

CHAPTER ELEVEN: CONSUMER PROTECTION

TABLE OF CONTENTS

I.	OVERVIEW	1
A.	INTRODUCTION.....	1
B.	COMMON LAW VS. STATUTE.....	1
C.	GOVERNING LEGISLATION, REGULATIONS, AND RESOURCES	1
1.	<i>Legislation and Regulations</i>	1
2.	<i>Resources</i>	2
II.	A STEP-BY-STEP ANALYSIS OF CONSUMER TRANSACTIONS	3
A.	DETERMINE THE CLIENT’S POSITION AND DESIRED OUTCOME	3
B.	CHECK THE FORM AND TERMS OF THE AGREEMENT.....	4
C.	DETERMINE WHETHER THE CONTRACT COMPLIES WITH THE STATUTORY REQUIREMENTS.....	5
D.	DETERMINE WHETHER ANY COMMON LAW REMEDIES ARE AVAILABLE	5
1.	<i>No Obligation</i>	5
2.	<i>Misrepresentation</i>	5
3.	<i>Frustration</i>	5
4.	<i>Mistake</i>	5
5.	<i>Laches or Acquiescence, Waiver, and Estoppel</i>	6
6.	<i>Unconscionability, Undue Influence, and Duress</i>	6
7.	<i>Illegality</i>	6
E.	DETERMINE THE LIMITATION PERIOD FOR MAKING A CLAIM	6
F.	CIVIL RESOLUTION TRIBUNAL.....	7
III.	CONTRACTS FOR THE SALE OF GOODS	7
A.	IDENTIFYING AND CLASSIFYING THE TERMS OF A CONTRACT	7
1.	<i>Condition</i>	8
2.	<i>Warranty</i>	8
3.	<i>Innominate Terms</i>	8
B.	DETERMINING IF THE <i>SALE OF GOODS ACT</i> GOVERNS THE CONTRACT.....	8
1.	<i>Goods</i>	9
2.	<i>Contract of Sale</i>	9
3.	<i>Lease Contracts</i>	9
C.	PROVISIONS OF THE <i>SALE OF GOODS ACT</i>	9
1.	<i>Implied Conditions and Warranties</i>	9
a)	Implied Condition of Title: s 16(a)	9
b)	Implied Warranty of Quiet Possession: ss 16(b) and (c).....	10
c)	Implied Condition of Compliance with the Description: s 17	10
d)	Implied Condition of Fitness for Buyer’s Purpose: s 18(a)	10
e)	Implied Condition of Merchantable Quality: s 18(b)	11
f)	Implied Conditions in Sales by Sample: s 19.....	12
2.	<i>Exemption from Implied Contractual Terms</i>	13
a)	Private Seller.....	13
b)	Commercial Seller	13
3.	<i>Buyer’s Lien</i>	13
4.	<i>Buyer’s Obligations and Seller’s Rights</i>	13

a)	Seller's Personal Rights	14
b)	Seller's <i>In Rem</i> Rights	14
5.	<i>Other Sale of Goods Act Provisions</i>	15
a)	Stipulations as to Time	15
b)	Stipulations as to Quantity	15
c)	Stipulations as to Price	15
d)	Installments	15
D.	REMEDIES FOR BREACH OF CONTRACT	15
1.	<i>Damages Generally</i>	15
2.	<i>Breach of Warranty</i>	16
3.	<i>Breach of Condition</i>	16
a)	Repudiation	16
b)	Damages for Breach of Condition	17
c)	Specific Performance	18
4.	<i>Rescission</i>	18
IV.	BUSINESS PRACTICES AND CONSUMER PROTECTION ACT – DECEPTIVE AND UNCONSCIONABLE ACTS	18
A.	DOES THE ACT GOVERN THE CONTRACT?	18
1.	<i>Consumer Transaction</i>	18
2.	<i>Consumer</i>	18
3.	<i>Supplier</i>	19
B.	DEFINING A “DECEPTIVE OR UNCONSCIONABLE ACT OR PRACTICE”	19
1.	<i>Deceptive Acts</i>	19
2.	<i>Unconscionable Acts</i>	20
C.	REMEDIES AND SANCTIONS	21
1.	<i>Damages Recoverable by Consumers</i>	21
2.	<i>Transaction Unenforceable by Supplier</i>	21
3.	<i>Injunction, Declaration and Class Action</i>	21
4.	<i>Supplier Found Guilty of an Offence Under the BPCPA</i>	21
D.	LIMITATION PERIOD	22
E.	POWERS OF THE DIRECTOR	22
F.	DECEPTIVE PRACTICES UNDER THE COMPETITION ACT	22
1.	<i>More than One Price Tag (“Double Ticketing”)</i>	22
2.	<i>Advertising a Sale Price</i>	23
3.	<i>Bait and Switch</i>	23
G.	FALSE OR MISLEADING ADVERTISING	23
<i>The Common Law</i>	23	
a)	Fraudulent Misrepresentation	24
b)	Innocent Misrepresentation	24
c)	Negligent Misrepresentation	24
V.	DIRECT SALES, FUTURE PERFORMANCE AND TIME SHARE CONTRACTS	25
A.	DIRECT SALES	25
<i>Right of Cancellation</i>	25	
B.	FUTURE PERFORMANCE CONTRACTS	26
<i>Right of Cancellation</i>	27	

C.	TRAVEL OR VACATION CLUBS, “BOOK-OF-THE-MONTH”, AND RECORD CLUBS (CONTINUING SERVICES CONTRACTS)	27
	<i>Right of Cancellation</i>	27
D.	UNSOLICITED GOODS OR SERVICES	28
E.	DISTANCE SALES	28
F.	CREDIT TRANSACTIONS	28
1.	<i>Notice Required for Increased Interest Rates</i>	29
2.	<i>Unsolicited Credit Cards</i>	29
G.	REGULATION OF PAYDAY LENDERS AND CRIMINAL RATE OF INTEREST	29
H.	REMEDIES AND SANCTIONS	30
1.	<i>Fines or Imprisonment</i>	30
2.	<i>Investigation and Search Powers</i>	30
VI.	CONDITIONAL SALES CONTRACTS AND SECURITY AGREEMENTS.....	30
A.	CREDITOR’S REMEDIES AGAINST THE DEBTOR	30
1.	<i>Seizure by the Creditor</i>	30
2.	<i>Action by the Creditor</i>	31
B.	RESTRICTIONS ON THE CREDITOR’S RIGHT TO DISPOSE	31
C.	DISQUALIFICATION FROM “SEIZE OR SUE” PROVISIONS	31
D.	THIRD PARTY PURCHASER’S RIGHTS	31
E.	APPLICATION OF PPSA TO LEASES	32
F.	BILLS OF EXCHANGE ACT	32
VII.	THE MOTOR DEALER ACT	32
A.	OVERVIEW OF THE MOTOR DEALER ACT	32
B.	MOTOR DEALER CUSTOMER COMPENSATION FUND	33
VIII.	MISCELLANEOUS.....	34
A.	CIRCUMVENTION OF DISCLAIMER CLAUSES	34
1.	<i>Statutory Relief</i>	34
a)	Retail Sales of Goods	34
b)	Deceptive Act or Practice	34
c)	Consumer Transactions Generally	34
2.	<i>Common Law Relief</i>	34
a)	Clause Deemed Not to Be Part of Contract	34
b)	Misrepresentation as to the Clause’s Legal Effect	35
c)	Strict Interpretation of Clause	35
d)	Collateral Contract	35
e)	Inadequate Notice	35
B.	CONSUMERS’ RIGHTS AGAINST CREDITORS AND DEBT COLLECTION AGENCIES	35
1.	<i>If the Client has Serious Debt, Inform the Client of:</i>	35
2.	<i>Legislation Regulating Debt Collection</i>	35
C.	TELEMARKETER LICENSING REGULATION	36
D.	REPAIRER’S LIENS	36
E.	LIENS FOR STORAGE	37
F.	TOWED VEHICLES	37
G.	ELECTRONIC TRANSACTIONS ACT	37

CHAPTER ELEVEN: CONSUMER PROTECTION

I. OVERVIEW

A. Introduction

This chapter provides an overview of the law of consumer protection in British Columbia. The introduction includes brief explanations of the common law and statute law relating to consumer contracts. The following sections then describe the statutes in some detail. The sections are necessarily brief, and while intended to give the reader an accurate general understanding of consumer protection laws, do not replace a careful reading of the statutes and case law.

While parts of this chapter are concerned with the rights of sellers, the main thrust is to help clinicians advise consumers who want to get out of contractual obligations, enforce contractual obligations, extract damages for a breach of contract, or file a complaint with the appropriate regulator. This chapter should also help students determine the contractual and other obligations of the parties, and whether or not those obligations are enforceable.

B. Common Law vs. Statute

An aggrieved party may have remedies under statutory law, the common law, or both. B.C. statutes provide better protection to consumers than is afforded by the common law. Since legislation takes precedence over the common law, it is crucial that students check all relevant statutes when faced with the legal matters of consumers. For example, some contracts that are enforceable at common law are rendered unenforceable by relevant statutes.

C. Governing Legislation, Regulations, and Resources

1. Legislation and Regulations

The statutes to consult include the following:

Sale of Goods Act, RSBC 1996, c 410 [SGA].

- This legislation regulates contracts for the sale (or lease) of goods, but not services. The SGA is not concerned with the ethics of the transaction unless there is also a defect in the manner in which the contract is carried out (e.g. if the goods are not delivered, are damaged, or are unfit for the purpose for which they were sold). The protections are stronger for new goods than for goods that the purchaser knows are used.

Business Practices and Consumer Protection Act, SBC 2004, c 2 [BPCPA].

- The BPCPA is concerned with the ethics of a transaction, such as deceptive and unconscionable practices as well as information requirements for many types of consumer contracts. The BPCPA also gives consumers the right under some circumstances to get out of contracts in which the consumer has ongoing obligations under the contract, such as time share, gym memberships, and book of the month contracts. If the client wishes to get out of future obligations under a contract, see **Section V.A: Direct Selling**, below. In addition, the Act regulates businesses that offer such contracts and other transactions that are open to abuse, such as direct sales and payday lenders. One of the key features of the Act is that it provides for statutory causes of action for certain kinds of consumer transactions.

Motor Dealer Act, RSBC 1996, c 316 [MDA].

- The MDA contains important disclosure requirements for dealers selling to consumers. It requires disclosure of the prior history of a car (for example, its use as a taxi) and any damage suffered over \$2,000, and other important information. The administration of this Act became self-regulated as of April 1, 2004. Clients with consumer complaints regarding car dealers should now be directed to the Motor Vehicle Sales Authority of British Columbia.

Personal Property Security Act, RSBC 1996, c 359 [PPSA].

- The PPSA governs all security agreements as well as chattel mortgages, conditional sales, floating charges, pledges, trust indentures, trust receipts, assignments, consignments, leases, trusts, and transfers of chattel paper that secure payment or performance of an obligation. A security interest is an interest in goods or other property that secures payment or performance of an obligation for a lender. It used to matter who retained title; however, recent cases abolished title as an important factor. See also **Section VI: Conditional Sales Contracts and Security Agreements**.

Bills of Exchange Act, RSC 1985, c. B-4, ss. 188-192.

- This Act states that a promissory note is a written promise to pay a specified sum of money, at a fixed time or on demand. These are commonly used in conjunction with executory contracts, where one party has fulfilled his or her material obligations and the other party still has some or all outstanding.

2. Resources

Consumer Protection BC (previously the Business Practices and Consumer Protection Authority)

Toll-free: 1-888-564-9963

Website: www.consumerprotectionbc.ca

- Consumer Protection BC operates at arm's length from government and has responsibility for a range of licensing, inspection, investigation, and enforcement activities. If consumer protection legislation appears to have been violated, the aggrieved party can phone Consumer Protection BC to report the infraction. This is the office to contact for students (on behalf of clients) seeking action by the Director under the statutory causes of action found in consumer protection legislation. This office also has a mandate to receive and act on consumer complaints generally.

Motor Vehicle Sales Authority of British Columbia (formally known as the Motor Dealer Council of BC)

Telephone: (604) 574-5050

Website: www.mdcbc.com

- This is the office to contact if one believes that the MDA has been violated or one has questions regarding the provisions in the MDA.

Better Business Bureau

Telephone: (604) 682-2711

Website: <http://www.bbb.org/mbc>

- Businesses voluntarily join this association, which provides self-policing of the business community. Complaints against a member company can be made at this office, which

offers an extra-judicial resolution process for conflicts between consumers and member companies. Information about a specific member company can also be obtained.

Dial-a-Law

Telephone: (604) 687-4680

Website: www.cba.org/BC/Public_Media/dal/

- This service provides pre-recorded summaries on the law pertaining to a wide variety of issues in consumer law. Some useful tapes include:

Door-to-Door Sales: 255

Purchasing Defective Goods: 257

Deceptive Trade Practices: 260

Credit Cards: Unsolicited, Lost or Stolen: 259

Buying Goods by Mail Order: 256

Car Repairs: 198

Leasing a Car: 196

Buying a Used Car: 197

II. A STEP-BY-STEP ANALYSIS OF CONSUMER TRANSACTIONS

A. Determine the Client's Position and Desired Outcome

- **Ask to see the contract.** Reading the terms as they are written is the first step in analysing the contract and determining its meaning.
- **What did the client and the other party agree to do, and how did that party agree?** Clients tend to focus on the personal consequences of a transaction. That a contract or its execution is inconvenient to the client is not helpful unless the client has a legal remedy. Determine the subject matter of the contract and the understandings surrounding it. It should be ascertained as early as possible what other terms or representations were made surrounding this contract as what is written on paper may not accurately communicate the parties' agreement.
- **What were the written and oral understandings?** Under traditional common law, a contract had to be either all written or all verbal. Section 8 of the SGA permits a contract to be partly in writing and partly by word of mouth, or implied by the conduct of the parties. Section 187 of the BPCPA states that parol (verbal) or extrinsic evidence can be admissible evidence toward understanding what agreements the parties made. Further, there is extensive case law supporting the position that one cannot induce another party to enter a contract with verbal representations and then refuse to act on those representations because they are not in the written contract.
- Did the client receive all of the statutorily required information when entering the contract? The BPCPA sets up significant notice and information requirements that, if unmet, may invalidate the contract.
- **What outcome is the client looking for?** Does the client want damages? Or to get out of a contract? Or some other remedy? The client may need assistance in resolving these questions. Frequently, a client will feel wronged, but have no clear idea what his or her rights are or what solutions he or she would find acceptable.
- **When the client arranged the transaction, did he or she do so primarily for personal, household, or family purposes, or for business purposes?** In many situations, the BPCPA will not apply to non-consumer transactions. The SGA, on the whole, protects all buyers – although some rights may be weaker if the buyer is a business rather than a consumer.
- **Was the client cheated, misled, or bullied in the transaction?** If the answer is yes, the BPCPA or common law rules against misrepresentation or unconscionable conduct may apply.

- **Has the client in any way acquiesced to the actions of the other party, or waived his or her rights?** According to section 3 of the BPCPA: “Any waiver or release by a person of the person’s rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act”. Section 69 of the SGA allows some of the rights or duties under a contract of sale to be set aside (see also SGA, s. 20). At common law, if a party waives rights he or she may be estopped from later insisting on them.
- **Has the other party already performed all or part of the obligations?** Section 15(4) of the SGA provides that if the buyer has accepted part of the goods, and the contract is not severable, the buyer can no longer treat the contract as terminated for breach without an express or implied term in the contract allowing so. However, he or she may be entitled to damages for breach of contract in that situation. This position is subject to qualification. For instance, under s. 23 of the BPCPA, concerning future performance contracts, the buyer is entitled to cancel the contract for up to a year when the supplier has not made the appropriate disclosures required by the Act.
- **Has the client expressed his or her concerns to the other party?** The other party may not know there is a problem. Where the other party has not been put on notice that there is a problem, issues of estoppel and acquiescence may enter into play. The *Law and Equity Act*, RSBC 1996, c 253, s 62 provides that a party to a contract may, instead of refusing to perform a disputed obligation, perform the obligation under protest if he or she gives reasonable notice to the other party that the performance is under protest, and then perhaps receive compensation for that obligation if it is beyond what was required in the contract. Letting the other party know may be the most simple and cost effective way to resolve any problems arising from a consumer transaction.
- **Is either party unable to perform the obligations due to circumstances beyond that party’s control?** If so, the common law around frustration of contracts and the *Frustrated Contract Act*, RSBC 1996, c 166 may apply to the transaction.
- **Was the client’s attention drawn to any onerous provisions in the contract?** *Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601, 83 DLR (3d) 400 (Ont CA) states that a party seeking to rely on onerous terms in a standard form contract should take reasonable measures to ensure that the other party is aware of those provisions. In *Karroll v Silver Star Mountain Resorts* (1988), 33 BCLR (2d) 160, 47 CCLT 269 (BC SC), however, the Court found that there is no general requirement to bring onerous terms to the attention of a signing party; only circumstances in which a reasonable person would have known that the party signing was not consenting to those onerous terms create an obligation on the party tendering a document for signature.

B. Check the Form and Terms of the Agreement

- The terms of a contract should refer to such things as quality, terms of payment, and the time at which title is transferred.
- The terms may be construed either as conditions, warranties, or innominate terms. The rights and remedies of the buyer will depend on how the terms of the contract are classified. This is discussed at length in **Section III: Contracts for the Sale of Goods**.
- The form of the agreement(s) can be legally important. If there is a contract in writing, what is said about the subject matter of the contract may be characterized as representations rather than terms of the agreement. Section 8(1) of the SGA states (with qualifications) that a contract may be partly in writing and partly by word of mouth, or may be implied by the parties’ conduct.

- Some contracts are statutorily required to be in writing, and moreover, some require that the writing conform to a strict format that is laid out either in an Act or by Regulation. The BPCPA is very strict on the form required for some contracts, as explained in detail in that section.

C. Determine Whether the Contract Complies with the Statutory Requirements

If the contract does not comply with the statutory requirements, inform the client of any available defences against legal actions by the other party, possible legal actions by the client, available statutory remedies, and the appropriate action for the client.

D. Determine Whether Any Common Law Remedies are Available

Where the statutes do not apply, there may still be a common law defence available.

1. No Obligation

In order to enforce the terms of a contract, there must be a contract and the particular terms must be enforceable under that contract.

2. Misrepresentation

Misrepresentation occurs when a party is induced to enter a contract based on a false statement. The remedies available depend on the nature of the misrepresentation. See section IV.I for more information on misrepresentation.

3. Frustration

If performance of the contract is impossible due to circumstances that arise after the contract was signed and that were outside of either party's control then the contract can be found to have been frustrated, and ongoing obligations under the contract will cease to apply. Once frustration is found to have occurred at common law, the *Frustrated Contract Act* will apply to adjust the rights and liabilities of each party and to appropriate restitution.

4. Mistake

Mistake is defined at common law as a fundamental misunderstanding between the parties to a contract. There are three categories of mistake: common, mutual, and unilateral.

- A **common mistake** exists when both parties make the same mistake. For example, the subject matter of the contract may not exist or was destroyed prior to the agreement.
- A **mutual mistake** exists when the parties make a different mistake, e.g. a purchaser wanted type A widgets and the vendor thought he or she ordered B widgets, so there is disagreement as to a term of the contract. This is usually an offer and acceptance issue, for both parties have to come to agreement for there to be a contract in the first place.
- A **unilateral mistake** exists when one party is mistaken about the obligations that he or she has assumed. This is a difficult defence because a court is unlikely to excuse the party from obligations on account of his or her unilateral mistake, unless the other party was aware of the mistake.

5. Laches or Acquiescence, Waiver, and Estoppel

If a party allows the other party to proceed according to a mistaken assumption that is to the party's own detriment, that party may have acquiesced to it by inaction.

The doctrine of laches becomes relevant if one party unreasonably delays pursuing a claim, and the other party is thereby prejudiced.

Promissory estoppel occurs when one party promises not to enforce his or her rights under the contract. In such a case, and where the other party has relied on the promise, it may be inequitable to allow the first party to later enforce the right. For an example of how promissory estoppel can be raised, see *Central London Property v High Tress House* [1947] 1 KB 130.

In some circumstances, a party to a contract can waive rights within the contract. It may be possible to retract the waiver with reasonable notice.

6. Unconscionability, Undue Influence, and Duress

Unconscionability, undue influence, and duress can all make a contract voidable. There are two requirements for unconscionability: an imbalance in the relationship of the parties, and an imbalance in the contract. Unconscionability is also dealt with in the BPCPA, ss 8-10.

See *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710 and *Harry v Kreutziger* (1978) 95 DLR 93d) 231 for examples of unconscionability. Undue influence is the abuse of a relationship of trust and confidence to strongly influence another to make a contract. See *Geffen v Goodman Estate* (1991) 2 SCR 353 for an example of undue influence. Duress is the coercion of the will to the point where it vitiates consent.

7. Illegality

In the past, Canadian courts would not enforce those contracts created for an illegal purpose.

A leading case in this area is *International Paper Industries Ltd. v. Top Line Industries Inc.*, [1996] B.C.J. 1089, in which a lease for a portion of land was declared invalid, preventing the tenant from exercising the option to renew, because the land was subdivided contrary to the *Land Title Act*, RSBC 1996, c 250.

Today, courts may enforce contracts made for an illegal purpose if inequity would otherwise result, or if the purpose of the governing statute is not undermined. See *Still v Minister of National Revenue*, [1998] 1 FC 549 (CA). The Court will consider the purpose and object of a statutory prohibition when deciding whether or not the contract is enforceable. *Continental Bank Leasing Corp v Canada*, [1998] 2 SCR 298, at para 67 in particular offers a good summary of the law of illegality.

E. Determine the Limitation Period for Making a Claim

With a new *Limitation Act*, SBC 2012, c 13 now in force, it is vital that students determine whether the new or the old legislation applies to a particular legal matter. If the act or omission occurred after June 1, 2013, the new Act applies and the basic limitation period of two years set out in s 6(1) applies. Note, however, that if the claim was discovered before June 1, 2013, the former *Limitation Act* applies.

If the former Act applies and the client is suing for breach of contract, s. 3(5) of the *Limitation Act*, RSBC 1996, c 266 states that the limitation period for breach of contract is **six years**. However, under s. 3(2)(a), where damages claimed arise from physical damage to persons or property, the limitation

period is **two years**, even where the claim is based on contract. Also, if the client is considering suing for negligence as well, the limitation period is **two years**. Therefore, to take advantage of all the possible remedies available, the prudent course is to start an action for breach of contract and file the notice of claim within two years of the date when the cause of action arose.

F. Civil Resolution Tribunal

Note: British Columbia's new civil Resolution Tribunal Act received Royal Assent in May 2012. The Act was supposed to come into force in Spring 2015. However, most of its provisions are still not in force.

The Act establishes a new dispute resolution body, the Civil Resolution Tribunal. It is anticipated that the Tribunal will begin operation sometime in 2015. Once operational, the Tribunal will provide a new venue for the resolution of small claims matters. I will encourage people to use a broad range of collaborative dispute resolution tools to resolve their disputes as early as possible, while still preserving adjudication as a last resort.

The Act will provide the Civil Resolution Tribunal to resolve:

-Small claims disputes where the parties decide to take the matter to the tribunal instead of the court, up to a maximum value of \$25,000 for:

- debt or damages;
- recovery of personal property;
- specific performance of an agreement relating to personal property or services; or
- relief from opposing claims to personal property

-Strata disputes between owners of strata properties and strata corporations for a wide variety of matters such as:

- non-payment of monthly strata fees or fines;
- unfair actions by the strata corporation or by people owning more than half of the strata lots in a complex;
- uneven, arbitrary or non-enforcement of strata bylaws (such as noise, pets, parking, rentals);
- issues of financial responsibility for repairs and the choice of bids for services;
- irregularities in the conduct of meetings, voting, minutes or other matters;
- interpretation of the legislation, regulations or bylaws; and
- issues regarding the common property.

III. CONTRACTS FOR THE SALE OF GOODS

Generally, consumers have no right to return goods or cancel a contract simply because they decide the goods are no longer wanted or needed. However, it is often only after the goods are purchased that damages or defects are discovered. In such cases, a purchaser may have a remedy if it can be shown that a term of the contract has been breached. It may also be the case that the business has a refund policy of which the consumer can take advantage.

This section outlines the protection that consumers have against the problems that may occur **after** a purchase has been made. To understand one's legal rights, it is necessary to know the differences between terms, representations, and mere puffs.

A. Identifying and Classifying the Terms of a Contract

A term of the contract is a promise made by the manufacturer or seller regarding the character or quality of an article. It can be either written or oral. Written terms will generally be straightforward to

identify. Whether an oral statement can be properly considered a term may be less obvious. Not everything said by the seller will be a term of the contract. To be a term, the statement must be a specific promise that makes up part of the contract.

If a statement is not a term, it will be either a representation or a puff. A representation is a material statement of fact made to induce the other party to enter the contract. A puff is vague sales talk not meant to have any legal effect. For example, a statement that, “This is a wonderful car,” would be a puff.

If a statement is a term of the contract, it can be a condition, warranty, or innominate term. A well-drafted contract will characterize particular terms as conditions or warranties, though the wording used in the contract will not always be determinative. The difference between the three types of terms is as follows:

1. Condition

A condition is a term that is so essential to the agreement that its breach is considered to be a substantial failure to perform the contract. A breach of a condition is said to go to the root of the contract. In other words, the breach is such that it deprives the innocent party of “substantially the whole benefit” of the contract. *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, [1962] 1 All ER 474 at 489. Breach of condition entitles the buyer to terminate any further obligations under the contract and sue for damages. The aggrieved party, if aware of the impending breach, could accept the repudiation of the other party and terminate the contract, ending all future obligations except for the damages that stem from non-performance. Or, the aggrieved party could not accept the repudiation, and may wait for the future breach to occur before pursuing damages (e.g., if he or she thinks that there is still a chance that the contract will be performed).

2. Warranty

A warranty is a term of the contract that is not so essential. A warranty must be performed, but its breach is not considered to go to the root of the contract. This meaning of warranty should not be confused with other uses of the word such as in “one-year maintenance warranty”. When a warranty is breached, the innocent party must continue to perform its own obligations under the contract but can sue for damages.

3. Innominate Terms

Innominate terms arise out of the common law, but unlike conditions and warranties, they are not mentioned in the SGA. An innominate term is one that may be treated as either a condition or a warranty, depending on how severe the consequences of a breach turn out to be. Whether an innominate term is a condition or a warranty is for a judge to decide. Note that the SGA specifies whether certain terms are conditions or warranties.

B. Determining if the *Sale of Goods Act* Governs the Contract

The SGA applies to transactions that can be characterized as contracts for the sale of goods. Any transaction that is not for the sale of goods does not receive the benefit of the SGA. Hence, the subject matter of the transaction must be goods and the essential elements of a contract must also be present.

1. Goods

Goods include all personal chattels, other than “things in action” (e.g. cheques, insurance policies, money). Things attached to real property, which the parties agree to sever before sale, or under the contract of sale, are included (s. 1). Note that registration in the Land Title Office may be advisable to avoid possible characterization of the goods as real property or fixtures, so that the SGA may apply to the transaction.

According to ss 1 and 9, the SGA covers **existing** and **future goods**. Future goods are goods to be manufactured or acquired by the seller after the making of the contract of sale.

According to ss 1 and 6(1), general property or title in the goods must pass – not merely a special property or interest. Thus, for example, a contract of bailment is not covered.

Contracts for skill and labour alone are not contracts for the sale of goods, so the SGA does not apply to them. However, if a contract is for labour and materials, then the SGA could apply to the materials (e.g. a contract to paint a house with paint supplied by the contractor).

2. Contract of Sale

According to s 6(6) of the SGA, a contract of sale includes an agreement to sell as well as a sale. Thus the definition covers conditional sales.

Section 8 provides that the contract may be either written or oral.

According to s 6(1), the SGA applies only where the purchaser agrees to buy goods with money as consideration. Hence gifts, barter, or exchanges are not subject to the SGA’s implied conditions and warranties. However, a court may avoid this result by finding two separate contracts rather than a barter, as long as the consideration, whether money or goods, has its value measured in monetary terms: see *Messenger v. Green*, [1937] 2 DLR 26 (NSSC). Thus, if a total price is attached, there will be a sale, even if payment is in goods.

3. Lease Contracts

The SGA applies to lease contracts if the goods are leased for personal, family or household purposes.

C. Provisions of the *Sale of Goods Act*

Sections 16 – 19 of the SGA imply many terms into contracts for the sale of new items. Section 20 governs when these implied terms can and cannot be expressly waived by the seller. The SGA also defines these terms as conditions or warranties, thus defining the remedies available if breached.

1. Implied Conditions and Warranties

The vital part of the SGA for the consumer is ss. 16 – 19, which **may** add statutory conditions and warranties to a contract for the sale of goods, subject to the possibility of exclusion (see **Section III.C.2: Exemption from Implied Contractual Terms**).

a) Implied Condition of Title: s 16(a)

Section 16(a) provides that, subject to contrary intentions, there is an implied condition that the seller has the right to sell the goods. In an agreement to sell

goods at a later date, there is an implied condition that the seller will have the right to sell the goods at the date the buyer takes possession.

b) Implied Warranty of Quiet Possession: ss 16(b) and (c)

Sections 16(b) and (c) provide implied warranties that in the future the buyer will enjoy undisturbed possession of the goods, free from any liens or other encumbrances in favour of third parties that are unknown to the buyer at the time the contract is made. If a secured creditor subsequently makes claims against the buyer, the buyer can sue the seller for damages resulting from breach of this implied warranty. The quantum of damages would likely be the amount of the liens outstanding so that the buyer could pay them off.

c) Implied Condition of Compliance with the Description: s 17

Under s. 17, when goods are sold by description, there is an implied condition that they correspond to the description.

Most sales will be sales by description. The notable exception is where a buyer makes it clear that he or she is buying a particular item on the basis of its qualities known, independent of any representations by the seller. Generally, where a buyer purchases a product because of a vendor's representations about its features (which may have been offered either gratuitously or in response to the buyer's questions), this will be a sale by description, with the vendor's representations forming part of the description. Catalogue purchases and purchases of products sealed in containers by the manufacturer are also sales by description.

NOTE: Specific (as opposed to unascertained) goods are goods that, at the time the contract is made, are agreed to be the only goods whose transfer will satisfy the contract. For example, in a sale of a new chair, if the parties agree that a specific chair is to be the subject matter of the contract, the sale has been of specific goods. So, if the seller attempts to deliver a different chair, which is identical in every way, except that it is not the actual chair agreed upon, the seller has breached the contract. Unascertained goods are goods that are agreed to be the subject matter of the contract at a point in time after the contract is made. For example, in the sale of a new chair, if the parties agree only on a specific type of chair, but do not specifically single out any individual chair, the sale has been of unascertained goods.

Although s 17 cannot be excluded in retail sales of new goods, it may be excluded in private or commercial sales, subject to the *contra proferentum* rule.. The *contra proferentum* rule states that a contract, if ambiguous, is construed as against the party who wrote it. Where a standard form contract is used, it is construed as against the party who offered it.

A sale by description may also raise s 18(b) issues (see **Section III.C.1.e: Implied Condition of Merchantable Quality**).

d) Implied Condition of Fitness for Buyer's Purpose: s 18(a)

Under s 18(a), if:

- i) 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 he or she relies on the seller's skill and judgment; and

- ii) the goods are of a description which it is in the course of the seller's business to supply;

then there is an implied condition that the goods are necessarily fit for such purpose. An **exception** occurs where the contract is for the sale of a specified article under its patent or trade name, in which case there is no implied condition as to its fitness for any particular purpose.

To establish a claim under s 18(a) of the SGA, three factors must be satisfied on a balance of probabilities (*Nikka Traders v Gizella Pastry* 2012 BCSC 1412, para 65):

- (1) that the buyer has made known to the seller the purpose for which it requires the goods;
- (2) the dissemination of that purpose shows that the buyer relies on the seller's skill or judgment; and
- (3) the goods are of a description that is in the course of the seller's business to supply.

Furthermore, the courts have held that the seller need not know the specific purpose for which the buyer wishes to use the goods. Knowledge of a broad purpose is sufficient. For example, in *Sugiyama v Pilsen*, 2006 BCPC 265, para 71, the court held that section 18(a) provides a warranty that a car is "a reliable vehicle for use in driving in safety on the roads." However, if the buyer wishes to use the goods for an unusual or peculiar purpose, this must be indicated to the seller.

The "Patent and Trade Name Exception" is of little effect since the courts have interpreted it narrowly. The issue remains one of reliance, and the trade names exception will apply only where the buyer's use of the patent or trade name indicates a lack of reliance upon the seller. In other words, the exception only applies where a consumer decides to purchase goods solely because of the trade name of a product without any reliance on representations by the seller. See *Wharton v Tom Harris Chevrolet Oldsmobile Cadillac*, 2002 BCCA 78, paras 38-39.

e) **Implied Condition of Merchantable Quality: s 18(b)**

Under s 18(b), if: (1) goods are bought by description, and (2) from a seller who deals in goods of that description, the seller is bound by an implied condition that the goods are of merchantable quality, except to the extent that the buyer has examined them.

(1) The Concept of Merchantable Quality

The concept of merchantable quality is difficult to define. A commonly used test, the **price abatement** test, asks whether a reasonable buyer, informed of the actual quality of the goods, would buy the goods without a substantial abatement of price (*B.S. Brown & Son v Craikes Ltd.*, [1970] 1 All ER 823 (HL)). If the informed reasonable buyer would not buy without a substantial abatement of price, unmerchantable quality is inferred, and repudiation may be available.

Any damage to goods beyond the de minimus range, may be said to render the goods of unmerchantable quality (*IBM v Shcherban*, [1925] 1 DLR 864 (Sask CA)).

Section 18(b) applies to the sale of used goods as well. However, there is a lower standard here: the goods must be usable but not perfect. A minor defect does not necessarily render the goods unmerchantable. See *Bartlett v Sidney Marcus Ltd.*, [1965] 2 All ER 753 (CA).

In any case, where the buyer seeks recovery of the full purchase price based on the implied condition of merchantable quality, he or she should be cautioned that continued use of the goods in question seriously weakens the argument that the goods are not fit for a particular purpose, or are not of merchantable quality.

(2) Sale by Description

Section 18(b) only applies to a sale by description. This is usually not a problem since most sales are by description, except where the buyer is clearly buying a particular item on the basis of qualities known to him apart from any representations.

(3) Seller who Deals in Goods of that Description

In addition to requiring that the sale be by description, section 18(b) also requires that the seller must “deal in goods of that description.” In *Hartman v McKerness*, 2011 BCSC 927, a seller sold a watch by description over eBay and was sued for violating the implied condition of merchantability in section 18(b). In paragraphs 43-47, the BC Supreme Court held that the eBay seller was not a seller “who dealt in goods of that description” for the purpose of 18(b), as he did not specialize in watches, but rather sold a large variety of goods.

(4) Effect of Examination by the Buyer

If the buyer examines the goods, there is no condition of merchantable quality for defects that the examination ought to have revealed. However, if the average person would not have been able to spot the defect during the exam, the condition of merchantability remains. Hence, it must be determined: 1) whether the buyer examined the goods, and 2) whether the defects ought to have been revealed by the exam. There is no obligation on the buyer to make a reasonable examination, or even any examination.

(5) Implied Condition of Reasonable Durability

The goods must be durable for a reasonable period of time (s 18(c)).

f) Implied Conditions in Sales by Sample: s 19

For a contract to be a sale by sample, there must be “an express or implied term in the contract to that effect” (s 19(1)).

The elements of a sale by sample are set out in s 19(2):

- i) an implied condition that the bulk shall correspond with the sample in quality;
- ii) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and

- iii) an implied condition that the goods are free from defects rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The last condition can only be relied upon where the defect would not have been apparent on a hypothetical reasonable examination. Contrast this with the s 18(b) condition of merchantability for sales by description, where the buyer's **actual** examination is considered.

2. Exemption from Implied Contractual Terms

a) Private Seller

Based on section 20, Private sellers or lessors, as opposed to retail sellers or lessors, can explicitly exempt themselves from ss 17, 18, and 19. A retail sale is defined as one in the "ordinary course of the seller or lessor's business." This is subject to the *contra proferentum* rule that such a clause, if ambiguous, is read strictly against the person relying on it.

b) Commercial Seller

Under s 20 of the SGA, retailers of **new goods** cannot exempt themselves from the implied terms in ss 16 – 19, and any clause that attempts to do so is void, subject to the exceptions listed below.

A seller who is making a retail sale in the ordinary course of business can **only** expressly waive ss 16 – 19 if:

- i) the goods are used (except s 16, which also applies to used goods);
- ii) the purchaser, even a private individual, intends to resell the goods;
- iii) the lease is to a lessee for the purpose of subletting the goods;
- iv) the purchaser intends to use the goods primarily for business;
- v) the purchaser is a corporation or commercial enterprise; or
- vi) the seller is a trustee in bankruptcy, a liquidator, or a sheriff.

Where a commercial dealer includes a disclaimer clause exempting the transaction from the provisions in ss 16 – 19, the clause is void, unless one of the exceptions applies.

3. Buyer's Lien

Amendments to the SGA in 1994 created the buyer's lien, which gives priority to a consumer who has paid some or all of the purchase price of the goods, but has not taken possession, before the seller goes into receivership or bankruptcy.

4. Buyer's Obligations and Seller's Rights

A seller's rights arise from a breach of the buyer's obligations. The buyer has two main obligations: (1) to pay the price, and (2) to take delivery. A breach of either of these obligations does not necessarily give rise to all of the seller's possible remedies as outlined below. One must consider the severity and consequences of a breach to determine the

seller's remedy. The seller has two classes of rights under the SGA: (1) personal rights against the buyer for price or for damages, and (2) *in rem* rights to the goods.

a) Seller's Personal Rights

(1) Action for the Price: s 52

This action arises when the property in the goods has passed to the buyer, and the buyer neglects or refuses to pay; or where the price is payable on a certain day and the buyer neglects or refuses to pay. This remedy involves the seller seeking the price of the goods.

(2) Damages for Non-Acceptance: s 53

This is an alternate remedy to action for the price. The prima facie rule for damages is set out in s 53(3). The seller is entitled to be paid an amount equal to the difference between the negotiated price and the market price for the goods. However, this rule may be displaced where there is either no available market, or the goods are unique, in which case the damages will be assessed based on the estimated loss incurred by the seller stemming from the breach (s 53(2)).

b) Seller's *In Rem* Rights

(1) Unpaid Seller's Lien: ss 43 - 45

To get an unpaid seller's possessory lien (the right to retain the goods until the whole of the price has been paid), the seller must be an "unpaid seller" as set out in s 42. An unpaid seller may retain the goods beyond the specified delivery date. Where goods are to be delivered in installments under a single contract, the seller may exercise a lien over any part of the goods if any part of the price is outstanding (s 45). If the goods are sold on credit, the seller is not entitled to a lien, except under ss 44(1)(b) and (c) where the term of credit has expired, or where the buyer is insolvent.

The right of lien may be lost if:

- a) the price is paid or tendered (s 44(1));
- b) delivery is made to a carrier or bailee (not the seller's agent) without reserving a right of disposal (s 46(1)(a));
- c) the buyer or his or her agent lawfully obtains possession (s 46(1)(b));
or
- d) there is a waiver (s 46(1)(c)).

(2) The Right of Stoppage in Transit: ss 47 - 49

This right can be exercised in accordance with s 47 when the seller is unpaid, the buyer is insolvent, and the goods are in the hands of a carrier.

(3) The Right of Resale: ss 43(1) and 51

The seller has the right to resell:

- a) where the goods are perishable and notice is given to the buyer, the seller may resell and recover damages (s 51(3));
- b) where the seller has expressly reserved the right to resell in the contract (s 51(4));

Note that if the buyer defaults, and the contract provides that the seller may resell the goods in that situation, the seller may still claim damages, (s 51(4)).

5. Other *Sale of Goods Act* Provisions

a) Stipulations as to Time

Section 14 states that, unless there is a different intention, stipulations as to time of payment do not go to the essence of a contract of sale (i.e. they are not conditions).

b) Stipulations as to Quantity

Under s 34, if the seller delivers a quantity of goods either greater or lesser than that contracted for, the buyer may either reject the entire shipment, or accept the quantity delivered and pay accordingly, or, if the quantity is greater than ordered, reject the balance over that ordered. There is likely an exception when the difference in quantity is so slight as to be *de minimis*.

c) Stipulations as to Price

Under s. 12, where a contract is silent as to price, the court will infer a reasonable price, but where the price would be too vague for the court to infer, there may be no consensus upon an essential term, and therefore no contract.

d) Installments

Under s. 35(1), a buyer need not accept delivery by installments unless that is agreed to. Where a contract is for separately paid installments, circumstances and construction of the contract determine whether a breach allows for repudiation of the entire contract, or only a right to sue for damages regarding the defective installment..

D. Remedies for Breach of Contract

Sections 52 – 57 of the SGA cover actions for breach of contract. Common law and equitable remedies may exist as well.

1. Damages Generally

Generally, the object of damages is to put the injured party in the same position he or she would have been in had the other party performed their contract obligations (“expectation damages”).

At common law, to be awarded damages for breach of contract, those damages must be in the reasonable contemplation of both parties at the time the contract was formed. If the damages are too remote, they may not be recoverable under contract law. Both sides must be aware of the circumstances at the time of formation that would lead to damages if an obligation went un- or underperformed. This may encompass either implied circumstances, if reasonable, or special circumstances that were communicated at the time the contract was formed (*Hadley v. Baxendale* (1854), 9 Exch. 341). Damages that were substantially likely and easily foreseeable at the time the contract was formed will be deemed to have been in the reasonable contemplation of the parties. Once the **type** of loss is found to have been foreseeable, the extent of damages can be recoverable even if the **degree** of damages is so extensive as to be unforeseeable.

Parties have a common law **duty to mitigate** their damages from the date of the contractual breach. In a contract for the sale of goods, this means buying the goods elsewhere and suing the party who breached the contract for the additional amount paid for the goods over the contract price. In a contract for services, such as roof repair, this means hiring another party to do the repairs and suing the original party for the difference in price paid, if any. There is some jurisprudence that suggests when it is not feasible for a party to mitigate, they are excused from doing so. See *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51.

2. Breach of Warranty

For a breach of a term of the contract that is a warranty, the only available remedy will be damages. The innocent party must continue with the contract while seeking damages.

In a contract for the sale of goods governed by the SGA, the standard measure of damages is “the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach” (s. 56(2)). Where the warranty pertained to quality of the goods, the loss will be calculated as the difference between the cost of obtaining the goods in the market and the contract price of the goods (s.56(3)). Thus a buyer who has negotiated a good deal can recover the difference between his or her expected savings and the market price. Section 57 states that s. 56 does not affect recovery of special damages or interest, if otherwise available by law. The common law governs the recovery of special damages. For special damages to be recoverable both parties must have been made aware of their possible incursion at the time of formation of the contract.

3. Breach of Condition

For a breach of condition, the aggrieved party can affirm the contract and, in the future, seek damages, or terminate the contract, discharging future obligations but still allowing recovery for damages. The offending party has “repudiated” the contract by acting in a way that expresses the intention to no longer be bound by the contract, and the party aggrieved can accept or reject that repudiation.

a) Repudiation

The buyer’s primary right for a breach of a condition is to repudiate the contract and reject the goods. This can normally be exercised regardless of the actual quantum of loss or benefit to the parties. However, the right to repudiate may be lost under the SGA.

In the case of a rightful repudiation, the buyer may refuse further payment, and in addition, seek either damages or restitution from the seller. The consequence of wrongful repudiation termination (the buyer repudiates when he or she did not have the right to do so; e.g. because the seller breached a warranty rather than a

condition) is that the buyer is liable to the seller for his or her own breach of condition. So, it is important to determine whether or not repudiation is justified **before** taking any action, by determining the nature of the term the seller breached.

(1) When a Breach of Condition is Treated as a Breach of Warranty

Section 15(4) specifies two circumstances where, unless the parties contract otherwise, any breach of condition (including the implied statutory conditions in ss 16 – 19) must be treated as a breach of warranty: (1) in a contract for sale of specific goods when property has passed to the buyer; or (2) where the buyer has accepted the goods, or part of them.

(2) Specific Goods: Upon Passage of Property

When s 15(4) is combined with ss 23(1) and (2), the result is that, for a sale of specific goods in a deliverable state, the buyer loses the right to repudiate as soon as the contract is made.

However, courts may avoid this harsh result by: (1) implying a term allowing the buyer to accept the goods and later reject them: see *Polar Refrigeration Service Ltd v Moldenhauer (cob Traveller's Hotel)* (1967), 61 DLR (2d) 462 (Sask QB); (2) finding a total failure of consideration: see *Rowland v. Divall*, [1923] 2 K.B. 500; (3) finding the intent for property to not pass immediately (ss 22 and 23(1)); (4) finding that the goods are not specific; or (5) finding ss 23(3), (4) or (5) to be applicable.

(3) Unascertained Goods: Upon Acceptance

For a sale of unascertained goods, the buyer loses the right to repudiate upon acceptance of the goods (s 15(4)).

Under s 38, if the buyer has not previously examined the goods, there is no acceptance unless and until the buyer has had a reasonable opportunity to examine them. However, under s 39 a purchaser has accepted the goods once (1) the seller is notified by the buyer of acceptance, (2) the goods are used in a manner inconsistent with the seller's ownership (e.g. reselling the goods to a third party), or (3) the goods are retained without being rejected within a "reasonable time".

The court determines a reasonable time for inspection and possible rejection by looking at all the circumstances surrounding the transaction.

b) Damages for Breach of Condition

As mentioned above, the innocent party has a choice in the face of a breach of condition. He or she may (1) accept the repudiation, terminate the contract, and sue for damages right away, or (2), if he or she has a legitimate interest in doing so, may affirm the contract, wait for the date of performance, and sue for damages for any defect in performance at that date. (In many cases involving one-time sales, the performance date will be contemporaneous with the date of the payment/delivery/breach, rendering this a moot point.)

In deciding whether or not to affirm a contract in order to assess damages at a later date, the client should consider the implications of his or her duty to mitigate the loss. In a sale of goods, purchasing the goods from someone else can often mitigate

damages; generally no special interest exists in purchasing the particular goods from a particular vendor.

c) **Specific Performance**

If an aggrieved party does decide to affirm the contract, specific performance may be available for a contract of sale for specific goods. Specific performance is a court order compelling performance of a contract in the specific form in which it was made (SGA, s 55). In certain circumstances, it may be available at common law for unascertained goods (*Skyl Petroleum Ltd v VIP Petroleum Ltd*, [1974] 1 All ER 954). Specific performance is a discretionary equitable remedy and will only be granted if damages are inadequate; for example where the goods are unique or otherwise unavailable. Section 3(1)(c) of the *Small Claims Act* provides that the Small Claims Division of the Provincial Court of British Columbia can grant specific performance in an agreement relating to personal property.

4. **Rescission**

The remedy of rescission seeks to undo a contract. It is available for, among other things, misrepresentation. See section IV.I for a fuller discussion of what constitutes misrepresentation. Rescission is an equitable remedy that sets the contract aside and seeks to restore the parties to their original, pre-contractual positions. This usually means return of the goods and return of any payment made. Because it undoes the contract, no damages can be claimed beyond the restitution necessary to return the parties to their pre-contractual positions. Delay in bringing the action or acceptance of the goods may bar rescission.

IV. **BUSINESS PRACTICES AND CONSUMER PROTECTION ACT – DECEPTIVE AND UNCONSCIONABLE ACTS**

A. **Does the Act Govern the Contract?**

For a contract to fall under the *Business Practices and Consumer Protection Act* [BPCPA], the contract must be 1) a consumer transaction, between 2) a consumer and 3) a supplier, as defined by section 1. Each of the three criteria must be fulfilled before relying on the BPCPA.

1. **Consumer Transaction**

A consumer transaction is a dealing that:

- a) involves a supply of goods, services, membership in a club or organization, or real property by a supplier to a consumer, **or**
- b) is a solicitation or promotion by a “supplier” with respect to the above mentioned transaction; **and** is for purposes that are primarily personal, family, or household.

Except in Parts 4 and 5 of the BPCPA, a consumer transaction includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer.

The Act **does not** apply to securities as defined by the *Securities Act*, RSBC 1996, c 418 or contracts of insurance under the *Insurance Act*, RSBC 1996, c 226.

2. **Consumer**

The consumer may reside inside or outside BC. A consumer is an individual, other than a supplier, who participates in a consumer transaction for **primarily personal, family, or**

household purposes. The definition of consumer in section 1 does not include a guarantor of the consumer who actually participated in the transaction.

3. Supplier

A supplier means a person, whether in BC or not, who in the course of business participates in a consumer transaction by:

- a) supplying goods, services, or real property to a consumer; or
- b) soliciting, offering, advertising, or promoting with respect to a transaction referred to in paragraph (a) of the definition of “consumer transaction”.

A supplier also includes the successor to, or assignee of, any rights or obligations of the supplier and, except in Parts 3 to 5, includes a person who solicits a consumer for a contribution of money or other property.

The definition of supplier in section 1 requires that the transaction occur “in the course of the supplier’s business”. Thus, private sales and transactions made by people who are not in the business of dealing with such goods are generally exempt from the BPCPA. If a consumer buys a used car advertised in a newspaper ad placed by a private person, the consumer will likely be restricted to the remedies found in the SGA or at common law. Some remedies in the SGA are also available only when goods are sold in the ordinary course of business.

Several suppliers can be involved in one transaction. Therefore, in order for the consumer to sue, he or she need not have a contract with the supplier who made a deceptive representation or committed an unconscionable act. For example, a consumer buys a car from a dealer and the contract is assigned to a financial institution. The vendor would be a supplier, as would the finance company attempting to collect on the contract (see section 15). Since privity of contract is not necessary, each of the suppliers would be liable under the BPCPA if they engaged in deceptive or unconscionable practices.

According to section 6, advertisers who, on behalf of another supplier, publish a deceptive or misleading advertisement are not liable for damages, court actions, or offences, **if** they are acting in good faith when they accept advertisements for publication. If, however, they knew or ought to have known that the advertisement had the capability, tendency, or effect of deceiving or misleading, then they too may be liable as a supplier under the BPCPA.

B. Defining a “Deceptive or Unconscionable Act or Practice”

For the consumer to have a remedy, the supplier’s conduct must involve deceptive or unconscionable acts or practices.

-Section 4 of the BPCPA describes “deceptive” acts or practices. Section 8 of the BPCPA describes “unconscionable” acts or practices.

1. Deceptive Acts

A deceptive act or practice is a representation (whether oral, written, visual, descriptive, or other) or any conduct by the supplier that has the capacity, tendency, or effect of deceiving or misleading a consumer or guarantor.

Section 4(3) sets out an extensive but non-exhaustive list of deceptive practices.

If a certain practice is not listed in 4(3), it may still be considered deceptive. The term “deceptive act or practice” was also found in BC’s old *Trade Practices Act*, which was repealed by the BPCPA in 2004. Thus, looking back at the old *Trade Practice Act* jurisprudence can shed light on the meaning of “deceptive act or practice.”

The term was interpreted by the court in *Director of Trade Practices v. Household Finance Corporation*, [1976] 3 W.W.R. 731 (B.C.S.C.) [*Household Finance*]. To be considered deceptive, it is not necessary that the consumer actually be deceived or misled so long as the act or practice has the “capability, tendency or effect of deceiving or misleading a person”. Such an act may occur before, during or after the transaction.

Household Finance suggests that a practice is deceptive for purposes of the BPCPA if it causes the consumer to commit an error in judgment.

A plaintiff consumer relying on the supplier’s deceptive practice for an action should show:

- a) that he or she was actually deceived by the deceptive practice;
- b) that he or she relied on the deception to the extent that an error in judgment resulted from the deception; and
- c) that the error in judgment caused loss.

The Director need only show that a deceptive practice would tend to cause consumers to make an error in judgment, but does not need to show that any consumer made an error in judgment, to enforce the Act against a supplier.

It is not necessary that there be any deliberate intention to deceive for a practice or act to be deceptive (*Findlay v. Couldwell* (1976), 5 W.W.R. 340).

The BPCPA, similarly to the *Trade Practices Act*, should be interpreted as imposing a high standard of “candour, especially on suppliers who choose to commend their wares” (*Rushak v. Henneken*, [1991] BCJ No 2692 (CA) (QL) [*Rushak*]).

Where there is an embellishing endorsement of the goods, and the supplier knows the goods may be defective in an important respect, these facts must be disclosed (*Rushak*, above).

For the consumer to set aside the consumer transaction on the basis that the supplier engaged in a deceptive act or practice, the representation must be material – what is material depends on the individual circumstances of the transaction (*Rushak v Henneken*, [1986] BCJ No 3072 (SC)).

The court may draw the conclusion that a practice is deceptive on the basis of vague contractual language in circumstances where that language allowed the supplier to claim that additional work was not part of the original contract: see *British Columbia (Director of Trade Practices) v Van City Construction*, [1999] BCJ No 2033.

2. Unconscionable Acts

Sections 7 to 9 of the BPCPA now set out clear prohibitions. Unconscionable acts involve high pressure tactics or demanding consideration far in excess of the market, and may occur before, during or after the consumer transaction. Under s 10(1), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor. The court will look at the particular vulnerabilities of the consumer, such as mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, which will trigger the reviewability of that transaction in the consumer’s mind. Both the common law and statutes

hold the supplier to a stringent standard, demanding that he or she not act unreasonably in order to protect his or her own interests.

Under s 9(2), if it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof is on the supplier to show that the unconscionable act or practice was not committed.

NOTE: As above, s 8(3) sets out a list of circumstances that the court must consider when determining whether a practice is unconscionable. Again, this list is not comprehensive, as the court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

C. Remedies and Sanctions

1. Damages Recoverable by Consumers

Under s 171 of the BPCPA, a consumer may commence a civil action seeking damages for loss due to a deceptive or unconscionable act or practice. As with other civil actions, punitive damages or restitution may also be available. Small Claims Court may be used if the claim does not exceed \$25,000.

2. Transaction Unenforceable by Supplier

Under s 10(1), where there is an unconscionable act or practice in a consumer transaction, that transaction is unenforceable by the supplier.

3. Injunction, Declaration and Class Action

Under s 172, any person, whether or not that person has a special interest in or is affected by a consumer transaction, may bring an action seeking declaratory or injunctive relief. This involves seeking to have the court declare an act to be deceptive or unconscionable and to have the court grant an injunction restraining the supplier from engaging further in such acts. Under s 172(2) the Director may bring an action on behalf of consumers generally or a designated class of consumers.

The BPCPA stipulates that while the Provincial Court has jurisdiction for civil actions under s 171, actions under s 172 must be brought in Supreme Court.

For an example of a class action suit dealing with the BPCPA, see *Dabl v Royal Bank of Canada*, 2006 BCCA 369. Credit card debtors brought a class action suit against the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, and the Bank of Montreal. In the plaintiffs' Statement of Claim, they asserted that the defendants failed to disclose the true cost of borrowing by providing the transaction dates for cash advances on their monthly statements rather than the posting dates (the dates the money was actually advanced), allowing more interest to be charged; the court, however, ultimately rejected this argument.

In any action for permanent injunction under s 172(1)(b), the court may restore to any interested person any property or money acquired by deception or unconscionable acts or practices by the supplier (s 172(3)(a)), and may require the supplier to advertise to the public in a way that will assure prompt and reasonable communication to consumers (s 172(3)(c)).

4. Supplier Found Guilty of an Offence Under the BPCPA

Section 189 creates a list of offences punishable by both fines and imprisonment, which may be sought by the Crown against a party found in breach of the BPCPA. Under s 190, an

individual who commits an offence is liable to a fine of not more than \$10,000, or to imprisonment for not more than 12 months, or to both.

D. Limitation Period

Under s 193, no prosecution under the BPCPA may be started more than two years after the date on which the subject matter of the proceeding arose.

Note that s 193 does not apply to civil proceedings. The limitations period in civil proceedings will depend on the nature of the claim and the time period allowed by the *Limitation Act*. Remember that either the new or the old *Limitation Act* may apply; see **Section II.E: Determine the Limitation Period for Making a Claim**.

E. Powers of the Director

Consumer Protection BC is responsible for the administration and enforcement of the BPCPA. Part 10 of the BPCPA contains all inspecting and enforcement powers of Consumer Protection BC, its inspectors, and the Director. The Director has the power to:

- a) use the same powers that the Supreme Court has during trials of civil action for the purposes of an inspection, to summon and enforce the attendance of witnesses, compel witnesses to give evidence under oath or in any other manner, and to produce records;
- b) institute proceedings or assume the conduct of proceedings on behalf of a consumer;
- c) make an order (called a “freeze” order) against assets of a person who is being investigated (s 159). This order can also be attached to property being held in trust for a person under investigation;
- d) refrain from bringing an action against a supplier and accept instead a written undertaking under s 154 of the BPCPA. This undertaking usually takes the form of a formal agreement between the Director and supplier and may involve consumer redress. It is probably one of the most effective remedies under the BPCPA because it avoids both the time and expense of court proceedings;
- e) issue a compliance order under s 155 of the BPCPA where compliance is mandatory. The Director can order restitution and compensation to the consumer with this function (s 155(4)) without having to go through court proceedings. If a person fails to comply with a compliance order, he or she is committing an offence under s 189(5) and could face a fine of not more than \$10,000, imprisonment for not more than 12 months, or both;
- f) seek declaration and/or injunctive relief on behalf of a consumer, or a class of consumers, and make their applications *ex parte* (s 172); and
- g) impose an administrative penalty under s 164.

F. Deceptive Practices Under the Competition Act

In addition to the protections under the BPCPA, the Canadian *Competition Act*, RSC 1985, c C-34, proscribes various types of deceptive practices. Some common ones are discussed below:

1. More than One Price Tag (“Double Ticketing”)

Shopkeepers often mark goods for sale with more than one price tag. Under the *Competition Act*, RSC 1985, c C-34, it is an offence for the store to charge anything but the lowest price unless the lower price has been crossed out or the new tag covers the older tag (s 54). The older tag does not have to be unreadable; a line over it or a new tag slightly covering it is

fine. However, a cashier may not cross out the older price at the cashier stand. Note that the consumer has no independent right of action. The Competition Bureau, on its website, indicates that “prosecutions under this section have rarely occurred”.

2. Advertising a Sale Price

If a business advertises a sale price, it must charge that price throughout the sale period (*Competition Act* s 74.05). However, the advertiser may be relieved of this obligation if (1) the price was advertised in error and if the advertisement indicated prices were subject to error, or (2) the advertisement is immediately followed by a correction. Advertisers who violate this section may be subject to an administrative penalty (s 74.1).

3. Bait and Switch

If a business advertises a sale, it must stock a reasonable quantity of the item (*Competition Act* s 74.04). The bait and switch tactic occurs when a business advertises an item at a bargain price to attract customers but, having no intention of selling the item, does not adequately stock it. Rather, the business intends to use sale pressure to get customers to buy other, higher-priced items.

If the business does not have adequate stock of a sale item, it must issue rain cheques. Rain cheques are not required, however, if the advertisement states “while quantities last”.

Advertisers who violate this section may be subject to an administrative penalty (s 74.1). A business may avoid penalties stemming from bait and switch tactics if it attempted to supply more of an item than it was able to, if demand for the item was greater than expected, or if the advertisement stated that the sale price was good “while supplies last”.

G. False or Misleading Advertising

All advertising, whether on radio or television, in a newspaper or flyer or posted in a store, is subject to federal and provincial laws that prevent businesses from making false claims that may mislead consumers. The BPCPA’s prohibition against deceptive acts and practices extends to advertising, as a representation made before a sale. (s 4(2)).

Purchasers have a right to know what they are buying. If a person asks for information and the sales agent volunteers it, the information **must** be correct and not deceptive. However, not everything a salesperson says is a term of the contract; some comments are mere puffery. Puffery is the sort of comment that is made to promote a product. Such comments are statements of opinion rather than misrepresentations of fact and are not treated as part of the contract.

An example of puffery is “It’s a great little car.”

An example of a statement of fact is “It’s a 1994 Dodge.”

What would otherwise be puffery may constitute a deceptive act or practice under the BPCPA. In circumstances where a supplier provides a laudatory description of a defective item of which he or she has specific factual knowledge and of which the potential buyer is wholly unaware, the description is not mere puffery, but rather a deceptive act. See *Rushak*, above.

For credit advertising, pay particular attention to ss 59 to 64 of the BPCPA. When there is misrepresentation, a consumer may also have a cause of action at common law.

The Common Law

Despite the breadth of the BPCPA, it does not provide remedies for all contractual situations. Before commercial legislation (SGA) or consumer protection acts (BPCPA), the common law provided remedies for misrepresentation.

a) Fraudulent Misrepresentation

Fraudulent misrepresentation occurs when the vendor knowingly makes a false statement of fact that is material to the contract and the statement serves as an inducement to enter the contract. The buyer may be awarded the common law remedy of rescission and can also sue for damages in the tort of deceit. Breaches of contract damages, such as the expectation of profit, are not available, because a party cannot claim for the contract to be rescinded and, at the same time claim that the contract exists for the purposes of claiming damages.

b) Innocent Misrepresentation

An innocent misrepresentation arises when a representation of fact is false, material to the contract, and the buyer is induced to enter the contract by the representation. Unlike fraudulent misrepresentation, though the representation is not known to be false. The remedy, which is an equitable remedy, is rescission, which attempts to put the parties back in the position they were in before the contract.

A misrepresentation might also be considered to be a term of the contract or as a term in a collateral contract. In this situation, the client can sue for damages if the misrepresentation ends up being untrue.

For the remedy of rescission, there could be several possible bars:

- i) third party rights have arisen;
- ii) an undue delay occurred since the misrepresentation;
- iii) the contract has been executed (not an absolute bar);
- iv) the contract has been affirmed by the aggrieved party; or
- v) it is impossible for the courts to undo the contract.

c) Negligent Misrepresentation

Negligent misrepresentation operates in the same way as innocent misrepresentation, but it arises when the representation is made negligently as opposed to in a completely innocent manner. As with innocent misrepresentation, the remedy is rescission. *Hedley Byrne v Heller (1964)*, AC 465 is one example of a case involving negligent misrepresentation.

V. DIRECT SALES, FUTURE PERFORMANCE AND TIME SHARE CONTRACTS

Since the BPCPA has replaced the *Consumer Protection Act*, the BPCPA covers door-to-door sales, payday loans, credit cards, income tax refund services (although the federal *Tax Rebating Discounting Act*, RSC 1985, c T-3 regulates the actual amount which can be refunded), food plan contracts, unsolicited goods, and similar activities. The primary remedy for consumers in the BPCPA regarding these types of activities is the right to avoid or cease contracts for direct sale or for future services, after giving notice in the manner required by the statute. A single contract may fall under more than one category, and in that case, will attract the requirements and cancellation provisions of each applicable section.

NOTE: When exercising cancellation rights under the BPCPA consumers should be apprised of ss 27 and 28. In most cases, the contract is effectively rescinded by the cancellation; goods must be returned undamaged and payment must be refunded in full.

A. Direct Sales

When consumer is approached by a salesperson, instead of making a conscious decision to seek out a product or service, they may be taken unawares and can be vulnerable to being taken advantage of. The BPCPA recognizes this risk by imposing disclosure requirements and allowing a consumer to cancel the contract in ways the common law of contract does not permit.

A direct sales contract is defined in s. 17 as:

...a contract between a supplier and a consumer for the supply of goods or services that is entered into in person at a place other than the supplier's permanent place of business, but does **not** include any of the following:

- (a) a funeral contract, interment right contract or preneed cemetery or funeral services contract;
- (b) a contract for which the total price payable by the consumer, not including the total cost of credit, is less than an amount prescribed by regulation (an amount that has yet to be set at time of printing: cf. *Business Practices and Consumer Protection Regulation*, BC Reg. 294/2004);
- (c) a prepaid purchase card;

The BPCPA sets out a lengthy list of requirements under ss. 19 and 20 for the content of direct sales contracts, such as the name, address, and telephone number of the seller, the name (in a readable form) of the individual who signs the contract on behalf of the supplier, a detailed description of the goods or services to identify them with certainty, the price, and a detailed statement of the terms of payment. When credit is extended, there also needs to be a description of the subject matter of any security interest. This is **not** an exhaustive list; please consult the Act.

Right of Cancellation

Under s 21 of the BPCPA,

- (a) the purchaser may cancel the contract within 10 days after receiving a copy of the contract. The purchaser need not offer explanations for his or her decision. The vendor then has 15 days after the date of cancellation to refund all money without deduction.
- (b) if a delivery date is specified in the contract and not all of the goods/services are delivered/performed within 30 days of this date, the purchaser may cancel the contract within one year after the date a copy of the contract was received, provided that the purchaser has not accepted or used the goods/services;

- (c) if the contract does not contain information required under s. 19 and 20(1) of the Act, the buyer may cancel within one year of the date of the contract.

A direct sale is unenforceable by the seller if the buyer is required to make a down payment in excess of a prescribed amount (BPCPA, s 20(3)(b)).

NOTE: Whether the purchaser has **accepted** goods is determined by the definition in the *Sale of Goods Act* (s. 39).

The BPCPA does not make oral executory contracts unenforceable. However, s 20 requires that the seller deliver a written copy to the buyer at the time of signing, or the contract is not binding on the buyer.

Section 54 requires that the buyer provide notice of cancellation to the seller, and declares that it may be delivered by any method that permits the cancelling party to produce evidence that the contract was cancelled. Notice by registered mail, electronic mail, personal delivery, and fax is explicitly permitted. Nowhere does the BPCPA explicitly state that a notice of cancellation shall be in writing, but a buyer should be cautious and deliver written notice. The section explicitly permits that the notice can be given to the seller directly, or to the postal, fax, or electronic mail address of the seller shown in the contract. When a buyer rescinds a contract under s 21, that section also provides that the goods may be retained until all of the money paid is refunded.

In *Woodward v International Exteriors (British Columbia) Ltd* (1991), 53 BCLR (2d) 397, 1 BLR 254 (CA), verbal notice of termination of an agreement was sufficient for the consumer to terminate this form of contract. Note that verbal notice may not be sufficient in all instances and written notice remains advisable.

B. Future Performance Contracts

A future performance contract is defined in s 17 as:

...a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed, but does **not** include:

- (a) a contract for which the total price payable by the consumer, not including the total cost of credit, is less than a prescribed amount, (currently no amount has been so prescribed);
- (b) a contract for the supply of goods or services under a credit agreement, as defined in s. 57 (definitions), if the goods or services have been supplied; or,
- (c) a time share contract.

Future services contracts are subject to some important statutory requirements under Part 4, Division 2 of the BPCPA.

The BPCPA sets out a long list of requirements under ss. 19 and 23 for the content of future services contracts, such as the name, address, and telephone number of the seller, a detailed description of the goods or services to identify them with certainty, the price, supply date, and a detailed statement of the terms of payment. When credit is extended, there also needs to be a description of the subject matter of any security interest. This is **not** an exhaustive list; please consult the Act.

Under s 23, a future performance contract is not enforceable by the seller if a rebate or discount is given on the condition of some event occurring after the time the buyer agrees to buy (usually a referral selling scheme whereby the purchaser aids the seller in making a further sale).

Right of Cancellation

If the future performance contract does not contain the required information (ss 19 and 23), then a consumer may cancel the contract by giving notice of cancellation to the supplier within one year of the date that the consumer receives a copy of the contract (s 23(5)). Section 54 sets out the required form and procedure for giving notice. (See **Section V.A.1**).

C. Travel or Vacation Clubs, “Book-of-the-Month”, and Record Clubs (Continuing Services Contracts)

These contracts are called continuing services contracts because, while you may pay now, the contract extends into the future. This type of contract is often used when one joins a karate club or a dance studio, buys a membership in a vacation club, or joins a “book of the month” club.

Continuing services contracts must not exceed 24 months in duration. However, a contract can allow the consumer to renew in writing within one month of its expiry, and if the consumer exercises this option, the contract can continue past 24 months (s 24(3)). If a contract does exceed 24 months in duration, there are remedies available under s 24(6).

Right of Cancellation

Because they are often sold at high-pressure presentations, under s 24 these contracts are subject to a 10 day right of cancellation from the date the consumer receives a copy of the contract (s 25(6)). Section 26(3), which also gives a 10 day right of cancellation, applies to time-share interests not covered by the *Real Estate Development Marketing Act*, SBC 2004, c 41, such as resorts or condominiums.

Contracts for continuing services can also be cancelled if there is a material change in circumstances of the buyer or the seller, and where the buyer or seller gives notice of cancellation (s 25). When alleging a material change in circumstances as the basis for cancelling, the reason must be specified in the notice (s 25(2)).

Material changes in circumstances include, but are not limited to:

- the buyer’s death; and
- permanent disability or permanent relocation further than 30 km from the seller.

Material changes in circumstances of the seller include:

- through the partial or entire fault of the seller, the services are not completed, or at any time the seller appears to be unable to reasonably complete the services in the time frame set out in the contract for the completion of services;
- the services are no longer available because of the seller’s discontinued operation or substantial change in operation; and
- the relocation of the business of the seller 30 km from the buyer without provision of equivalent service within 30 km.

Section 54 sets out the required form and procedure for giving notice. (See **Section V.A.1**).

D. Unsolicited Goods or Services

Under s 11, unsolicited goods or services means goods or services that are supplied to a consumer who did not request them, other than:

- (a) goods or services supplied to a consumer who knew or ought to have known they were intended for delivery to another person;
- (b) goods or services for which the supplier does not require payment; or
- (c) a prescribed supply of goods or services.

Under s 12, a recipient of unsolicited goods has no legal obligation to the sender unless the recipient gives notice of an intention to accept them, or unless the recipient knew or ought to have known that the goods were intended for delivery to another person.

If however, a consumer does pay for unsolicited goods or services, under s 14 the consumer may give to the supplier a demand, in writing, for a refund from the supplier within 2 years after the consumer first received the goods or services if the consumer did not expressly acknowledge to the supplier in writing his or her intention to accept the goods or services.

NOTE: If a consumer is being supplied with goods or services on a continuing basis and there is a material change in the goods or services or in the supply of them, the goods or services are deemed to be unsolicited goods or services from the time of the material change **unless** the supplier is able to establish that the consumer consented to the material change.

E. Distance Sales

Under s 17, a “distance sale” means “a contract for the supply of goods or services between a supplier and a consumer that is not entered into in person and, with respect to goods, for which the consumer does not have the opportunity to inspect the goods that are the subject of the contract before the contract is entered into”. This definition encompasses all forms of commerce where the parties are not face-to-face, such as catalogue sales, sales over the internet, or sales over the telephone. Section 48 stipulates that a supplier must give a consumer a copy of the contract within 15 days after the contract is entered into, and also sets out a list of requirements for distance sales contracts.

Section 49 provides consumer rights concerning cancellation of distance sales contracts. These provisions are an attempt to deal with sales done over the internet. Note that there are different time restrictions on cancellation rights on distance sales depending on which provisions the supplier does not comply with. Once a consumer gives notice to the supplier of the cancellation, the supplier has 15 days to refund to the customer all monies paid in respect of the contract and any related consumer transactions. If the supplier fails to do this, the consumer may have recourse under s 52 if the consumer charged to a credit card all or any part of the total price under the contract.

F. Credit Transactions

Part 5 of the BPCPA deals with the disclosure of the cost of consumer credit.

The Acts set out disclosure requirements, as well as advertising requirements for both fixed and open credit. The basic distinction between fixed and open credit is that open credit involves multiple advances and does not establish the total amount advanced under the agreement. However, open credit can be subject to an overall credit limit. Fixed credit is a credit arrangement that is normally based on a fixed initial advance and a predetermined payment schedule. Under s 105 of the BPCPA, the creditor is obliged to compensate borrowers for contraventions of the Act.

The rules for credit transactions under the BPCPA are:

- Under s 66, lenders are required to furnish debtors with a written statement of disclosure. Consult ss 66-93 for the specific requirements pertaining to your client's situation.
- Under ss 59 to 64, certain requirements flow from the advertising of certain aspects of credit, such as interest-free periods, interest rates, and cost of credit.
- Under Division 4 of Part 5, a borrower has certain rights, such as being able to choose an insurer and to cancel optional services.
- Under s 99, where a credit card is lost or stolen, the holder is not liable for any charges incurred after notice in person or by registered mail has been given to the issuer of the card. In the case of purchases made before notice is given, an individual is only liable for \$50 or up to the credit limit remaining on the card, whichever is less. This protection does not extend to unauthorized use of a card to get cash from an ATM where the cardholder left his or her PIN number in the wallet with the card, and it is stolen (see *Plater v. Bank of Montreal* (1988), 22 BCLR (2d) 308 (Co Ct.)).

1. Notice Required for Increased Interest Rates

Under s 98, there is a notice requirement for increasing credit card interest rates.

2. Unsolicited Credit Cards

Section 96 provides that a credit card issuer must not issue a credit card to an individual that has not applied for one. This does not affect the ability of a credit card issuer to provide a renewal or replacement card that has been applied for. Prepaid Purchase Cards (Gift Certificates and Gift Cards)

Sections 56.1-56.5 regulate the terms of prepaid purchase cards. A prepaid purchase card is a card, written certificate or other voucher with a monetary value that is issued or sold to a person in exchange for the future supply of goods or services. These include gift cards or gift certificates. Section 56.2 prevents any cards from being issued with an expiry date. *Prepaid Purchase Cards Regulation*, BC Reg. 292/2008 contains exemptions from the expiry date prohibition. These include cards issued for a specific good or service, cards issued for a charitable purpose, and cards issued to a person who provides nothing of value in exchange.

G. Regulation of Payday Lenders and Criminal Rate of Interest

Section 347 of the *Criminal Code* prohibits loans that charge a criminal rate of interest, which is defined as an annual rate that **exceeds 60 percent**.

Loans offered by payday lenders, if calculated according to the *Criminal Code*, may charge rates that exceed the amount permitted under the definition. In 2006, the federal government amended the *Criminal Code* to exempt payday loan agreements from the criminal interest rate provision.

Under s 347.1, payday loan agreements are defined and are exempted from s 347 provided that the following three conditions are met:

- i) the loan must be for \$1500 or less and for 62 days or less;
- ii) the person must be licensed or specifically authorized under provincial /territorial law to enter into that payday loan agreement; and

- iii) the province must be designated by the Governor in Council (which will happen in the province has adequate measures to protect recipients of payday loans)

Payday Loans Regulation, B.C. Reg. 57/2009 s. 2 designates payday lenders as a “designated activity” under s 142 of the BPCPA. Section 143 requires anyone who participates in a designated activity to carry a license. A payday lender must carry a separate license for each operating location. The regulations also set limits on the amount of interest that can be applied, mirroring s 347 of the *Criminal Code*. The maximum amount that can be charged on a payday loan is 23% of the principal. Annual interest on the outstanding principal cannot exceed 30%. In addition, a payday loan cannot exceed 50% of the borrower’s net pay. Thus, payday loans in BC are permitted under *Criminal Code* section 347.1, as long as they follow the provincial requirements.

H. Remedies and Sanctions

In addition to the remedies already mentioned that are available to consumers, the BPCPA provides for further sanctions:

1. Fines or Imprisonment

Section 190 establishes a summary conviction offence with penalties of imprisonment up to one year and fines of up to \$10,000 for individuals and \$100,000 for corporations, for any contravention of the BPCPA.

2. Investigation and Search Powers

Part 10 gives the Director the power to investigate and request information where there are reasonable and probable grounds to believe that a person has contravened, is contravening, or is about to contravene the BPCPA or an order made under it.

VI. CONDITIONAL SALES CONTRACTS AND SECURITY AGREEMENTS

The *Personal Property Security Act*, RSBC 1996, c 359 [PPSA] governs conditional sales agreements and security contracts. It established a new unified system for the registration, priority, and enforcement of transactions where collateral is given to secure payment or the performance of an obligation. The main purpose of the PPSA is to offer lenders or creditors a system of priority vis-à-vis other creditors where it is necessary for the lender or seller to take an interest in personal property to ensure the obligations of the borrower or purchaser are met. The legislation effectively creates a system for the registration and enforcement of a security interest against personal property.

Under s 2, the PPSA governs every transaction that creates a security interest. A “security interest” is defined in s 1 as an interest in goods that secures payment or the performance of an obligation.

Chapter 10: Creditors’ Remedies and Debtors’ Assistance has a discussion on the protection offered to a consumer by the PPSA, including the requirements of enforceable security. The PPSA has some special considerations applicable if the goods in which the collateral was taken were consumer goods. Consumer goods are defined in s 1 as goods that are acquired primarily for personal, family, or household purposes.

A. Creditor’s Remedies Against the Debtor

1. Seizure by the Creditor

Section 58 provides that where the debtor defaults on a security agreement, the creditor can seize the collateral item unless the security agreement states otherwise (s 56). Where, however, the collateral is a consumer good and the debtor has paid two-thirds of the total amount secured, the creditor may **not** seize the goods without an application to the court.

2. Action by the Creditor

A creditor can sue the debtor for breach of contract and seek repayment of the monies owed. Unless the security interest has been taken in consumer goods, the secured party can seize **and** sue for any deficiency. When consumer goods form all or merely a portion of the collateral, the secured party must elect to **seize or sue**, subject to s. 58(3).

B. Restrictions on the Creditor's Right to Dispose

Section 59 provides that a creditor cannot sell the seized goods before the expiration of the 20 day notice period since every party entitled to notice under ss 59(6) and (10) may **redeem** the collateral by fulfilling the obligations secured in the security agreement (s 62). Where the collateral is a consumer good, the redeeming party need only pay the amount in arrears (s 62(1)(b)), plus reasonable seizure fees. This is known as the right of re-instatement. It cannot be used more than twice in a 12 month period (s 62(2)).

C. Disqualification from "Seize or Sue" Provisions

A party with a security interest in consumer goods may avoid the "seize or sue" restriction where:

- a) the debtor has engaged in wilful or reckless acts or neglect which have caused substantial damage or deterioration to the goods, and the secured party may seek a court order pursuant to s 67(9) disqualifying the debtor from the rights and remedies ordinarily available under ss 67(1) - (7); or
- b) the secured party discovers after seizure that an accession that was collateral has been removed and not replaced by other goods of equivalent value and free from prior security interests; a claim may be advanced against the debtor for the value of the accession (s 67(8)).

The seizure of consumer goods generally extinguishes the debt in relation to the security agreement. However, there are exceptions:

- If the creditor returns the consumer goods within 20 days after the seizure, that will revive the debt;
- If the security agreement is a mortgage or an agreement for sale and the consumer goods are part of this security and the lender exercises his or her rights under the mortgage or agreement of sale but does not seize the goods, the debt is not extinguished;
- If the creditor has a purchase money security interest in the seized consumer goods and other consumer goods, the debt is extinguished to the extent identified in the security instrument as relating to the seized consumer goods.

These qualifications also apply in the event of a voluntary foreclosure and a voluntary surrender of consumer goods rather than a seizure.

D. Third Party Purchaser's Rights

Under s 30(3), where a third party purchases collateral in the form of consumer goods worth less than \$1,000, and the third party does not have knowledge of the security agreement between the vendor

and the creditor, the third party takes the item free of the creditor's interest, even if registered. This is known as the "garage sale" defence.

The third party's priority over the creditor ends if there is knowledge of the security agreement itself rather than knowledge that the sale constitutes a breach. Under s 1(2), "knowledge" is judged objectively rather than subjectively (i.e. would a reasonable person know?).

NOTE: Even if the creditor's interest in the collateral does not continue because the third party purchaser takes title free of that interest, the creditor's interest will continue in the proceeds of the sale by the debtor to the purchaser (s 28).

E. Application of PPSA to Leases

Many consumers lease cars instead of buying on credit under a financing agreement. A lease **can** qualify as a security agreement: see *Re Bronson* (1995), 34 CBR (3d) 255 (BCSC). Therefore, if they default and the car is repossessed, the "seize or sue" restriction may apply, but the situation is not always clear cut. LSLAP clients should be referred to a lawyer.

F. Bills of Exchange Act

Under Part V of the *Bills of Exchange Act* [BEA], a bill of exchange or promissory note given for a consumer purchase must be clearly marked "Consumer Purchase" (s 190(1)), and where it is marked, the rights of an assignee of the bill or note are subject to any defence the purchaser would have against the vendor (s 191). Where it is not marked, it is void except in the hands of a holder in due course without notice (s 190(2)). The purpose of Part V is to codify the rule in *Federal Discount Corp v St Pierre* 32 DLR (2d) 86 (1962).

Part V does not cover private sales (where the seller is not engaged in the business of selling the goods in question), or sales to small businesses or corporations of items to be used in their business. Nor does it cover a purchaser's loan, i.e. a loan from a lender to a person to enable that person to buy goods and/or services from a seller (subject to s 189(3) below).

Section 189(1) defines a consumer bill and s 189(2) defines a consumer note. Under s 189(3), a consumer bill or note is conclusively presumed if:

1. the consideration for its issue was the lending of money, etc. by a person other than a seller, to enable the purchaser to make a consumer purchase; and
2. the seller and the person who lent the money, etc. were, at the time the bill or note was issued, not dealing with each other at arm's length within the meaning of the Income Tax Act.

If an instrument meets the definition of a consumer note, any defence that consumer would have for an action against him or her by the seller would also be available as against subsequent note holders.

Therefore, if the consumer does not get what he or she has paid for, that person may not be required to pay the loan back when pressed for payment by the assignee. Also, if the seller does not fulfil obligations under a warranty, the consumer will be able to resist payment. (See *Canadian Imperial Bank of Commerce v. Geldart* [1985] BCJ No 1973 and *Canadian Imperial Bank of Commerce v. Kabatoff* [1986] BCJ No 942.)

VII. THE MOTOR DEALER ACT

A. Overview of the Motor Dealer Act

The *Motor Dealer Act*, RSBC 1996, c 316 [MDA] sets up a licensing regime that requires all motor dealers in the province be licensed. The Registrar of Motor Dealers carries out the licensing function. The Registrar has the authority to receive complaints concerning the conduct of a motor dealer and has the authority to refuse to provide a license, or suspend or terminate an existing motor dealer's license.

NOTE: There has been a recent move to industry self-regulation authorized by the Ministry, which entered into an administrative agreement with the Motor Dealer Council of BC

The definition of a motor dealer is a person who, in the course of business:

- (a) engages in the sale, exchange or other disposition of a motor vehicle, whether for that person's own account or for the account of another person, to another person for purposes that are primarily personal, family or household;
- (b) holds himself, herself or itself out as engaging in the disposition of motor vehicles under paragraph (a); or
- (c) solicits, offers, advertises or promotes with respect to the disposition of motor vehicles under paragraph (a),

but **does not** include a salesperson.

The MDA Regulations set out requirements concerning representations made by a motor dealer when offering motor vehicles for sale. A motor dealer is required to disclose to a prospective buyer whether the motor vehicle was previously used as a taxi, police or emergency vehicle, or for organized racing. In the case of a new motor vehicle, the motor dealer must disclose whether or not the vehicle has sustained damage that required repairs worth more than 20 percent of the asking price. In the case of a used vehicle, the dealer must disclose whether the vehicle has sustained damages requiring repairs of more than \$2,000. The motor dealer is also required to disclose whether a vehicle has previously been used as a lease or rental vehicle and whether a used motor vehicle has been brought into the province specifically for the purposes of sale.

A motor dealer is required to disclose to a prospective consumer whether the odometer accurately reflects the true distance travelled by the motor vehicle. The MDA Regulations also set out the required contents of a sale or purchase agreement concerning new vehicles.

Section 34 of the MDA prohibits any person from disconnecting or tampering with an odometer. It is also an offence to drive or operate a motor vehicle with a disconnected odometer. Furthermore, it is an offence for any person to alter, disconnect, or replace a motor vehicle's odometer with the intent to mislead a prospective purchaser about the distance travelled by the motor vehicle. Odometer tampering can significantly increase the apparent sale value of a motor vehicle and, therefore, the consumer should be wary of representations of low mileage. The MDA sets out regulatory responses to odometer tampering. The consumer who suffers loss as a result of odometer tampering has a contractual remedy and may be able to present a claim to the Motor Dealer Customer Compensation Fund Board.

B. Motor Dealer Customer Compensation Fund

An individual who suffers a loss as a result of purchasing a motor vehicle from a registered motor dealer may be entitled to compensation from the Motor Dealer Customer Compensation Fund Board ("the Board"). A consignor of a motor vehicle is also entitled to make an application – on similar grounds as a purchaser – for compensation for the loss of the consigned vehicle or the value of the vehicle. Individuals who have purchased a vehicle, primarily for personal or family use, from a registered motor dealer are eligible to apply to the Board for compensation. Before applying for compensation, the consumer must first make a demand against the motor dealer responsible for the loss. What constitutes an eligible loss is set out in s 5 of the *Motor Dealer Customer Compensation Fund*

Regulation, BC Reg 102/95. An eligible loss must be a liquidated amount arising from a trade-in, full payment, deposit or down payment or other liquidated amount in respect of the purchase of a motor vehicle. The cause of the loss must be related to the bankruptcy, insolvency, receivership, dishonest conduct, or failure of the motor dealer to provide clear title.

Under the *Motor Dealer Customer Compensation Fund Regulation* an eligible loss may also arise from the unexpired portion of an extended warranty so long as it results from the bankruptcy, insolvency, receivership, or other failure of the motor dealer. Claims that will not be compensated include those based upon cost, value or quality, those based on an extended warranty or service if it is recoverable from an insurer, and those related to the portion of the operation of the motor vehicle claimed as a business expense. For further information about making an application for compensation from the Motor Dealer Customer Compensation Fund, call the Vehicle Sales Authority at (604) 575-7255 or visit <http://www.mvsabc.com/consumers/compensation-fund>. A claim against the Fund must be made within two years from the refusal or the motor dealer's failure to pay for the losses.

VIII. MISCELLANEOUS

A. Circumvention of Disclaimer Clauses

Vendors may try to protect themselves from liability arising from oral representations made to a buyer by inserting an exclusion clause into the written contract. Exclusion clauses attempt to invalidate any representations or warranties other than those explicitly mentioned in the written contract. Exclusion clauses can also seek to exclude statutory conditions and warranties, or they can attempt to limit the buyer's default rights. There can be a variety of ways to get around such clauses.

1. Statutory Relief

a) Retail Sales of Goods

SGA s 20(2) states that, in the case of a retail sale of new goods to a consumer, any term of a contract that purports to negate or in any way diminish the statutory conditions or warranties in ss 17 – 19 of the SGA is void.

b) Deceptive Act or Practice

Where a supplier makes oral representations to a consumer, but terms in the contract deny or negate such representations, the vendor may have engaged in a deceptive act or practice under the BPCPA, or .

c) Consumer Transactions Generally

In consumer transactions involving a commercial supplier, the purchaser may invoke s 187 of the BPCPA, which makes oral or extrinsic evidence admissible for determining the understanding of the parties.

2. Common Law Relief

Although the statutory provisions will usually help a consumer defeat disclaimer clauses, several common law doctrines and judicial techniques may also be of assistance.

a) Clause Deemed Not to Be Part of Contract

To rely on an exclusion clause, the seller must show that it is part of the contract. However, the court may find that the clause does not form part of the contract where, for example, it is insufficiently legible, or where it was inserted after the agreement was concluded.

b) Misrepresentation as to the Clause’s Legal Effect

When the seller has misrepresented the legal effect of a disclaimer clause, a court may be willing to render the clause inoperative. Traditionally, however, courts would not invalidate a clause based on a misrepresentation of law, as opposed to fact.

c) Strict Interpretation of Clause

Disclaimer clauses are strictly construed against the party seeking to rely on them. Anything not explicitly found in the clause will not be read into it.

d) Collateral Contract

The court may find that where a clause excludes oral representations, an oral representation made by the seller actually constitutes a collateral (or parallel) contract.

e) Inadequate Notice

Some disclaimer clauses are hidden in the “boilerplate” fine print of the contract and have been held not binding for this reason, if they are particularly onerous and attention was not drawn to them.

B. Consumers’ Rights against Creditors and Debt Collection Agencies

1. If the Client has Serious Debt, Inform the Client of:

- a) the limits of a creditor’s remedies (*Court Order Enforcement Act*, RSBC 1996, c 78), including garnishment and seizure;
- b) the limits to debt recovery (exemptions) under the *Court Order Enforcement Act*, which as of May 11, 1998 were increased substantially; and
- c) options for getting out of debt (see **Chapter 10: Creditors’ and Debtors’ Remedies** for Orderly Payment of Debts information).

2. Legislation Regulating Debt Collection

Business Practices and Consumer Protection Act, SBC 2004

Court Order Enforcement Act, RSBC 1996, c 78

Repairer’s Lien Act, RSBC 1996, c 404

Small Claims Act, RSBC 1996, c 430

Bankruptcy and Insolvency Act (Canada), RSC 1985, c B-3

Debtor Assistance Act, RSBC 1996, c 93

Creditor Assistance Act, RSBC 1996, c 83

Personal Property Security Act, RSBC 1996, c 359

For more information on debtor and creditor law, see **Chapter 10: Debtors' and Creditors' Remedies**.

C. Telemarketer Licensing Regulation

In the *Telemarketer Licensing Regulation*, BC Reg 83/2005 [TLR}, “telemarketer” is defined as “a supplier who engages in the business or occupation of initiating contact with a consumer by telephone or facsimile for the purpose of conducting a consumer transaction.”

Section 4(1) of the TLR requires that a telemarketer have a license for each location in which they conduct business.

Section 7 outlines the various records a telemarketer must keep for **each** sales contract entered into, and stipulates that the records be maintained for a period of two years after the contract is entered into by the consumer.

Section 8 of the TLR prohibits several acts and practices by telemarketers. Section 8(2) prohibits contacting a consumer by either phone or fax on (a) statutory holidays, (b) outside of the hours of 10 a.m. – 6 p.m. on Saturdays or Sundays, and (c) outside of the hours of 9 a.m. – 9:30 p.m. on any other day. Section 8(3) prohibits contacting a consumer more than once in 30 days for the same transaction. Section 8(4) prohibits telemarketers from blocking their number on the call display of the consumer. Section 8(5) requires that, before the consumer enters into a contract or commits to contributing money, a telemarketer acting on behalf of a supplier disclose (a) the name, business address and telephone number of the supplier, or (b) the purpose of the contribution if requesting a donation.

D. Repairer's Liens

The *Repairer's Lien Act* [RLA], which codifies the common law possessory lien, offers an extremely powerful collection tool for those who repair or do other work on chattels. With respect to any chattel, it allows the repairer to simply retain possession of the goods until paid and, if payment is not forthcoming, to sell the goods to recover the cost of the repair. In addition, for a limited category of chattels, the most important of which is motor vehicles, the RLA, if followed precisely, allows the repairer to maintain and enforce a lien on a vehicle, even after it has been returned to the owner. This is a common consumer problem encountered by individuals whose vehicles have been seized by a bailiff following a dispute over the amount of a repair bill. The most important requirement for a valid repairer's lien is that the repairer, after doing the work but before releasing possession of the vehicle, must get the owner to sign an acknowledgement of indebtedness (often included as part of the repair invoice). The repairer then has 21 days to file a lien in the Personal Property Registry and, if everything has been done properly, the lien remains valid for a period of six months and can be renewed for an additional six months. At any time while the lien is subsisting, the garage keeper or repairer can have the vehicle seized by a bailiff.

Another common consumer complaint with respect to repairer's lien seizures is the amount of the bailiff's fee. A schedule to the RLA limits certain bailiff fees. See BC Regulation 424/81. Bailiffs frequently try to demand excessive seizure fees. Complaints about excessive fees charged by bailiffs can be referred to the Director of Debt Collection, Ministry of Attorney General.

E. Liens for Storage

The *Warehouse Lien Act*, RSBC 1996, c 480 gives a statutory lien and power of sale to those who are in the business of storing goods.

F. Towed Vehicles

Under s 188 of the *Motor Vehicle Act*, where an illegally parked vehicle has been towed away, the owner of the vehicle must pay all costs and charges for the removal, care, and storage of the motor vehicle. These costs and charges represent a lien in favour of the keeper of the place where the vehicle is being kept.

G. Electronic Transactions Act

The *Electronic Transaction Act*, SBC 2001, c 10 [ETA] prevents parties from challenging contracts solely on the grounds that they are entered into electronically. The ETA removes legal uncertainty concerning the enforceability of contracts entered into electronically, and is primarily designed to facilitate commercial relations using the Internet. However, s 17 of the Act provides an element of consumer protection. It provides that an electronic record created by an individual is not enforceable where the individual made a material error in the record and: (i.) the electronic agent did not provide an opportunity to prevent or correct the error; (ii.) the individual notifies the other party that an error has been made as soon as practicable after learning of the error; (iii.) the person making the error takes reasonable steps to return the consideration in accordance with the instructions of the other party or destroy the consideration if requested to do so; and (iv.) the individual has not received any material benefit or value from the consideration.