circumstances. Only an admission of non-reliance by the consumer will effectively prevent the seller's oral statement from constituting an express warranty.

[136]The *Uniform Commercial Code* serves as a precedent in making the seller liable for such statements: see s. 2-314(2)(f). This was adopted in the *Ontario Draft Sales Bill, supra*, footnote 133: see s. 5.13(b)(v).

[137]*Ontario Report on Sale of Goods, supra*, footnote 104, at 139.

[138]*Ibid.*, at 138. The O.L.R.C., in the context of non-consumer sales, does not recommend that the retailer be jointly responsible with the manufacturer for any written, published or broadcast warranties given by a manufacturer. However, the warranty of merchantable quality in s. 5.13 implies that the goods conform to any representations on the container, label, or other material accompanying the goods: *supra*, footnote 136.

[139]S. 4(2)(b). This, of course, in appropriate cases, obviates the necessity of resorting to the collateral contract device to establish contractual liability.

Another notable difference between the recent Ontario formulation and the C.P.W.L.A. is that while the *Ontario Draft Sales Bill* dispenses with proof of actual reliance where the representation is made to the public, the New Brunswick Act avoids completely the necessity in any particular case of having to decide whether or not a written statement was "made to the public".[140]

(ii) Conflict in Oral, Written and Advertising Statements

It is appropriate at this point to comment specifically upon the C.P.W.L.A. treatment of cases: (1) where the retailer's or salesman's oral statements made during contractual negotiations conflict with the written terms of the subsequent contract, and (2) where the retailer's or salesman's more modest oral or written statements conflict with other advertising representations.

In the first type of case the consumer's lot has been improved in two ways. The initial improvement occurs as a result of the abolition of the parol evidence rule effected by section 5 of the C.P.W.L.A.:

> Where there is a written contract, oral and other extrinsic evidence is admissible in any court to establish an express warranty notwithstanding that it adds to, varies or contradicts the written contract.[141]

This abolition does not disentitle a seller from retracting an oral promise made during contractual negotiations because it does not obviate or diminish the onus upon the consumer to prove the existence and content of the express warranty relied upon. Rather, the abolition provides the consumer with an opportunity, often unavailable under the general sales law, to prove that the seller's oral statement was in actual fact the type of statement that a reasonable buyer should be able to rely upon in the circumstances, notwithstanding the existence of an "entire contract" clause.[142] From the consumer's standpoint, the second improvement effected by the C.P.W.L.A. in these cases occurs in section 4(2)(a) which deems the seller to make any statement that his salesman makes, unless he proves that the salesman was acting outside the scope of his usual or apparent authority. This will depend upon whether, in business terms, the salesman is the type of agent or employee whom the reasonable consumer would take to be

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[140]The *Ontario Draft Sales Bill* does not contain a deeming provision similar to s. 36(2) of the *Combines Investigation Act* R.S.C. 1970, c. C-23, as am. by S.C. 1974-75-76, c. 76, s. 18. The *Draft Uniform Sale of Goods Act*, in s. 5.10(9), follows in part the *C.P.W.L.A.* precedent and expressly provides that it is sufficient if the representation is addressed to a "section of the public" thus negating any suggestion that it need emcompass all the public: see Uniform Law Conference of Canada, *Uniform Law Section Report on Sale of Goods* (1982) at 74.

[141]Abolition of the parol evidence rule was also recommended in the *Ontario Warranties Report, supra*, footnote 16, at 44 and enacted in the Saskatchewan Act: see s. 9.

[142]For an exhaustive discussion of the pros and cons of abolition from a policy standpoint see the *First Report of the Consumer Protection Project, Part I supra* footnote 4,at 13-21.

entitled to make the sort of representation that was involved.[143] While the Act has stopped short of rendering a seller liable for all statements made by his sales staff, it has, at a minimum, provided him with a strong incentive to supervise the representations being made by his sales staff.

Resolution in the second type of case, *ie.*, where a retailer's more modest oral or written statements conflict with other advertising representations, is more complex. If the advertisement is the retailer's, or is deemed by the Act to be the retailer's,[144] the consumer can attempt to establish an express warranty on the basis of the seller's public representation, but again the issue will revolve around whether, in light of the retailer's direct statements, it was reasonable for the consumer to rely upon the advertising claims.[145] A more complex situation is presented where the advertisement is not placed or deemed to be placed by the retailer. Assuming the retailer was accurate in his statements to the consumer, it would appear the latter would have no recourse against the retailer for breach of a C.P.W.L.A. express warranty. The consumer may actually find himself in a favoured position *vis-à-vis* the advertiser. Assume, for example, the advertiser was the manufacturer and the distribution chain, for purposes of illustration, was a short one, *viz.* manufacturer-retailer-consumer. If the advertisement had been placed prior to the manufacturer's contract with the retailer, the statements contained therein would become express warranties in the contract between the manufacturer and retailer pursuant to section 4(1)(c). This would be so whether or not the retailer was aware of or relied upon those statements, as long as it would not have been unreasonable for him to have done so. If such is the case, the consumer, who has suffered a "consumer loss" within the meaning of the C.P.W.L.A.,[146] may be able to successfully maintain an action under section 23 of the Act against the manufacturer for breach of his express warranty, notwithstanding that the consumer was not a party to the contract between the manufacturer and retailer.[147] If the scope of section 23 is this expansive,[148] the consumer, it

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[143]Was the salesman a mere functionary or a vital participant in the contracting process? For an excellent general discussion of this issue see Fridman, "Written contracts with an Oral Element" (1977-78) 8 *Man. L.J.* 382.

[144]See s. 4(2).

[145]This example highlights a potential difficulty with the Saskatchewan formulation. Under s. 8 of the Saskatchewan Act, it can be argued that any statement made by the seller is to be judged *in the abstract* by an objective standard — the reasonable consumer. The New Brunswick formulation, on the other hand, gives recognition to the seller's statement in a broader context where the standard to be applied is that of a reasonable consumer *in the position of the buyer*.

[146]See text accompanying footnote 61.

[147]Of course, the manufacturter and retailer could agree to exclude or restrict any warranty or remedy pursuant to s. 26, but, in the circumstatnces presented, the only exclusion or restriction clearly permissible would be in relation to the s. 13 remedies for breach of express warranty and even this would be subject to the fairness and reasonableness control imposed by s. 25(1).

[148]Professors Tetley and Bridge do not share the view that s. 23 is wide enough to fix manufacturers with liability for express warranty in respect of statements made in advertising see Tetley and Bridge, "Consumer Product and Liability Act, 1978," (1979) 1 Prod. Liab. Int. 166.

is submitted, is in a favoured position because the retailer's comments to him may not be taken into account in limiting the manufacturer's express warranty. Yet, if the advertisement had been placed by the retailer, as noted above, the retailer's comments, *inter praesentes*, could disentitle the consumer from establishing express warranties because it might be unreasonable for the consumer to rely on the advertising claims in light of the retailer's verbal comments.

(iii) Scope Remaining for "Puffs" and "Sales Pitch"

In light of the foregoing, what scope remains in New Brunswick for the seller's "puffery" and "sales pitch"? Because of the C.P.W.L.A. requirement of reasonable reliance in all cases, there is still considerable scope for "puffery" by the seller. His potential for attracting laibility will be inversely proportional to the generality or outlandishness of his statements; the more general or outlandish, the less likely a reasonable consumer would rely upon it.[149] The scope remaining for the seller's "sales pitch", however, has now been restricted to the realm of opinion. This is so because any language of commendation by the seller which contains representations of fact in relation to the product will clearly attract C.P.W.L.A. express warranties, providing those representations would be relied upon by a reasonable consumer in the buyer's position.[150] Where the statement in question can be classified as a statement of the seller's opinion, the position is different. "Statement" was originally defined in section 4(4)(b) of the C.P.W.L.A. as including representations of fact, intention, or opinion.[151] The purpose behind inclusion of opinion within the statutory definition was set out in the *First Report*:

> An unscrupulous seller might attempt to avoid our proposals by stating in the form of an opinion what he hopes the consumer will take as a fact. To prevent this possible evasion, we recommend that the law should apply the same test to opinions given by the seller as that recommended for promises and representations of fact made by the seller. If the seller states his opinion that the goods have certain qualities (or whatever), then it should be a statutory term of the contract that the goods will have these qualities, unless the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's opinion.[152]

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[149]See, for example, *Silverman* v. *Samuel Mallinger Co.*, 100 A.2d 715, 375 Pa. 422 (Pa. 1974), where a statement made by the seller to a buyer that specified glassware was "as good as anyone else's ware" was held to constitute mere "puffing" and not amount to a warranty.

[150]S. 8. *Cf. Selig* v. *Bottcher* (1978), 26 N.S.R. (2d) 347 (N.S.C.A.). In this respect the *C.P.W.L.A.* does not follow the precedent embodied in U.C.C. 2-313(2) of a blanket exclusion for the seller's commendation of his goods. A seller's statement that "This car is in A-1 condition; I just overhauled the motor" has been held to be merely sales talk under the U.C.C.: see *Mikula* v. *Lucibello* 17 Conn. Supp. 360 (Conn. 1951). The seller's statement in New Brunswick would constitute an express warranty. The same result would obtain in Saskatchewan: see s. 8.

[151]The original text of s. 4(4)(b) read as follows:

> "statement" means a statement that is made before or at the time of the contract and includes a promise and a representation of fact, intention or opinion.

[152]*Supra*, footnote 4, at 53-54.

Under the Saskatchewan Act, the present position is the same as that originally proposed in New Brunswick, *viz.* that representations of the seller's opinion can give rise to express warranties.[153]

The New Brunswick definition was subsequently amended in 1980[154] and, as a result, representations of the seller's opinion were excluded from the statutory definition:

> 4(4)(b) "statement" means a promise or representation of fact or intention that is made before or at the time of the contract.

Thus, the distinction which exists under the general sales law between representations of fact as opposed to representations of opinion has, unfortunately, it is submitted, been resurrected by the amendment, and it may again be possible for unscrupulous sellers to avoid the intent of the C.P.W.L.A. by manipulating the form in which a statement is made. From the consumer's standpoint, the courts must now be exclusively relied upon to make the distinction between genuine opinion and that which is opinion in form only. At times the dividing line will inevitably be very difficult to draw.[155]

Of course, even assuming the seller's statements amount to statements of fact, there will still remain in many cases difficulties of interpretation. A good illustration is provided by *Salk* v. *Alpine Ski Shop, Inc.*[156] In that case the plaintiff-skier broke his leg when his new ski binding failed to release. The manufacturer had nationally advertised that "Cubco is the precise binding . . . that releases when it's supposed to. Both heel and toe release at the exact tension you set. And release whichever way you fall." The Supreme Court of Rhode Island dismissed the plaintiff's claim in warranty on the basis of interpretation: ". . . The plaintiff must first establish that Cubco warranted its bindings would release in every situation presenting a danger to the user's limbs. It is our judgment that Cubco's advertising falls short of this blanket guarantee."[157]

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[153]See s. 8, the text of which is contained in footnote 132. This also, it should be noted, is the position proposed in s. 5.10(1) of the *Ontario Draft Sales Bill, supra*, footnote 133, which renders "a representation or promise *in any form* . . . an express warranty." Section 5.10(1) of the *Draft Uniform Sale of Goods Act, supra*, footnote 140, at 69, is even more explicit. It defines "statement" as "a statement in any form . . . and includes a promise or representation of fact or opinion . . ."

[154]S.N.B. 1980, c. 12, s. 1.

[155]Professor Romero, *supra*, footnote 23, at 137, cites the following comments of Bowen L.J. in *Smith* v. *Land and House Property Corporation* (1884), 28 Ch.D. 7 at 15, as particularly appropriate to consumer transactions in which sellers and manufacturers often have more expertise and access to facts than consumers: "It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact . . . if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

[156]342 A.2d 622 (R.I. 1975).

[157]*Ibid.*, at 626.

In advising any seller on the scope remaining for "sales pitch" under the C.P.W.L.A. it is important to place the issue within the overall context of what the legislation is attempting to accomplish with its concept of "express warranty," *viz.* to provide New Brunswick consumers with the right to reasonably rely upon what suppliers in the distribution chain say, write or advertise about their products: *fidem habeat emptor*. It is to further this legislative objective that sellers, *inter alia*, are no longer permitted to limit the scope of their contractual obligations by sole resort to the parol evidence rule, are no longer permitted to limit the scope of their contractual obligations by sole resort to the parol evidence rule, are no longer permitted to seek refuge behind "no authority" clauses to insulate themselves from the representations of their sales staff, and are no longer permitted to unilaterally eliminate or disclaim an express warranty once it has arisen under the Act. Viewed in this teleological context, the only viable advice to give a New Brunswick seller who inquires as to the scope now remaining for "sales pitch" is, I submit, to tell him to insure that a breach of express warranty never arises in the first place. How can the seller accomplish this? By careful attention to accuracy in the formation of the contract: only promise what can be delivered, only affirm what is really a fact, only describe the merchandise cautiously. This should hardly prove an impossible task for a responsible seller.

2. *Implied Warranties*

A. *Introduction*

While express terms relating to title, quality, fitness and durability of goods sold are frequently observed in commercial transactions, their incidence is relatively rare in consumer sales. In every contract for the sale of supply of a consumer product, certain warranties are implied by the C.P.W.L.A. relating to the seller's obligations with respect to these matters. Many of the changes effected by this C.P.W.L.A. scheme of implied warranties are minor in nature, merely attempting to eliminate anomalies extant under the general sales law and to clarify and modernize it. Other changes, some of which are equally applicable to the implied warranties, are comparatively major. These changes include: (1) abolition of the condition-warranty distinction and imposition of the unitary classification of warranty, (2) treatment of remedies as a separate issue emancipated from the classification of contractual terms, (3) abolition of the doctrine of privity of contract enabling contractual recourse by consumers and subordinate suppliers against superordinate suppliers, and (4) imposition of severe limitations upon the seller's ability to exclude or restrict C.P.W.L.A. warranties and remedies.

The legislative purpose behind these changes, major and minor, is to strengthen the consumer's hand by generally guaranteeing, through the mechanism of the C.P.W.L.A. remedial regime, that the consumer product

supplied will possess the requisite title, quality, fitness and durability characteristics that he, as a reasonable consumer, should be able to expect from his purchase. In effecting this purpose the C.P.W.L.A. injects the *fidem habeat emptor* principle into the area of implied warranties.

The implied warranties of title, quality, fitness and durability will now be discussed in detail. In repsect of each, an attempt will be made to point out defects in existing sales law and how the C.P.W.L.A., in comparison with other jurisdiction, has addressed the issues raised. An attempt will also be made, where appropriate, to comment upon potential problems inherent in the C.P.W.L.A. formulations.

B. *Warranty of Title*

(i) Introduction

Under section13 of the *Sale of Goods Act* there is "unless the circumstances of the contract are such as to show a different intention", an implied condition covering the seller's right to sell, an implied warranty of quiet possession and an implied warranty covering liens and encumbrances.[158] The corresponding C.P.W.L.A. provision is contained in section 8(1) which provides as follows:

> In every contract for the sale or supply of a consumer product, other than one to which subsection (2) applies, there is an implied warranty given by the seller to the buyer
>
> (a) that the seller has a right to sell the product, or will have a right to sell the product at the time of its delivery to the buyer;
>
> (b) that the product is free, or will be free at the time of its delivery to the buyer, and will remain free from any interest, lien, charge or encumbrance not actually known to the buyer before the contract is made; and
>
> (c) that the buyer will enjoy quiet possession of the product except so far as it may be disturbed by any person entitled to any interest, lien, charge or encumbrance actually known to the buyer before the contract is made.[159]

It is immediately apparent that the anomalies inherent in the S.G.A. condition-warranty dichotomy have been eliminated resulting in uniform treat-

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[158]S. 13 *S.G.A.* provides:

> In a contract of sale unless the circumstances of the contract show a different intention, there is
>
> (a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property passes.
>
> (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
>
> (c) an implied warranty that the goods shall be free from any charge or incumbrance in favour of a third party, not declared or known to the buyer before or at the time when the contract is made.

[159]S. 8(2) provides the equivalent warranties, *mutatis mutandis*, in contracts of lease or hire of consumer products where there is no option to purchase, *i.e.*, the supplier must have the rights to supply and to give quiet possession.

ment of the three implied warranties, an important factor in light of their considerable overlap. What is less obvious is how the C.P.W.L.A. has resolved at what time the implied warranty of title should take effect, whether a seller should be allowed to contract out of or restrict the implied warranty, and the consequences of a seller's breach, *viz.* whether and under what circumstances the seller should be permitted to cure defective title, and when, if the seller is unable to cure, he should be permitted to deduct from the refund any benefits received by the buyer.

(ii) When The Seller's Obligations Arises

The seller's title obligation under the C.P.W.L.A. can be satisfied in one of two ways, *viz.* (1) if the seller has the right to sell the consumer product at the time of sale, or (2) if he has the right to sell at the time of delivery of the consumer product to the buyer. The major difference between the C.P.W.L.A. and S.G.A. is with respect to the buyer's rights under a conditional sales contract after his discovery of the seller's defective title. Under the S.G.A. such contracts are agreements to sell[160] and the seller is only in breach of his title obligation therein if he can't supply good title at the time property is to pass.[161] In the typical conditional sales contract, since property is reserved until payment in full, this would mean that the seller's obligation does not arise until the buyer has completed payment. The C.P.W.L.A. formulation, following the recommendation of the *Ontario Warranties Report*[162] and in part, the precedent of the Manitoba *Consumer Protection Act*,[163] would in these circumstances impose liability upon the seller for breach of his title obligation at the time of delivery of the consumer product. This would provide the buyer with a remedy and excuse him from making future payments immediately upon his discovery of the seller's defect in title.[164]

(iii) The Limited Scope for Exclusion

The ability of a seller to successfully exclude his title obligations under the *Sale of Goods Act* has been the subject of academic controversy.[165] The

[160]See *Sawyer* v. *Pringle* (1891), 18 O.A.R. 218 (App. Div.).

[161]S. 13(a) *S.G.A.*

[162]*Supra*, footnote 16, at 33-34. It is important to note, however, that the *Ontario Draft Sales Bill, supra*, footnote 133, has retained the same when title is to pass as the relevant time for the seller's obligation to arise in the case of contracts to sell: see s. 5.12(a)(a).

[163]*Supra*, footnote 131. S. 58(1)(a), as amended, requires the conditional seller to have the right to agree to sell at the time of contract, and the actual right to sell at the time property is to pass.

[164]The Saskatchewan Act, in comparison, goes even further. As a result of s. 11.1 and the definition of "sale" in s. 2(m)(i), the seller's title obligation arises at the time of entering into the conditional sales contract.

[165]See the authorities cited in the *Ontario Report on Sale of Goods, supra*, footnote 104, at 199.

C.P.W.L.A. is unequivocal: section 24 disallows all disclaimers relating to title.[166] To a limited degree, however, exclusion or restriction of the implied warranties of freedom from encumbrances and quiet possession is possible. This is so because, under subsections (b) and (c) of section 8, these implied warranties will not arise with respect to any interest, lien, charge or encumbrance actually known to the buyer before the contract is made. The important point, though, is that the seller is unable unilaterally, through disclosure to prevent these warranties from arising. In this respect the C.P.W.L.A. differs from the Saskatchewan Act[167] and the proposal in the *Ontario Draft Sales Bill.*[168] In New Brunswick the only way for the seller to clearly exonerate himself from liability under section 8(b) or (c) is to prove *actual* knowledge on the buyer's part. Constructive knowledge, occasioned simply through disclosure, albeit reasonable, may be insufficient.

(iv) The Consequences of Breach

(a) Problems under the General Sales Law — The Seller's Dilemma

The consequences of a seller's breach of title obligation are quite severe under the general sales law. Under the *Sale of Goods Act*, the buyer's right to rescission is easily lost.[169] Where there has been a breach of the seller's implied title obligation the buyer can always claim return of the purchase price on the basis of failure of consideration.[170] In the normal case the buyer would not be permitted to profit if he had elected to rescind his contract,[171] breach of the seller's title obligation permits the buyer to have the best of both worlds. In the leading case of *Rowland* v. *Divall*,[172] it was held that the buyer was entitled to recover his entire purchase price, and the seller was unable to set-off anything for the buyer's use of an automobile over a period of four months, notwithstanding that the seller was innocent of the fact that he was not the owner of the vehicle and notwithstanding that the buyer was unable to return the car to him.[173] The seller's position

[166]The only exception to this is contained in s. 26 which permits the seller to exclude or restrict any warranty where the buyer makes or holds himself out as making the contract in the course of a business; but even this agreement is ineffective where that buyer ultimately suffers a "consumer loss' in resale.

[167]Under s. 11.2 of the Saskatchewan Act, the seller can unilaterally prevent the comparable implied warranties from arising with respect to any security interest, lien, charge or encumbrance "expressly disclosed or actually known to the consumer before the sale is made."

[168]*Supra*, footnote 133, s. 5.12(1)(b) where the equivalent wording is ". . . not disclosed or known to the buyer before the contract was made." The specificity of the buyer's knowledge sufficient to relieve the seller from liability was emphasized in the *Draft Uniform Sale of Goods Act, supra*, footnote 140, at 79 by requiring the buyer to have "actually" known of the encumbrance before the contract was made: see s. 5.12(1)(b).

[9]See *First Report of the Consumer Protection Project, Part I, supra*, footnote 4, at 114-119.

[170]See s. 51 *S.G.A.* See also *Karflex, Ltd.* v. *Poole*, [1933] 2 K.B. 251 (Eng. C.A.).

[171]This is so on the basis that the buyer would be unable to retain or fail to account for any benefit under the contract if he elected to repudiate it.

[172][1923] 2 K.B. 500 (Eng. C.A.).

[173]Nor is the buyer's right to sue on this basis dependent upon any actual claim by the true owner: see *Karflex, Ltd.* v. *Poole, supra*, footnote 170.

becomes untenable when one considers further that, under the general sales law, once the buyer repudiates, the seller is not permitted to cure his defective title.[174]

(b) *The C.P.W.L.A. Solution — Creation of Rights to Cure and Deduct for Use*

Just what changes will be brought about in respect of the seller's opportunity to cure defective title and his opportunity to set-off for the buyer's use under the C.P.W.L.A.'s new remedial regime remain to be seen. The remedies available to the consumer buyer under the Act differ from those available to the business buyer.[175] The latter may find himself in a favoured position where breach of the seller's title obligation is subsequently discovered. This is so because the remedies that would normally be available under the law for breach of the title condition are deemed, by section 13(a), to be the applicable C.P.W.L.A. remedies. Consequently, in accordance with the foregoing discussion, the business buyer does not have to permit the seller any opportunity to effect a late cure and does not face any deduction whatever for use during the interval preceding rejection. The consumer buyer, on the other hand, is normally under an obligation to give the seller a reasonable opportunity to rectify any breach of warranty.[176] This, presumably, includes breach of the title warranty in section 8(1)(a), and, indeed, such was the recommendation of the *First Report of the Consumer Protection Project*.[177] It should be noted at this juncture, however, that the consumer buyer does not have to afford the seller the opportunity to rectify where the breach is a "major breach."[178] Because this term is undefined in the Act, the courts are now certainly empowered to assess both the nature of the breach and its consequences in determining the issue.[179] Nevertheless, if there is any residual effect from the special importance which the courts have attached to a seller's title obligation under the general sales law, the very fact of breach may be categorized as "major", with the result that the consumer buyer may be permitted to reject under the Act notwithstanding the seller's willingness to effect a late cure of defective title. This potential difficulty has been resolved, for example, in the **Ontario Draft Sales Bill**

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[174]See *Butterworth* v. *Kingsway Motors Ltd.*, [1954] 2 All E.R. 694 (Q.B.), which was followed in *McNeill* v. *Associated Car Markets Ltd.* (1962), 35 D.L.R. (2d) 581 (B.C.C.A.). While the question was expressly left open by Pearson J. in the *Butterworth* case, in New South Wales it has been held that the seller is permitted to cure defective title prior to the buyer's repudiation: see *Patten* v. *Thomas Motors Pty. Ltd.* [1965] N.S.W.R. 1457.

[175]Where the buyer acquires a consumer product for both personal and business purposes, the primary purpose of his acquisition governs his classification: s. 1(2). See also Dore, *supra*, footnote 7, at 167.

[176]S. 14(1). See *Audet* v. *Central Motors Ltd.* (1982), 35 N.B.R. (2d) 143 (Q.B.).

[177]*Supra, footnote 4, at 68 and 133.*

[178]*S. 14(1)(b).*

[179]*See Chapter III of the First Report of the Consumer Protection Project, Part I, supra*, footnote 4, at 106-138.

by defining the seller's right to cure as expressly including the "remedying of any . . . defect, including a defect in title."[180]

In any event, under the C.P.W.L.A., where the seller is either not permitted or is unable to effect a late cure, he will be allowed to deduct from the buyer's refund "any amount that is equitable in the circumstances" for the benefits which the buyer has derived from use.[181] In this respect the courts will undoubtedly inquire into both the time period and quality of the buyer's use, and into the nature of the title breach which has occurred distinguishing between cases where the seller has acted knowingly on the one hand and cases where the seller has unknowingly been victimized by a third party rogue.

C. *Warranty of Quality*

(i) Introduction

Section 15 of the *Sale of Goods Act* contains the two implied conditions which have spawned the most litigation and which, when applicable, have provided the buyer with what is often his only protection in respect to the quality of the product he has purchased:

> 15 Subject to the provisions of this Act and of any Statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply, whether he is the manufacturer or not, there is an implied condition that the goods are reasonably fit for the purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods are of merchantable quality; but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed;

The opening words of section 15 codify what many New Brunswick consumers probably believe to be the governing rule of sales law — *caveat emptor*. It is unfortunate, as noted by the Ontario Law Reform Commission, that the opening words reinforce the misconception that the implied terms of merchantability and fitness for purpose are exceptions to the *caveat emptor* rule because the empirical evidence suggests that, unless successfully dis-

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[180]*Supra*, footnote 133, s. 7.7(1)(c).

[181]S. 17(2).

claimed, most sales by a dealer will attract one or other or both of the implied conditions.[182]

The C.P.W.L.A. formulation of the quality and fitness warranties clearly asserts that reasonable quality and fitness will be the general rule in contracts for the sale or supply of consumer products rather than the exception. The warranty of quality contained in section 10(1) requires that the consumer product supplied be of the quality which reasonable buyers would expect, having regard to all the relevant circumstances:

> 10(1) Subject to subsection (2), in every contract for the sale or supply of a consumer product there is an implied warranty given by the seller to the buyer
>
> (a) that the product is of such quality, in such state or condition, and as fit for the purpose or purposes for which products of that kind are normally used as it is reasonable to expect having regard to the seller's description of the product, if any, the price, when relevant, and all other relevant circumstances; and
>
> (b) that the product complies with all mandatory federal and provincial standards in relation to health, safety and quality.

In some respects section 10 rectifies ambiguities and defects inherent in the S.G.A. formulation. In other respects it simply enables the consumer protection legislation to clearly reflect the construction which the courts have placed upon merchantability within the consumer context under general sales law. In still other respects it broadens the extent of protection afforded to the consumer.

(ii) Eliminating S.G.A. Ambiguities and Defects

(a) No Sale by Description Necessary

Section 15(b) of the *Sale of Goods Act* implies a condition that the goods are of merchantable quality only when the goods are sold by description. The requirement that the sale must be a sale by description creates no difficulties in the case of a sale of future or unascertained goods because the phrase certainly must apply "to all cases where the purchaser has not seen the goods but is relying on the description alone."[183] The difficulties have occurred in the case of sales of specific goods. Such sales can be sales by description providing the seller undertakes responsibility under the contract for the identity of the subject matter.[184] In the application of this minimum requirement, courts have leaned in favour of finding a sale by description so as to afford the buyer the merchantability protection of

[182] *Ontario Report on Sale of Goods*, *supra*, footnote 104, at 207.

[183] See judgement of Channel J., in *Varley* v. *Whipp*, [1900[1 Q.B. 513 at 516.

[184] See *Grant* v. *Australian Knitting Mills, Ltd.*, *supra*, footnote 135, at 100 *per* Lord Wright.

section 15(b).[185] Nevertheless, as pointed out in the *First Report of the Consumer Protection Project*, just how far a New Brunswick court would lean in this regard has been clouded by the decision in *Godsoe* v. *Beatty*.[186] The approach utilized by the New Brunswick Court of Appeal in that case raises the question of how many sales in self-service stores would be held to be sales by description, especially in respect of articles which have not labels attached and in which nothing is said concerning their identity.[187] The same question was raised in England in the *Final Report of the Committee on Consumer Protection*:

> The shop counter across which the customer asks for what he wants has ceased to be the prominent feature of retail establishments it once was. The customer is now encouraged to make his choice unaided by a sales assistant. A very considerable proportion of consumer goods are selected from shelves in self-service stores or from open counters or racks in shops that still maintain some sales staff. It is questionable whether these sales are "by description" and if not, the customer has no shred of right in law to complain of a defective purchase . . .[188]

The *First Report of the Consumer Protection Project*, following the precedents of the U.K. *Supply of Goods (Implied Terms) Act*, 1973,[189] the Manitoba *Consumer Protection Act*,[190] and the *Ontario Warranties Report*[191] recommended that there should be no requirement that goods be bought by description in order for merchantibility to apply.[192] Section 10(1)(a) of the C.P.W.L.A. implements this recommendation in respect of the implied warranty of requisite quality. It should be noted that this position is consonant with that taken in the Saskatchewan Act[193] and, most recently, recommended by the Ontario Law Reform Commission.[194]

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[185]Indeed, according to Atiyah, *supra*, footnote 10, at 94, the consequence of holding a sale to be a sale by description is so important that the courts in practice tend to interpret the condition of correspondence with description in s. 14 with half an eye to the merchantability protection afforded by s. 15(b).

[186](1958), 19 D.L.R. (2d) 265 (N.B.C.A.). See also *Associated Fisheries of Canada Ltd. and Profile-United Industries Ltd.* v. *Bluenose Fisheries Ltd.* (1982), 41 N.B.R. (2d) 37 (Q.B.).

[187]For a full discussion of *Godsoe* v. *Beatty* and its anomalous implications, see *First Report of the Consumer Protection Project*, *supra*, footnote 4, at 74-76.

[188]London, H.M.S.O. 1962, Cmnd. 1781, para. 441. See also Romero, *supra*, footnote 23, at 162-164.

[189]See s. 3 which revises s. 14(2) of the U.K. *Sale of Goods Act* by deleting the requirement of sale by description.

[190]*Supra*, footnote 131, s. 58(1)(e).

[191]*Supra*, footnote 16, at 41.

[192]*Supra*, footnote 4, at 77.

[193]See s. 11.4. Saskatchewan, however, unlike New Brunswick, has expressly included a warranty of correspondence with description where the sale of the consumer product is a sale by description: see s. 11.3. The Sask. Act has resolved some of the categorization problems in this respect by expressly providing that no sale is precluded from being a sale by description by reason only that it is a sale of specific consumer products or that the products being exposed for sale are selected by the consumer: see s. 12.

[194]*Ontario Report on Sale of Goods*, *supra*, footnote 104, at 208.

While the sale by description requirement has been abolished for this purpose, it must be remembered that description retains significant residual importance in the determination of requisite quality because the "reasonable" quality warranted under section 10(1)(a) is dependent upon, *inter alia*, the seller's description of the product. Also, under section 25(4), where there is a sale by description the parties cannot exclude or restrict any C.P.W.L.A. remedy for breach of an express warranty that forms part of the description of the product. However, the categorization problems in the sale of "specific" consumer products occasioned by *Godsoe* v. *Beatty* have been substantially ameliorated by section 25(5) which provides that a sale or supply of a consumer product will 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. This accords with statutory clarification in other jurisdictions.[195]

b) No Contracting Out in Consumer Transactions

In a large number of cases the *Sale of Goods Act* has provided a high degree of consumer protection through the implied conditions of merchantability and fitness. However, at common law and under the Act,[196] the contract of sale can expressly provide that the seller is to be exempt from the performance of these implied conditions or from liability for their breach. The Ontario Law Reform Commission has noted that sellers have not been slow to take advantage of this option with the result that disclaimer or exception clauses are now a common feature of consumer sale and financing contracts.[197] Indeed, some sellers are so financially powerful that they can blatantly insist upon such clauses being included in their contracts by adopting "take it or leave it" attitudes. Even more common are sellers who, having inserted exclusion clauses into their standard form conditions of sale, rely on their buyers not bothering to read, or, if reading, not understanding fine print.[198]

While a detailed analysis of the C.P.W.L.A. treatment of this issue will be deferred,[199] it is appropriate at this point to note that, insofar as consumer transactions are concerned, the Act contains a blanket prohibition

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[195]See, for example, s. 12 Sask. Act which is described in footnote 193. See also s. 2 of the U.K. *Supply of Goods (Implied Terms) Act, 1973*, which adds a new subsection to the correspondence with description condition in the U.K. *Sale of Goods Act*, expressly providing that a sale will not be prevented from being a sale by description by reason only that, being exposed, the goods are selected by the buyer.

[196]See s. 52 *S.G.A.* of New Brunswick, *supra*, footnote 1, which embraces the freedom of contract principle in allowing the parties to contract out of, or otherwise modify, the implied terms.

[197]*Ontario Warranties Report*, *supra*, footnote 16, at 47.

[198]An exclusion clause, for example, may be contained in the small print of a guarantee which the seller gives to the buyer: see *Adams* v. *Richardson and Starling* [1969] 2 All E.R. 1221 (Eng. C.A.) and, more particularly, the stinging commentary of Lord Denning M.R. at 1224.

[199]*Supra*, footnote 90.

against contracting out of the implied warranties and the remedies for their breach.[200] In this respect the prohibition implements the recommendation of the *First Report of the Consumer Protection Project*[201] and follows the precedents of remedial legislation in British Columbia,[202] Ontario,[203] Manitoba,[204] Nova Scotia,[205] the Yukon[206] and Northwest Territories.[207] Similarly, the Saskatchewan Act prohibits the exclusion or restriction of its warranties and remedies.[208]

It should be cautioned that the C.P.W.L.A. blanket prohibition against contracting out of the implied warranties and remedies for breach in consumer transactions does not mean that the seller will always be liable to the consumer if the consumer product is defective. The warranty of quality in section 10(1)(a) is a flexible concept and requisite quality is determined, as discussed below, by taking into consideration all the relevant circumstances surrounding the contract. Thus, to use ane xample put forward in the *First Report*,[209] a car may have certain defects rendering it incapable of satisfying the requisite quality standard if it was sold as a "new car" but not if it was sold as a "used car." The key point worth emphasizing is that now, under the Act, while the seller in any given consumer transaction retains the paramount role in shaping the applicable standard of requisite quality (for example, by the way he describes the consumer product and the price he establishes for it), he can no longer exclude application of the statutory standard or the consequences which flow from a failure to meet it.

(c) Dealer Requirement

The conditions implied under section 15 of the *Sale of Goods Act* only apply, *inter alia*, "where goods are bought by description from a seller who

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[200]See s. 24. This is not the case, however, where the buyer makes or holds himself out as making the contract in the course of a business: see s. 26.

[201]*Supra*, footnote 4, at 191-192.

[202]*Sale of Goods Act*, R.S.B.C. 1979, c. 370, s. 20(2), as enacted 1971, S.B.C. c. 52, s. 1.

[203]*Consumer Protection Act*, R.S.O. 1970, c. 82 s. 44a, enacted 1971, Vol. 2, c. 24, s. 2(1). The *Ontario Warranties Report, supra*, footnote 16, at 47-50, recommended that disclaimer clauses should be prohibited in consumer sales and that exceptions should only be permitted in carefully regulated circumstances. This recommendation was not extended to commercial sales: see *Ontario Report on Sale of Goods, supra*, footnote 104, at 228. As a result, the *Ontario Draft Sales Bill, supra*, footnote 133, s. 5.16(1) permits exclusion or restriction of implied warranties subject only to the overriding unconscionability provisions in the Act.

[204]*Consumer Protection Act, supra*, footnote 131, s. 58(1).

[205]*Consumer Protection Act*, R.S.N.S. 1967, c. 53, s. 20E as amended by S.N.S. 1975, c. 19, s. 1.

[206]*Consumer's Protection Ordinance, Act*, R.O.Y.T. 1971, c. C-13, s. 59.

[207]*Consumer's Protection Ordinance, Act*, R.O.N.Y.T. 1974, c. C-12, s. 58.

[208]See s. 7 Sask. Act.

[209]*Supra*, footnote 4, at 87.

deals in goods of that description" in the case of merchantability, and "where the goods are of a description which it is in the course of the seller's business to supply" in the case of fitness for purpose. The difference in phraseology appears to be cosmetic only. This was the view of the majority of the House of Lords in *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.*,[210] where it was held that the requirement in each subsection was similar and must be construed as limiting the liability of the seller to cases where he dealt in goods of that kind. Further, it was held sufficient to satisfy the "dealer" requirement if the seller agreed to sell goods of a particular kind when ordered from him, even if it was the first time he had handled that particular line of goods. Such broad interpretations of the "dealer" requirement under the S.G.A. have eroded it to the extent where the inquiry is basically akin to ascertaining whether or not the seller was a commercial seller. This, indeed, was the view espoused by the English and Scottish Law Commissions[211] and subsequently incorporated into the U.K. legislation, *viz.* that the "dealer" requirement should be replaced by a stipulation that the goods simply be sold "by a seller acting in the course of trade or business." The Saskatchewan Act adopted these recommendations and the statutory warranties of acceptable quality[212] and particular purpose[213] are implied whenever "a consumer product is sold by a retail seller."[214] The *First Report of the Consumer Protection Project* similarly recommended that merchantability and fitness should not be confined to sales in which the seller is a dealer in goods of the relevant description but should be extended to all sales where the seller is acting in the course of business.[215]

The difficulties associated with a blanket adoption of this recommendation, such as was actually implemented in the U.K. and Saskatchewan legislation, were discussed by the Law Reform Commission of New South Wales:

> . . . the Law Commissions made it clear in their Report that they took a broad view of what was meant by acting in the course of trade or business. In their view, the warranty of merchantable quality should be implied in a case where a coal merchant (whose business it was to supply coal) sold one of his delivery vehicles, on the ground that such a sale was part of his business activities. No doubt it would regard in a similar light the sale of his office typewriter by a dealer in cattle-food or an office safe by a solicitor. We suggest that, so interpreted, the phrase is too wide. In our view the test should be whether the seller is selling the goods as a dealer in those goods. This test would meet the situation where the seller is supplying goods of a particular kind for the first time but

[210][1971] 1 All E.R. 847 (H.L.).

[211]*Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act, 1893* (24th July, 1969), paras. 31 and 46. This was also the recommendation of the Ontario Law Reform Commission: see *Ontario Warranties Report, supra*, footnote 16, at 41.

[212]S. 11.4 of the Saskatchewan Act.

[213]S. 11.5 of the Saskatchewan Act.

[214]S. 2(1) of the Saskatchewan Act defines retail seller as "a person who sells consumer products to consumers in the ordinary course of his business . . ."

[215]*Supra*, footnote 4, at 78 and 96.

would leave out of account the sale of items of office equipment, *etc.*, where the seller is essentially in the same position as a private seller and does not hold himself out as having any particular expertise in the matter.[216]

While the C.P.W.L.A. formulation of the implied warranties of quality and fitness contain no "dealer" requirement *per se* and would, in the abstract, appear analogous to the corresponding provisions in the U.K. and Saskatchewan legislation, it is important to place these C.P.W.L.A. warranties within the contextual framework of the Act itself. It will be remembered that the C.P.W.L.A. is inapplicable to the sale or supply of a consumer product by a seller or supplier who is not a distributor of consumer products of that kind.[217] Thus, the C.P.W.L.A. warranties are restricted, in fact, to a seller or supplier who deals in goods of the kind supplied under the contract of sale or supply. This approach accords with the most recent recommendations of the Ontario Law Reform Commission.[218]

(iii) Clarifying the Quality Standard

(a) Defining the Requisite Quality

The *Sale of Goods Act* does not contain a definition of merchantable quality and, as a result, a number of different interpretations have been placed on the concept by the courts.[219] Indeed, as Lord Reid said in *Brown & Son Ltd.* v. *Craiks Ltd.*,[220] it is not "possible to frame, except in the vaguest terms, a definition of 'merchantable quality' which can apply to every kind of case." The *Law Commissions' Report* was critical of the absence of a statutory definition and proposed a definition "based on the relatively simple concept of the fitness of goods for the usual purposes for which they are bought."[221] This recommendation, with minor changes, was adopted in the *Supply of Goods (Implied Terms) Act, 1973* (U.K.),[222] which annexed the following definition of "merchantable quality" to the *Sale of Goods Act* (U.K.):

[216] *Working Paper on the Sale of Goods, supra*, footnote 116, at para. 8.7. It should be noted that while the criticism in general is appropriate to the Sask. Act, the specific example of the sale of an office safe by a solicitor would produce a different result because a solicitor does not sell consumer products "in the ordinary course of his business' within the s. 2(1) definition of retail seller: see Romero, *supra*, footnote 23, at 120.

[217] S. 2(2)(a). This is basically the same test as used in U.C.C. 2-314(1).

[218] *Report on Sale of Goods, supra*, footnote 104, at 209. See also *Ontario Draft Sales Bill, supra*, footnote 133, s. 5.13(2) and s. 5.14(1).

[219] See, for example, *Bristol Tramways & Carriage Co., Ltd.* v. *Fiat Motors, Ltd.*, [1910] 2 K.B. 831 (C.A.), *per* Farwell L.J., at 841; *Australian Knitting Mills, Ltd.* v. *Grant*, (1930), 50 C.L.R. 387 (Austr. H.C.) *per* Dixon J. at 418; *Cammell Laird & Co., Ltd.* v. *Manganese Bronze and Brass Co., Ltd.*, [1934] A.C. 402 *per* Lord Wright, at 430; *Kendall (Henry) & Sons* v. *William Lillico & Sons, Ltd.*, [1969] 2 A.C. 31, *per* Lord Reid at 77.

[220] [1970] 1 W.L.R. 752, 754 (H.L.).

[221] *Supra*, footnote 211, at paras. 42 and 43. In the Commissions' Working Paper a definition was put forward which was in effect a modified version of Dixon J.'s definition in *Australian Knitting Mills Ltd.* v. *Grant, supra*, footnote 219, but this definition was rejected as being unduly complicated: see para. 43.

[222] S. 7(2).

62(1A). Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly.[223]

Defining the concept of merchantability in terms of the fitness of goods for all their usual purposes negates the decision in the leading case of *Kendall* v. *Lillico*,[224] where the House of Lords held that in the case of a contract for the sale of multi-purpose goods (*i.e.*, goods with more than one ordinary purpose or use), the goods will be of "merchantable quality" within the S.G.A. if they are reasonably fit for any of the ordinary uses even if they are unfit for other ordinary uses, provided that buyers willing to purchase the goods for the purpose for which they are fit would not receive a substantial abatement in the purchase price.[225] The applicability of this test to consumer sales was questioned in the *First Report of the Consumer Protection Project*:

The buyer of multipurpose goods may find that notwithstanding the fact that the goods are unfit for his purpose, which is an ordinary purpose, he is not protected by merchantability.

This can raise a problem for the consumer buyer, for it may never occur to him that in this respect multipurpose goods can be a trap for him. Furthermore, there could be some difficulty in applying the above test to consumer cases; for example, suppose you were dealing with a car that performed well if used mainly in an area with a relatively mild climate, but did not perform well in a colder climate.[226]

Following the recommendations of the Ontario Law Reform Commission[227] and the precedent of the *Uniform Commercial Code*,[228] the *First Report* recommended that, in the absence of a clear indication to the contrary, "merchantability should cover all the purposes for which the goods are ordinarily used."[229] As a result, the C.P.W.L.A. warranty of quality in section 10(1)(a) contains a statutory definition of requisite quality cast in terms similar to section 62(1A) of the U.K. *Sale of Goods Act*.[230] For the

[223]Lord Denning felt that this definition was the best yet devised: *Cehave N.B.* v. *Bremer Handelsgesellschaft mb.H.*, *supra*, footnote 112, at 62.

[224]*Supra*, footnote 219.

[225]See *Brown & Son Ltd.* v. *Craiks Ltd.*, *supra*, footnote 220. It should be noted that any unfortunate results occasioned by the application of this test would be attenuated somewhat by the expanded interpretation of fitness for purpose adopted in *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.*, *supra*, footnote 210.

[226]*Supra*, footnote 4, at 81.

[227]See *Ontario Warranties Report*, *supra*, footnote 16, at 45. More recently, and outside the area of consumer sales, the *Ontario Report on Sale of Goods*, *supra*, footnote 104, at 214 made a similar recommendation which was incorporated in the *Ontario Draft Sales Bill*, *supra*, footnote 133, s. 5.13(1)(a).

[228]One of the minimum standards of merchantability is that the goods "are fit for the ordinary purposes for which such goods are used": see U.C.C. 2-314(2)(c).

[229]*Supra*, footnote 4, at 82.

[230]See text accompanying footnote 223.

most part, this New Brunswick definition, like its English predecessor, is largely declaratory of prior case law,[231] with the notable exception of the definitional reliance upon fitness for *all* normal purposes. The effect of this statutory expansion of the parameters of requisite quality is that the onus of warning the consumer that a consumer product is not fit for all its normal purposes will now rest upon the seller or supplier, and the consumer, in the absence of such warning, will be protected. This resolution of the multi-purpose goods issue has not received universal support.

The Law Reform Commission of New South Wales, in addressing this question of legal policy, felt that the onus should be upon the buyer to disclose to the seller a multi-purpose goods situation what particular normal purpose he had in mind when purchasing the goods.[232] The Commission was critical of the English precedent in section 62(1A) of the *Sale of Goods Act*[233] (U.K.) and of the position taken in the *Ontario Warranties Report*,[234] which was subsequently followed in New Brunswick, on the ground of the unreasonable burden it placed upon merchant sellers. It took specific issue with the example of a new car sold by a city dealer which turned out to be incapable of coping with rural road conditions near the city:

> We suggest that "purpose" ought not to be subjected to close analysis in ths way. A normal purpose of a motor car is to transport people adequately and comfortably in the conditions generally to be expected in the country in which is is sold — which in Canada or Australia means coping with rural roads as well as city streets. But a motor car which is suitable for this purpose may not be suitable to travel long distances as a touring vehicle, and yet this is a normal purpose for motor cars. A vehicle should be regarded as merchantable even though it is unsatisfactory as a long distance tourer, *e.g.*, because it is too small to be comfortable for long trips or because there is little or no luggage space.[235]

The Saskatchewan Act, in its definition of acceptable quality, does not speak in terms of fitness for purpose but, rather, refers to the characteristics and quality of the consumer product that consumers can reasonably expect it to possess.[236] Thus, even though the definition does not speak in terms

[231] Atiyah, *supra*, footnote 10, at 112, opines that the new [U.K.] statutory definition will not have much effect on prior case law: ". . . The reality is that the courts can fill that definition more or less as they please, and it seems unlikely that they will jettison the old case law and attempt to squeeze the answer to all future questions from this definition."

[232] *Working Paper on the Sale of Goods, supra*, footnote 116, at para. 8.38.

[233] *Supra*, footnote 230.

[234] *Supra*, footnote 227.

[235] Working Paper on the Sale of Goods, supra, footnote 116, at para. 8.39.

[236] Section 2(a) of the Saskatchewan Act defines "acceptable quality" as follows:

> "acceptable quality" means the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have, having regard to all the relevant circumstances of the sale of the product, including the description of the product, its purchase price and the express warranties of the retail seller or manufacturer of the product, and includes merchantable quality within the meaning of *The Sale of Goods Act*;

Professor Romero, *supra*, footnote 23, at 172, cites the following reasons for Saskatchewan's refusal to follow the English precedent of s. 62(1A) *S.G.A.* (U.K.) in this respect: (1) the undesirability of increasing the overlap between merchantability and fitness for purpose; (2) the desirability of following the case law which defines merchantability in terms of overall quality; and (3) the tendency of the fitness warranty to refer to functional as opposed to aesthetic qualities.

of fitness *per se*, Professor Romero suggests that "if it is reasonable to expect that the consumer product being sold can be put to a variety of uses, then the product delivered under the contract of sale should have the characteristics and quality necessary to enable it to be put to all of those uses."[237] If Professor Romero is correct, the practical effect of the Saskatchewan provisions, in circumstances where the consumer product supplied is not suitable for all of its reasonably expected uses, is the same as that which arises under the C.P.W.L.A., *viz.* the seller or supplier, in order to avoid liability under the respective warranties of quality, will be required to point out the restricted usefulness of the consumer product.

The C.P.W.L.A. definition of quality in section 10(1)(a) differs in one respect from its English precedent. It includes express reference to the "quality" and "state or condition" of the consumer product. This inclusion within the statutory definition will insure that the consumer is protected in the case of a cosmetic or other defect which doesn't interfere with the functional value of the consumer product but which may affect its resale or aesthetic value.[238]

Finally, it should be noted that the price of the consumer product is an important determinant of the requisite quality that should reasonably be expected by the consumer but it is only one factor, albeit an important one, to be taken into account.

(b) Compliance with Mandatory Legislative Standards

The *First Report of the Consumer Protection Project* dealt with the relationship between federal and provincial quality and safety standards and the warranty obligations of New Brunswick sellers and suppliers of consumer products. It recommended that merchantability should include a requirement that goods will comply with the applicable federal and provincial legislation.[239] The C.P.W.L.A., in section 10(1)(b), provides an implied warranty that the consumer product complies with all *mandatory* federal and provincial standards in relation to health, safety and welfare.[240] This

[237]Romero, *supra*, footnote 23, at 178.

[238]The Ontario Law Reform Commission in its *Report on Sale of Goods*, *supra*, footnote 104, at 212 noted the argument of English academics that the omission of any reference to quality and condition from the U.K. definition of merchantability may result in the anomalous situation where "... a new car that is delivered in a scratched and dirty condition and with other minor defects that do not affect the roadworthiness of the vehicle would satisfy the statutory definition of merchantable quality contained in section 62(1A), even though it might not satisfy the common law test." The *Ontario Draft Sales Bill*, *supra*, footnote 133, follows the New Brunswick formulation and specifically includes "quality and condition" in the statutory definition: see s. 5.13(1)(a). The Saskatchewan Act accomplishes the same result by a specific inclusion in the definition of "acceptable quality" of "merchantable quality within the meaning of *The Sale of Goods Act*": see s. 2(a), the text of which is contained in footnote 236.

[239]*Supra*, footnote 4, at 88.

[240]Note that the *C.P.W.L.A.* product liability provision in s. 27(1)(c) also deals with the issue of compliance with statutory standards and affixes liability upon out of province suppliers of unreasonably dangerous consumer products where the defect arises because of failure to comply with any mandatory federal health or safety standards.

unequivocal warranty of compliance will profoundly affect the relationship between the manufacturer and the marketplace because the warranty protection, when applicable, ultimately imposes strict liability upon the manufacturer for breach of the mandatory standards.

In personal injury cases this approach should vastly simplify the present tedious process of establishing that the manufacturer, who is not an insurer against injury from his consumer product, has entered the realm of culpability for injuries caused by it. Because tort recovery in negligence is based upon the concept of a legally recognized duty to conform to a standard of conduct or of due care, it is incumbent upon the consumer-plaintiff to define the duty and delineate the standard which the manufacturer failed to meet. Establishing a contractual cause of action for breach of an implied warranty in section 10(1)(b) relieves the consumer of this burden. The manufacturer's potential liability is consequently expanded and not only *vis-à-vis* the consumer but, also, *vis-à-vis* direct users, bystanders, and subordinate suppliers who suffer a "consumer loss" because of the manufacturer's breach of contract.[241] It should also be noted that while violation of a mandatory federal or provincial standard can work to the great advantage of the plaintiff by automatically entitling him to redress for breach of the section 10(1)(b) warranty, the manufacturer's compliance with the standard does not necessarily relieve him of liability for breach of the implied warranty of quality under section 10(1)(a). The reasoning here is that any applicable, mandatory federal or provincial quality standards would be regarded merely as *minimum* standards under that section. Meeting these standards does not insure that the consumer product is of the requisite quality warranted. For example, a new car may comply with all mandatory legislative standards but be delivered in a scratched or dirty condition.

The Saskatchewan approach to this matter of compliance with legislative standards is theoretically different from New Brunswick's although in most cases the practical effect will be the same.[242] Under section 34 of the Saskatchewan Act no warranty of compliance *per se* is created:

> In any action arising under this Act, proof that a consumer product does not comply with mandatory health or safety standards set under an Act of the Parliament of Canada or an Act of the Legislature or with quality standards set by regulation constitutes prima facie evidence that the consumer product is not of acceptable quality or fit for the purpose for which it was bought.[243]

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[241]See discussion, *supra*, at 19-21.

[242]For a full discussion of the Saskatchewan rationale and precedents see Romero, *supra*, footnote 23, at 178-180. The author concludes, at 179, that the likely effect of the provision will be "to incorporated by reference into provincial warranty law any standards set by federal or provincial health or safety legislation.'

[243]S. 34(2) of the Saskatchewan Act goes on to provide that mere proof of the fact that the consumer product complies with these standards does not constitute *prima facie* proof that the product *is* of acceptable quality or fit for its purpose.

Thus, in Saskatchewan, the consumer-plaintiff is only able to present a *prima facie* case of breach of the warranties of acceptable quality and fitness for purpose by establishing a violation of the applicable health or safety standards. In New Brunswick, on the other hand, because the C.P.W.L.A. creates a warranty of compliance *per se*, upon establishing that warranty, its violation and the ensuing damage, the consumer will always be entitled to succeed whether or not the mandatory standards are in any way related to the quality or fitness of the consumer product.[244] Finally, it should be noted that the Saskatchewan formulation relates only to mandatory health or safety standards. Quality standards are exempt unless "set by regulation."[245] The New Brunswick formulation avoids the necessity of having to convince a court to categorize a particular mandatory standard as one relating to health or safety as opposed to quality.

(c) Effect of Buyer's Examination

The *Sale of Goods Act* distinguishes between examinations in general and specifically in the case of sales by sample. In the former case, the proviso to section 15(b) provides that a seller is not liable for defects in the goods if the buyer has examined them and the type of examination which he made ought to have revealed the defect.[246] In sales by sample, however, section 16(2)(c) of the S.G.A. provides that the seller is not liable for any defect that would have been apparent on a reasonable examination, whether or not the buyer actually made one.

The *First Report of the Consumer Protection Project* examined the effect of examinations in general and questioned the denial of protection to the careful consumer who examines but doesn't find a reasonably discoverable defect, while protecting the casual consumer who doesn't examine at all.[247] Citing the complexity of modern consumer products, the extreme difficulty of delineating what defects would be discoverable on a reasonable examination, and the expectation in many cases of little, if any, examination by

[244]An amendment to the Saskatchewan Act, S.S. 1979-80, c. 17, s. 12, expressly provides that s. 34(1) is inapplicable where the non-compliance is not in any way related to quality or fitness: see s. 34(3) of the Saskatchewan Act as am.

[245]S. 37(g) Sask. Act empowers the Lieutenant Governor in Council to pass regulations "prescribing for the purposes of s. 34 the standards of quality for consumer products." While this allows for future adoption of federal or provincial quality standards, no regulations have been passed to date.

[246]This proviso modified the common law rule which was that the implied condition was excluded by the mere opportunity for examination, whether or not the buyer took advantage of it, providing the defect would have been reasonably discoverable. *Thornett & Fehr* v. *Beers & Son*, [1919] 1 K.B. 486, is an attempt to restore the common-law position and offers support for the view that if there has been some examination by the buyer, he cannot complain about defects which a reasonable examination would have revealed. *Cf. Frank* v. *Grosvenor Motor Auctions Pty. Ltd.*, [1960] V.R. 607. The new wording of s. 14(2) of the *Sale of Goods Act* (U.K.) would seem to put the point beyond doubt by exempting, in those cases where the buyer has examined the goods, defects which ". . .*that* examination ought to reveal": see Atiyah, *supra*, footnote 10, at 102. This particular precedent, as appropriate, has been followed in New Brunswick: s. 10(2)(c) *C.P.W.L.A.* and Saskatchewan: s. 11.4(b) Sask. Act.

[247]*Supra*, footnote 4, at 89.

the buyer. the *First Report* recommended that the proviso to section 15(b) S.G.A. be restricted in the consumer protection legislation to "defects that were known to the buyer as a result of his examination."[248] It also criticized the inconsistency between the buyer's position in the case of a sale by sample as opposed to the case of a sale by description and recommended that for consumer sales the difference should be eliminated.[249]

These recommendations differ markedly from those put forward or implemented in other jurisdictions. Manitoba, for example, has eliminated the examination proviso in its *Consumer Protection Act.*[250] The English and Scottish Law Commissions examined the issue and recommended retention of the existing law with the addition of a provision excluding the seller's liability, under the implied condition of merchantability, for defects which he specifically draws to the buyer's attention.[251] The new section 14(2) of the U.K. *Sale of Goods Act*[252] implements the Commissions' recommendations:

> Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition —
>
> (a) as regards defects specifically drawn to the buyer's attention before the contract is made; or
> (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

The recommendations of the Ontario Law Reform Commission[253] are consonant with the U.K. position, and the Saskatchewan Act contains provisions virtually identical to the above.[254] The effect in all cases is to exempt from merchantability protection those defects of which the buyer is given specific notice by the seller, and those defects which should have been revealed by the *actual* examination made, be it complete, partial or perfunctory. The American rule, by way of comparison, penalizes the careless or hasty inspection by exempting reasonably discoverable defects whenever the buyer

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[248] *Ibid.*, at 90.

[249] *Ibid.*, at 98.

[250] *Supra.*, footnote 131, s. 58(1)(e). However, the reasonable examination rule is retained in the case of sales by sample: see s. 58(1)(g).

[251] *Exemption Clauses in Contracts, First Report, supra,* footnote 211, at paras. 49-50.

[252] Enacted by s. 3 of the *Supply of Goods (Implied Terms) Act 1973* (U.K.).

[253] The *Ontario Warranties Report, supra,* footnote 16, at 45, simply recommended that the implied warranty of consumer acceptability "should not apply with respect to such defects as have been adequately disclosed to the buyer or that would have been apparent to him in those cases where he has examined the goods prior to his purchase." More recently, the O.L.R.C., in the *Ontario Report on Sale of Goods, supra,* footnote 104, at 218-219, endorsed the English and Scottish Law Commissions' recommendations on the basis that the problems created by the *S.G.A.* anomalies do "not appear to be of great practical importance." See *Ontario Draft Sales Bill, supra,* footnote 133, s. 5.13(3).

[254] S. 11.4 of the Saskatchewan Act.

has examined the goods as fully as he desired or has refused to examine them.[255] The recommendation of the Law Reform Commission of New South Wales, on the other hand, penalizes the buyer who doesn't examine at all in circumstances where he should have.[256] While the recommendations of the *First Report* are distinctive in comparison with the foregoing, it remains to examine the extent to which they were incorporated in the resulting legislation.

Section 10(2) of the C.P.W.L.A. provides as follows:

> There is no implied warranty under paragraph (1)(a)
>
> (a) as regards any defect that is known to the buyer before the contract is made;
>
> (b) as regards any defect that the seller has reason to believe exists and that he discloses to the buyer before the contract is made;
>
> (c) if the product is a used product and the buyer examines it before the contract is made, as regards any defect that that examination ought to reveal; or
>
> (d) if there is a sale or supply by sample, as regards any defect that a reasonable examination of the sample ought to reveal.

As can be seen, the Act, contrary to the *First Report's* recommendation, has retained the S.G.A. distinction between examinations in general and specifically in the case of sales by sample. In the latter case, section 10(2)(d) basically reiterates he rule in section 16(2)(c) S.G.A. and, as a result, keeps the New Brunswick position on this issue consistent with other Canadian common-law jurisidctions,[257] *viz.* the application in all cases of sale by sample of a completely objective test exempting the seller from responsibility for any defect discoverable on a reasonable examination,[258] whether or not the buyer actually made one.

In reintroducing the distinction between examinations in general and specifically in the case of sale by sample, the C.P.W.L.A. violates the recommendation of internal consistency advocated in the *First Report*.[259] This dichotomy may, however, be theoretically justified on the functional basis

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[255]See U.C.C. 2-316(3)(b).

[256]The N.S.W. proposal excludes from the ambit of merchantability protection "a defect which a reasonable examination of the goods would have revealed, where the buyer has examined or *ought to have examined* the goods before the contract is made." See *Working Paper on the Sale of Goods, supra*, footnote 116, at para. 8.70 (emphasis added).

[257]See, for example, the Manitoba *Consumer Protection Act, supra*, footnote 131, s. 58(1)(g); the Saskatchewan Act, s. 11.6(c); the *Ontario Draft Sales Bill, supra*, footnote 133, s. 5.13(3)(c).

[258]While buyers can be expected to be more careful in sales by sample because of the basic nature of such sales, they are not required to subject the product to unusual tests which curiosity or suspicion might suggest: see *Godley* v. *Perry et al.* [1960], 1 W.L.R. 9 (Q.B.).

[259]*Supra*, footnote 4, at 99.

that the purpose of a sample is to enable the buyer to determine for himself the quality of the goods offered. Viewed in this context it is not at all unfair to place the risk of reasonably discoverable defects squarely upon the buyer. From a consumer's standpoint, however, as noted in the *First Report*, the sale by sample is probably seen as practically the same as the case where he examines the goods before purchase.[260] In any event, given the difference in result which can occur because of the dichotomy, it is unfortunate that in some consumer cases the categorization itself will be of overriding importance. While the C.P.W.L.A. does not define "sale or supply by sample," presumably the concept will have the same meaning as under the *Sale of Goods Act*.[261] In many cases the categorization will be easy, *e.g.*, consumers ordering made-to-measure clothing, carpeting, draperies, *etc.* In other cases, it may be less so. The characterization, for example, of the everyday practice of demonstrating a floor model and delivering to the consumer a new, prepackaged product of the same kind is not free from doubt.[262]

The C.P.W.L.A. position on the effect of examinations in general is more complicated and represents a significant departure from the general sales law in New Brunswick and the existing and prospective law in other Canadian common law jurisdictions. The Act distinguishes between new and used consumer products. In the case of new consumer products, the effect of section 10(2)(a) is to render the examination irrelevant unless it provides the buyer with actual knowledge of the defect. This subsection implements the *First Report's* recommendation that the effect of an examination by the buyer be restricted to defects that were known to him as a result of his examination.[263] The test appears to be entirely subjective, but this is ameliorated to some extent by the express provision in section 10(2)(b) exempting the seller from liability for defects which he discloses to the buyer before the contract is made. Assuming a defect is reasonably discoverable upon examination, the practical effect of these provisions is to place the onus upon the seller to reasonably examine and to disclose in order to avoid liability under the C.P.W.L.A. quality warranty.

Two potential problems with this formulation should be noted. First, the actual knowledge requirement in section 10(2)(a) may prove unfair in those cases where the defect is obvious and the seller incorrectly assumes that the buyer is actually aware of it. Secondly, with respect to the disclosure exception in section 10(2)(b), while a New Brunswick seller would effectively be prevented from providing a buyer with a detailed list of potential defects

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[260]*Ibid.*, at 98.

[261]See s. 16(1) *S.G.A.*

[262]Professor Romero, *supra*, footnote 23, at 186-187, argues that it is only cases where the consumer sees or is given a small piece or portion of the goods sold that qualify as sales by sample. His argument is not without Canadian support: see, for example, *Goad* v. *Nelson*, (1919) 50 D.L.R. 61 (Sask. C.A.), where Lamont J.A. states at 68: "I think the word 'sample' is used in the Act as a small quantity of some commodity presented to a customer as a specimen of the goods offered for sale."

[263]*Supra*, footnote 248.

in the consumer product,[264] he may, nevertheless, be able to exclude his liability for a defect which he has reason to believe exists by general words of disclosure. In this respect the U.K. and Saskatchewan requirement that the "defect [must be] specifically drawn to the consumer's attention" is preferable.[265]

In the case of used consumer products, the C.P.W.L.A. treatment, in section 10(2)(c), parallels the S.G.A. position on the effect of examinations in general, *viz.* if the buyer has examined the product, the seller is not liable for defects which the type of examination made by him ought to have revealed.

A distinction between the effect of examinations in general in the case of new versus used consumer products, although not recommended in the *First Report*, may have a sound theoretical basis in terms of who should bear the risk in relation to reasonably discoverable defects. In the case of new consumer products, a seller is more likely to examine incoming stock very closely and is, therefore, in a better position to bear the risk of reasonably discoverable defects than would be the case with used consumer products, where it is generally expected that a buyer will be more discerning with respect to the possibility of defects. As a result, it is not unduly onerous in all cases involving used consumer products to require the buyer to bear the risk of reasonably discoverable defects. Such a straightforward approach would have certainty to commend it; both buyers and sellers would know the respective risks they assume depending upon whether the consumer product is new or used. The C.P.W.L.A., however, introduces yet another distinction and, as a result, renders the effect of an examination in the case of used consumer products much more difficult to assess. Who bears the risk of discoverable defects? The answer is solely dependent upon the type of examination made by the buyer, the more discerning the buyer, the more likely that the defect ought to have been discovered by the type of examination made. This C.P.W.L.A. formulation presents the buyer with a quandry in deciding whether and to what extent he should examine used consumer products. If he decides to examine and actually discovers the defect, he rightfully bears the risk just as in the case of new consumer products. If, however, he decides to examine and doesn't discover the defect, the buyer will lose the protection of the quality warranty if he should have discovered the defect by the type of examination he made. This leads to the anomalous result which the *First Report's* recommendations[266] attempted to avoid, *viz.* penalizing the diligent buyer who examines carefully but fails to discover, while rewarding his casual counterpart who refuses to examine or examines perfunctorily.

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[264]This is because of the requirement that the seller must have reason to believe that a defect exists before the disclosure exception in s. 10(2)(b) is operable.

[265]See text accompanying footnote 252. See also the Saskatchewan Act, s. 11.4(a) and Romero, *supra*, footnote 23, at 175.

[266]*Supra*, footnote 247.

In summary, the C.P.W.L.A. contains a series of graduated effects in respect of the buyer's examination: the least effect is accorded to an examination of new consumer products: liability is excluded only if the buyer actually discovers the defect or it is disclosed to him; a greater effect is accorded to an examination of used consumer products: in addition to the foregoing, liability is excluded if the defect should have been disclosed by they type of examination made by the buyer; the greatest effect is accorded to an examination, or absence thereof, in the case of a sale or supply by sample: liability is excluded in all cases where a reasonable examination would have disclosed the defect, whether or not an examination was actually made.

(d) Used Consumer Products

While there is some support in earlier Canadian decisions, including the decision of the New Brunswick Court of Appeal in *Godsoe* v. *Beatty*,[267] for the proposition that the implied condition of merchantability is inapplicable in the case of used goods, the more recent cases are clearly supportive of its applicability.[268] The *First Report of the Consumer Protection Project* recommended that it be made clear in the New Brunswick consumer protection legislation that merchantability applies to used goods,[269] and this recommendation was implemented in the C.P.W.L.A. definition of "consumer product."[270] The standard of requisite quality satisfying the implied warranty in section 10(1)(a) will differ, however, depending, *inter alia*, on whether the consumer product is new or used. This is so because requisite quality, under the C.P.W.L.A., "is a flexible concept that depends on all the circumstances of the case, including the description under which the goods were sold and the price."[271] The C.P.W.L.A. approach parallels that first put forward by the English and Scottish Law Reform Commissions in attempting to define merchantable quality in such a way that it would not operate unfairly in the case of used goods:

> We have tried to reach this result by incorporating in the definition of merchantable quality a specific reference to the description under which goods are sold; and we have linked this reference to another specific one pointing to the price of the goods. In our expectation this formula will put the honest seller of

[267]*Supra*, footnote 186. See also, for example, *Presley* v. *MacDonald* (1963), 38 D.L.R. (2d) 237 (Ont. Co. Ct.).

[268]See, for example, *Peters* v. *Parkway Mercury Sales Ltd.*, *supra*, footnote 93. See also: *Henzel* v. *Brussels Motors Ltd.* (1973), 31 D.L.R. (3d) 131 (Ont. Co. Ct.); *Green* v. *Holiday Chevrolet-Oldsmobile Ltd.*, [1975] 4 W.W.R. 445 (Man. C.A.). The applicability of the implied condition to the sale of used goods is recognized in England: see *Bartlett* v. *Sidney Marcus Ltd.*, [1965] 1 W.L.R. 1013 (C.A.). The warranty of merchantability in U.C.C. 2-314 is clearly applicable to the sale of second hand products: see *Overland Bond & Investment Corp.* v. *Howard*, 292 N.E. 2d 168 (Ill. App. 1972).

[269]*Supra*, footnote 4, at 80.

[270]S. 1(1).

[271]*First Report of the Consumer Protection Project, Part I*, *supra*, footnote 4, at 79.

> used or imperfect goods out of any danger of unfairness. If he has described the goods as used, second-hand, substandard or otherwise inferior or if this can reasonably be inferred from the fact that the price itself is patently lower than that at which new goods of that type are obtainable in the market, then the standard of fitness involved in the condition of merchantable quality will not be higher than is appropriate to the kind of used or inferior goods with which the particular transaction is concerned. A solution of this kind seems to us to be preferable to one which, even in transactions with private consumers, would allow the sale with impunity of goods which are so inferior in quality as to be unfit for any reasonable purpose. In our view even goods described as "second-hand", "shop-soiled" or "seconds" should measure up to some standard of fitness, and a seller who describes goods in such or similar terms should not be permitted to sell what is in effect useless rubbish.[272]

Manitoba has taken a similar approach[273] and the recommendations of the Ontario Law Reform Commission are in accord with the U.K. conception.[274] While the Saskatchewan formulation also, in similar terms,[275] extends the implied warranty of acceptable quality to the sale of used consumer products, unlike the C.P.W.L.A., it makes specific provision enabling "as is" sales by second-hand dealers.[276] These retailers can exclude the implied quality, fitness and durability warranties providing they bring the disclaimer "to the notice of the consumer and its effect [is] made clear to him."[277]

The *First Report*, citing the precedent contained in the Manitoba *Consumer Protection Act*,[278] also recommended that New Brunswick's consumer protection legislation provide an implied term that goods are new and unused unless the circumstances are such that it would be apparent to the buyer that this is not the case.[279] Section 9(1) of the C.P.W.L.A. incorporates this recommendation and provides an implied warranty that the consumer product is unused unless the seller discloses the contrary, or unless the buyer knows or ought to know that this is not, or is likely not, to be the

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[272]*Exemption Clauses in Contracts, First Report, supra*, footnote 211, at para. 52 This recommendation was implemented by enactment of the statutory definition of merchantable quality contained in s. 62(1A) of the *S.G.A.* (U.K.): see text accompanying footnote 223.

[273]*The Consumer Protection Act, supra*, footnote 131, s. 58(5). See *Friskin* v. *Holiday Chevrolet-Oldsmobile Ltd.* (1977), 72 D.L.R. (3d) 289 (Man. C.A.).

[274]The *Ontario Warranties Report, supra*, footnote 16, at 45, recommended that the implied warranty of consumer acceptability apply to used goods "with proper allowance being made for the age of the goods, the price paid for them, and all the other surrounding circumstances of the transaction." More recently, the O.L.R.C. reitereated the recommendation in the *Report on Sale of Goods, supra*, footnote 104, at 214-215. See *Ontario Draft Sales Bill, supra*, footnote 133, s. 5.13(1)(a).

[275]S. 6(1) Sask. Act, *supra*, footnote 3.

[276]For a discussion of the legislative history of this specific provision see Romero, *supra*, footnote 23, at 174. A "second-hand dealer" is defined, in s. 2 of the Saskatchewan Act, as a retail seller, other than a used car dealer, whose sales of used consumer products are 85% or more of his total volume of consumer product sales.

[277]S. 6(2) of the Saskatchewan Act.

[278]*Supra*, footnote 131, s. 58(1)(d), which implied a condition in every retail sale of goods "that the goods are new and unused unless otherwise described."

[279]*Supra*, footnote 4, at 80.

case. Thus, for example, if the price is patently lower than that at which new consumer products of that type are obtainable in the market, it can be argued that the buyer could reasonably infer that the product is likely not to be unused. Finally, reasonable use for the purpose of testing, preparing, servicing or delivering the consumer product will not violate the warranty.[280] An amendment to the original text, presumably for purposes of clarification, provides that this will be the result whether the reasonable use for these purposes is at the instance of "the seller or any other person."[281]

D. *Warranty of Fitness For Purpose*

(i) Introduction

Section 15(a) of the *Sale of Goods Act* imposes in certain circumstances an implied condition that goods are reasonably fit for the buyer's particular purpose.[282] The implied condition is only applicable when the goods are of a description which it is in the ordinary course of the seller's business to supply. Further, the buyer must have made known to the seller the particular purpose for which he was buying the goods. The courts, however, have given a very wide meaning to "particular purpose", thereby extending fitness protection to the normal or usual purpose. Where goods have only one normal purpose, the mere fact of purchase will impliedly make known to the seller the buyer's particular purpose.[283] But where the goods have more than one normal purpose,[284] or where the buyer specifically wants the goods for an unusual purpose,[285] the implied condition of fitness is inapplicable unless the seller was expressly informed of the particular purpose for which the goods were required.

If the buyer does not rely on the seller's skill or judgment he will be unable to bring himself within the fitness protection extended by section 15(a) S.G.A. However, the courts seem quite ready to infer the necessary reliance:

> Reliance will seldom be expressed; it will usually arise by implication from the circumstances. Th›.s to take a case . . . of a purchase from a retailer the reliance

[280]S. 9(2).

[281]S.N.B. 1980, c. 12, ›. 3 amending s. 9(2) *C.P.W.L.A.*

[282]For the text of s. ›5(a), see *supra*, 49.

[283]See *Grant* v. *A›stralian Knitting Mills, Ltd., supra*, footnote 135, where it was held that the particular purpose for wh›ch a buyer of underwear requires it is to be worn next to the skin. Similarly, a bottle of cola is norm›lly for drinking: *Yelland* v. *The National Cafe*, [1955] 5 D.L.R. 560 (Sask. C.A.); a hearing aid ›s normally for hearing: *Gorman* v. *Ear Hearing Services Ltd.* (1970), 8 D.L.R. (3d) 765 (P.E.I.S.C.).

[284]See, for exmaple, *Winslow* v. *Jenson*, (1920), 55 D.L.R. 314 (Alta. C.A.), where the buyer purchased a stallion for breeding purposes.

[285]See, for example, *Farmer* v. *Canada Packers Ltd.*, (1957), 6 D.L.R. (2d) 63 (Ont. H.C.), where the buyer purchased whale meat to feed minks.

> will be generally inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgement.[286]

Related to the issue of reliance is the proviso to section 15(a) which states that where a specified article is sold under its patent or trade name, there is no implied condition as to its fitness for any particular purpose. Here, however, judicial interpretation has limited the scope of the proviso to only those cases where the buyer asks for an article by its trade or brand name in such a way as to exclude any discussion of its suitability.[287]

The *First Report of the Consumer Protection Project*, following in large part the proposals of the English and Scottish Law Commissions,[288] recommended three major changes in fitness protection for New Brunswick's new consumer legislation: (1) express statutory clarification that fitness protection for a "particular purpose" covers a usual or normal purpose as well as an unusual or special purpose;[289] (2) deletion of the proviso concerning the sale of goods under a patent or trade name;[290] and (3) introduction of a rebuttable statutory presumption of reliance where the seller expressly or impliedly knows of the buyer's purpose.[292]

The C.P.W.L.A. formulation of the warranty of fitness is contained in section 11:

> Where before the contract is made the buyer expressly or by implication makes known to the seller any particular purpose for which the product is to be used, there is an implied warranty given by the seller to the buyer that the product is reasonably fit for that purpose, whether or not that is a purpose for which such a product is normally used, unless the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment.

For the most part this recast fitness provision brings the statutory language into alignment with judicial interpretation and clarifies S.G.A. ambiguities. In a modest fashion it also effects some changes in the law.

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[286]*Grant* v. *Australian Knitting Mills, Ltd.*, *supra*, footnote 135 at 99 *per* Lord Wright.

[287]*Baldry* v. *Marshall*, [1925] 1 K.B. 260 (Eng. C.A.); *Willis* v. *FMC Machinery & Chemicals Ltd. et al.*, (1976), 68 D.L.R. (3d) 127 (P.E.I.S.C.).

[288]*Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act*, *supra*, footnote 211, paras. 30-39. These recommendations were incorporated in s. 14(3) of the U.K. *Sale of Goods Act*: see s. 3 *Supply of Goods (Implied Terms) Act, 1973* (U.K.). These recommendations were also adopted by the Ontario Law Reform Commission: see *Ontario Warranties Report*, *supra*, footnote 16 at 35-36 and, more recently, *Ontario Report on Sale of Goods*, *supra*, footnote 104 at 220-222; see also *Ontario Draft Sales Bill*, *supra*, footnote 133, s. 5.14. Saskatchewan has also adopted these recommendations: see s. 11.5 Sask. Act and Romero, *supra*, footnote 23 at 165-171.

[289]*Supra*, footnote 4 at 94.

[290]*Ibid.*, at 94-95.

[291]*Ibid.*, at 95.

(ii) Clarifying the Parameters of the Fitness Warranty

(a) Dealer Requirement

Under section 15(a) of the *Sale of Goods Act* the implied condition of fitness is confined to sales where the goods are "of a description that it is in the course of the seller's business to supply." Although the C.P.W.L.A. warranty of fitness in section 11 appears to delete this prerequisite, it bears repeating that all C.P.W.L.A. warranties are restricted to contracts entered into by sellers or suppliers who deal in consumer products of the kind supplied under the contract.[292] While this approach accords with the most recent recommendation of the Ontario Law Reform Commission,[293] it presents a notable difference from the corresponding provisions in the United Kingdom[294] and Saskatchewan[295] which extend merchantability and fitness protection to all cases where the seller is acting in the course of a business whether or not he is a dealer in goods of the relevant kind.

(b) Retention of "Usual" Purpose Protection

The implied conditions of merchantability and fitness for purpose in the *Sale of Goods Act* are closely interrelated. Because the courts have interpreted "particular purpose" within the meaning of section 15(a) as including, in appropriate circumstances, a usual purpose[296] and because that purpose can be made known to the seller by implication,[297] where the goods purchased are ordinarily used for only one purpose (*e.g.*, food and clothing), merchantability and fitness protection often overlap. Where, however, the goods are multi-purpose goods, the protection afforded by each of the subsections diverges and it is incumbent upon the buyer to bring himself within the fitness protection by disclosure of his specific purpose.[298]

Because the C.P.W.L.A. implied warranty in section 10(1)(a) expands the seller's liability for quality to include warranting the fitness of a consumer product for any one of the several purposes for which it would normally be used, the formulation appeared to eliminate the overlap in quality and fitness protection by restricting the fitness warranty to fitness

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[292]See discussion *supra*, at 54-56.

[293]*Supra*, footnote 218. *Cf. Ontario Warranties Report, supra*, footnote 16 at 36.

[294]The implied conditions under s. 14 *S.G.A.* (U.K.) are applicable simply "where the seller sells goods in the course of a business."

[295]The statutory warranties of acceptable quality and particular purpose are implied whenever "a consumer product is sold by a retail seller": see ss. 11.4 and 11.5 Sask. Act.

[296]*Supra*, footnote 283.

[297]*Grant* v. *Australian Knitting Mills, Ltd., supra*, footnote 135 at 99 *per* Lord Wright.

[298]*Kendall (Henry) & Sons* v. *William Lillico & Sons, Ltd., supra*, footnote 219.

of the consumer product for a specified, unusual purpose.[299] This possibility was clearly negatived in section 11 which, in fact, expands the overlap. Fitness for a particular purpose which has been made known to the seller is warranted "whether or not this is a purpose for which such a product is normally used." This clearly enunciated retention of the wide meaning ascribed to "particular purpose" by the courts was recommended by the *First Report of the Consumer Protection Project*[300] following a similar recommendation by the English and Scottish Law Commissions which argued for retention on the basis of the proven utility of the merchantability-fitness overlap in practice:

> . . . if a buyer has examined the goods, the implied condition of merchantability does not arise as regards defects which such examination ought to have revealed. It follows that if a consumer examines the goods but fails to detect defects which an examination properly to be expected of him would have detected, he will have no remedy under subsection (2); in the final result, he may be worse off than he would have been if he had not examined the goods at all. As the law stands, this danger to the buyer is mitigated by the present formulation of subsection (1); if, because of a careless or unskilful examination, the buyer's claim falls down on merchantability, he still has a remedy under subsection (1) if the goods prove to be unfit for the particular purpose which had been indicated by him. But in the vast majority of cases the buyer would lose this chance if the condition to be implied under subsection (1) were to be restricted to fitness for a special, i.e., unusual, purpose. This, from the point of view of consumer protection, would be a retrograde step, and accordingly in our proposals for the reformulation of subsection (1) we have avoided the use of any form of words which would so restrict the implied condition of fitness.[301]

New Brunswick's refusal to restrict the warranty of fitness to the unusual purpose is consonant with U.K. [302] and Saskatchewan[303] legislation and accords with the recommendations of the Ontario Law Reform Commission.[304] The rationale upon which it is based, however, is far from compelling. The Law Commissions sought to mitigate the situation where a buyer purchasing and using goods for a normal purpose would be without a remedy under merchantability because of a careless or unskilful examination. Yet, under the C.P.W.L.A., that type of examination would not deprive the consumer of the benefit of the quality warranty in other than sales by sample unless he actually knew of the defect in the case of new

[299]A precedent for this approach is afforded by the *Uniform Commercial Code*. The warranty of merchantability in U.C.C. 2-314 provides fitness protection for the ordinary pruposes for which goods are used, whereas the fitness warranty for the ordinary purposes for which goods are used, whereas the fitness warranty in U.C.C. 2-315 is restricted to a specified peculiar purpose: see Official Comment No. 2.

[300]*Supra*, footnote 4, at 94.

[301]*Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act, 1893*, *supra*, footnote 211 at 14.

[302]S. 14(3) *S.G.A.* (U.K.).

[303]S. 11.5 Sask. Act.

[304]*Ontario Warranties Report*, *supra*, footnote 16 at 36. This recommendation was more recently reiterated in *Ontario Report on Sale of Goods, Vol. I*, *supra*, footnote 104, at 221. See *Ontario Draft Sales Bill*, *supra*, footnote 133, s. 5.14(1).

consumer products,[305] or, in the case of used consumer products, unless he knew of the defect or should have known by the type of examination he made, be it careless or unskilful.[306] If the examination is relevant to the extent of providing the buyer with actual or constructive knowledge of the defect which prevents the buyer from relying upon the fitness of the consumer product for its ordinary purpose or purposes, it would appear anomalous to allow the buyer an alternative claim under the fitness warranty which nullifies completely the effect of the examination. the *Uniform Commercial Code*, for example, resolves this problem by rendering the effect of the buyer's examination equally applicable to merchantability and fitness protection.[307] Similarly, in its rationalization, the *First Report* sought to assist the consumer who might be aware of certain defects but not appreciate that the defects are such as to render the goods totally unfit for their normal purpose.[308] Surely it would be a rare case where the consumer would be protected in these circumstances in any event. Where the consumer is aware of such defects, either through discovery or through express disclosure by the seller, it would in most cases be unreasonable for him to rely on the seller to supply a consumer product reasonably fit for its normal purpose.

(c) Abolition of Trade Name Priviso

The modest changes effected by the C.P.W.L.A. formulation of the fitness warranty relate to the issues of requisite disclosure and reliance. In connection with the latter, the proviso to the S.G.A. condition of fitness excludes protection where the buyer purchases a product by its patent or trade name. This exclusion presumably rested on the basis that the buyer's use of a trade name was a clear indication of a lack of his reliance upon the seller. Judicial interpretation of the proviso, however, has questioned the reliability of this particular guide to reliance to such an extent that, according to one learned author, the proviso has been virtually interpreted out of existence.[309]

The absence of a similar proviso in the C.P.W.L.A. implied warranty of fitness is in accord with the recommendation of the *First Report*[310] and the universal recommendations of reform proposals elsewhere.[311] Saskatch-

[305]S. 10(2)(a) and (b).

[306]S. 10(2)(c).

[307]U.C.C. 2-316(3)(b). See *Richards Manufacturing Co.* v. *Gamel*, 439 P.2d 366 (Wash. App. 1971).

[308]*Supra*, footnote 4 at 94.

[309]Atiyah, *supra*, footnote 10 at 120, in assessing the effect of *Baldry* v. *Marshall*, *supra*, footnote 287, stated that the case "virtually interpreted the proviso out of existence, since it was plain that the only circumstances in which the proviso applied were those in which the buyer had not relied on the skill or judgment of the seller."

[310]*Supra*, footnote 4 at 94-95.

[311]See English and Scottish Law Commissions, *supra*, footnote 211 at 12; Law Reform Commission of New South Wales, *supra*, footnote 116 at para. 1.94; Ontario Law Reform Commission, *supra*, footnote 16 at 36 and footnote 104 at 221; see also *Ontario Draft Sales Bill*, *supra*, footnote 133, s. 5.14.

ewan, it should be noted, deleted the proviso from its *Sale of Goods Act* in 1908,[312] and the statutory warranty of fitness in the Saskatchewan Act similarly contains no trade name exception.[313]

(d) *Disclosure of Purpose and Requisite Reliance*

The joint issues of disclosure and reliance are integral components of the buyer's entitlement to fitness protection under the *Sale of Goods Act*. Under section 15(a) the buyer has to make known to the seller his particular purpose in such a way "as to show that the buyer relies on the seller's skill or judgment." But this evidentiary burden has seldom presented the buyer with difficulties in practice. The courts have expressed a willingness to imply disclosure of ordinary purpose,[314] and even where the buyer expressly discloses a special or unusual purpose the courts will usually infer the requisite reliance unless it would be unreasonable in the circumstances.[315] Thus, as noted by the Law Reform Commission of New South Wales,[316] in most cases the issue of reliance by the buyer on the seller's skill or judgment remains largely a fiction. Certainly in consumer cases it is not essential that a seller be aware, in actual fact, of the buyer's reliance or that the parties consciously apply their mind to the reliance question.

The *First Report of the Consumer Protection Project*, addressed the issue, and recommended an evidentiary change in the fitness warranty to reflect this judicial interpretation.[317] This resolution of the reliance issue is yet another illustration of the *fidem habeat emptor* principle, and has been uniformly proposed or enacted in other jurisdictions.[318] In consequence of the *First Report's* recommendations, the C.P.W.L.A. warranty of fitness raises a presumption of reliance when the buyer expressly or impliedly discloses the particular purpose for which he is acquiring the consumer product. The onus is then upon the seller or supplier to rebut this presumption by showing the absence of reliance or the unreasonableness of the reliance in the circumstances. The effect, then, is to reverse the onus extant under the S.G.A. This was, indeed, the conclusion of Mr. Justice Maher in *Hiebert* v. *Sherwood Chevrolet Oldsmobile Ltd. and General Motors of Canada Ltd.*,[319]

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[312]S.S. 1908, c. 38, s. 4.

[313]S. 11.5.

[314]*Supra*, footnote 283.

[315]See the discussion of Lord Guest in *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.*, *supra*, footnote 210 at 861-862.

[316]*Supra*, footnote 116 at para. 97.

[317]*Supra*, footnote 4 at 95.

[318]See English and Scottish Law Commissions, *supra*, footnote 211 at 13 and *S.G.A.* (U.K.), s. 14(3); Law Reform Commission of New South Wales, *supra*, footnote 116 at para. 9.17; Ontario Law Reform Commission, *supra*, footnote 16 at 36 and footnote 104 at 221, and *Ontario Draft Sales Bill*, *supra*, footnote 133, s. 5.14(2); Sask. Act, s. 11.5.

[319][1981] 4 W.W.R. 708, at 711 (Sask. Q.B.).

when he assessed the effect of the Saskatchewan Act's corresponding provision in the consumer purchase of a new automobile:

> It is to be noted that the section of the new Act no longer requires the buyer to establish reliance on the seller's skill or judgment, and I would conclude that under the section the buyer need only request an automobile from a retail seller and it is then incumbent upon the seller to supply one that is reasonably fit for the purpose of being driven.

It is important to recognize that the C.P.W.L.A. warranty of fitness enables the seller to escape liability even in the presence of some actual reliance by the buyer. In order to do so the seller must establish that the buyer's reliance was unreasonable. This, of course, could emerge from the circumstances themselves. Thus, where the buyer requires construction of a consumer product, provides specifications for its construction, and exacts compliance with the specifications as an express term of the contract, any residual reliance on the seller to provide a consumer product reasonably fit for its purpose would be unreasonable.[320] In other cases, however, the seller or supplier, in order to show unreasonable reliance, may have to expressly profess a lack of knowledge or otherwise expressly intimate to the buyer that he must not rely on the seller or supplier's skill or judgment.

(e) Scope for Seller's Disclaimer

Although initially a buyer may exhibit reliance on a seller's opinion, this reliance may be negatived by the seller's attitude. Professor Romero states that such would be the case where the consumer asks the retailer whether a certain product would be suitable for a special or unusual purpose and "the retail seller expresses his doubts or indicates that he will not accept any responsibility if the goods are unfit for the communicated purpose."[321] Similarly, Professor Atiyah asserts that a good case can be made for treating reliance as unreasonable "where the seller in effect disclaims responsibility and merely proffers his advice for what it is worth."[322]

It should be made clear, however, that under the C.P.W.L.A. the mere use of a general exemption clause by the seller will not make it unreasonable for the buyer to rely on the seller to provide a consumer product suitable for the buyer's particular purpose. Indeed, such a clause in the consumer

[320] See, for example, *Klipfel* v. *Neill*, 494 P. 2d 115 (Colo. App. 1972), where a buyer was unable to claim breach of the U.C.C. fitness warranty when he gave his seller specifications for a water tank which, when constructed according to those specifications, leaked. See also *Draube* v. *Rieth*, 114 So. 2d 879 (La. App. 1959), where liability was successfully denied for provision of defective vinyl floor tiling when it was installed according to the buyer's specifications which called for a wood subfloor.

[321] *Supra*, footnote 23 at 169. Professor Romero cites the case of *Corbett Construction Ltd.* v. *Simplot Chemical Co.*, [1971] 2 W.W.R. 332 (Man. Q.B.), in support of the proposition that there is no or unreasonable reliance where the seller expressly states that he does not know whether goods are fit for the buyer's purpose.

[322] *Supra*, footnote 10 at 116-117.

context would be denied effect by the prohibition in section 24. The key distinction is between an attempt, on the one hand, to exclude the implied fitness warranty or the consequences of its breach, which is clearly prohibited and an attempt, on the other hand, to prevent the warranty from arising in the first place by a specific disclaimer of skill or judgment, which is clearly permissible.

There will inevitably be many cases where sellers and suppliers entertain doubt as to the suitability of their consumer products for a buyer's purpose. The ultimate effect of the C.P.W.L.A. warranty of fitness is to require these sellers and suppliers to expressly convey their misgivings to the buyer in order to relieve themselves of liability. In cases where the seller or supplier knows that he does not possess the expertise necessary to insure provision of consumer products reasonably fit for the buyer's special or unusual purpose, this is not an unfair burden. Neither is it unfair to require the same disclosure where the seller or supplier is unsure. Only in this way can a buyer really have confidence in circumstances where he relies upon the seller's skill or judgment. In this respect the C.P.W.L.A. formulation of the implied warranty of fitness incorporates yet another salient illustration of the legislation's *fidem habeat emptor* orientation.

E. Warranty of Durability

The concept of durability, as pointed out by the Ontario Law Reform Commission,[323] is not new. Rather, it is inherent in the notion of merchantability and fitness for purpose. While there is authority to suggest that goods must remain merchantable and fit for a reasonable time after sale,[324] doubt exists as to its present status.[325] Clearly, a seller is liable for a defect inherent in the goods at the time of sale, albeit not immediately apparent. The real issue, as pointed out by Professor Atiyah, is whether a seller incurs liability where the goods are not unmerchantable or unfit when sold but have a very limited durability.[326] In *Crowther* v. *Shannon Motor Co.*,[327] Lord Denning M.R. acknowledged that the relevant time to which the S.G.A. implied conditions relate is the time of contract,[328] but that the concepts of merchantability and fitness require the goods at that time to possess a present capacity to remain merchantable and fit for a reasonable

[323]See *Ontario Warranties Report, supra*, footnote 16 at 37 and the more recent reiteration in the *Ontario Report on Sale of Goods, Vol. I, supra*, footnote 104 at 215.

[324]*Mash and Murrell Ltd.* v. *Joseph I. Emmanuel Ltd.*, [1961] 1 W.W.R. 862, reversed on other grounds [1962] 1 W.L.R. 16 (Eng. C.A.). See also *Georgetown Seafoods Ltd.* v. *Usen Fisheries Ltd.* (1977), 78 D.L.R. (3d) 542 (P.E.I.S.C.).

[325]See Atiyah, *supra*, footnote 10 at 109.

[326]*Ibid.*, at 110.

[327][1975] 1 W.L.R. 30 (Eng. C.A.).

[328]*Ibid.*, at 33. See also *Strauss* v. *Bowser*, [1954] 4 D.L.R. 449 (S.C.C.) *per* Kerwin J. at 450.

period. In that case a car dealer sold an eight year old Jaguar car with 82,000 miles on the odometer. Three weeks and 2,300 miles later, the engine seized up and needed replacing. It was held that the fact that the engine seized up after only three weeks was evidence that at the time of the sale the car was not reasonably fit for the purpose of being driven on the road.

The *First Report of the Consumer Protection Project* recommended that New Brunswick's consumer protection legislation should clarify the position under the general sales law and expand merchantability so as to include a requirement that consumer products be durable for a reasonable time period.[329] The precedent recommendation in the *Ontario Warranties Report*[330] was strongly contested by various industry groups. The *Ontario Report on Sale of Goods* summarized the essence of the objections:

> The gravemen of the objections lies in the complaint that "reasonable durability" is an elusive concept, that it has no generally understood meaning, and that the introduction of the concept into sales law would invite a long period of litigation.[331]

The Canadian Manufacturers' Association, however, while rejecting a durability warranty *per se* did endorse the concept of minimum statutory warranty periods during which merchantability and fitness protection would rest wholly and absolutely in favour of the consumer.[332] Quebec, for example, has selectively adopted this scheme in respect of used automobile and motorcycle sales.[333] While the concept of a minimum period of durability, at least in the consumer context, is not without support among law reform agencies,[334] the serious difficulties that would be associated with its adoption were recently canvassed by the English Law Commission which dismissed the solution as impracticable.[335]

Implementation of the *First Report's* recommendation was accomplished in the C.P.W.L.A. by the inclusion of an independent implied warranty of durability:

> 12(1) In every contract for the sale or supply of a consumer product there is an implied warranty given by the seller to the buyer that the product and any components thereof will be durable for a reasonable period of time.
>
> 12(2) In determining a reasonable period of time for the purposes of subsection (1), regard shall be had to all relevant circumstances, including the nature of the product, whether it was new or used, its use as contemplated by the seller

[329] *Supra*, footnote 4 at 83.

[330] *Supra*, footnote 16 at 45.

[331] *Supra*, footnote 104 at 215.

[332] See "Comments on Durability (1973)" in Ziegel and Geva, *Commercial and Consumer Transactions* (1981), at 279.

[333] Quebec Consumer Protection Act, S.Q. 1978, c. 9, s. 155-166.

[334] See *Ontario Report on Sale of Goods, Vol. I, supra*, footnote 104 at 215.

[335] *Implied Terms in Contracts for the Supply of Goods*, London, H.M.S.O. 1979, para. 110.

and buyer at the time of the contract, its actual use and whether it was properly maintained.

The Saskatchewan Act contains a similar independent warranty of durability.[336] The only notable difference in the two formulations is with respect to the enumerated relevant circumstances. The Saskatchewan Act, unlike the C.P.W.L.A., includes express reference to the description of the consumer product, its purchase price and any express warranties of the retail seller or manufacturer. These would presumably also be relevant in New Brunswick as the circumstances enumerated in section 12 are illustrative only. Other jurisdictions have proposed the treatment of reasonable durability as once of the requirements of merchantable quality rather than as an independent warranty on the basis that the concept of merchantability is flexible enough to embrace the requirement of reasonable durability.[337]

With reference to the language of section 12, a recent New Brunswick case illustrates the importance of taking into account all relevant circumstances in order to assess whether a premature breakdown in a consumer product is caused by breach of the implied warranty or due to other causes. In *Gallant* v. *Larry Woods Used Cars Ltd.*,[338] the purchaser of an eight year old "souped up" Camaro brought an action for breach of the durability warranty when, three weeks after the sale, a spring mount broke and protruded through the floor of the trunk. While these facts, without more, could indicate the absence of requisite durability, the additional circumstances that the eighteen year old plaintiff had driven the car 3,000 miles in three weeks and had worn 50-60% of the tread off two new tires in the process proved fatal to the plaintiff's claim.

In conclusion, it should be noted that the implied durability warranty, as recommended in the *First Report*,[339] applies to "the [consumer] product and any components thereof." But the different components of a consumer product may well have different requisite durability requirements. This was recently illustrated in Saskatchewan where a homeowner purchased a new stove which required ten service calls over a one year period for a variety of miscellaneous problems, all of which were rectified by the seller, including, *inter alia*, a burnt oven light, broken locking mechanism, inoperative rear element switch, and defective oven temperature control. Nevertheless, in denying the plaintiff's claim for rescission, the court concluded that the range satisfied the requisite standard of durability.[340]

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[336]S. 11.7 of the Saskatchewan Act. Nova Scotia, it should be noted, provides an independent implied condition of durability in consumer sales: see Consumer Protection Act, *supra*, footnote 205, s. 20C(3)(j).

[337]See English Law Commission, *supra*, footnote 335 at para. 114; *Ontario Report on Sale of Goods, Vol. I*, *supra*, footnote 116 at 216, wherein the O.L.R.C. modified its earlier *Ontario Warranties Report* recommendation. See also *Ontario Draft Sales Bill*, *supra*, footnote 133, s. 5.13(b)(b)(vi) and *Draft Uniform Sale of Goods Act*, *supra*, footnote 140, s. 5.14(1) which, perhaps out of an abundance of caution, adds the requirement of reasonable durability to the implied warranty of fitness as well.

[338](1982), 38 N.B.R. (2d) 262 (Q.B.).

[339]*Supra*, footnote 4 at 84.

[340]*Woodley* v. *Alex's Appliances Ltd.* (1981), 13 Sask. R. 124 (Sask, Surr. Ct.).