CHAPTER ELEVEN: CONSUMER PROTECTION

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I. INTRODUCTION

A. Overview

This chapter provides a general discussion of consumer protection laws in British Columbia.

While parts of this chapter are concerned with the rights of sellers, the main objective is to aid consumers who want to enforce contractual obligations, cancel contractual obligations, obtain damages for a breach of contract, or file a complaint with the appropriate regulator. This chapter should also help in determining 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 (statutes) takes precedence over the common law, it is crucial to check all relevant statutes (see below) when faced with the legal matters of consumers. For example, some contracts that are enforceable at common law are rendered unenforceable by relevant statutes.

II. GOVERNING LEGISLATION AND RESOURCES

A. Legislation

- *Sale of Goods Act*, RSBC 1996, c 410 [*SGA*].
  The *SGA* 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 and goods sold by sellers in the business of selling that good (e.g. retail stores) than for goods that the purchaser knows are used or sellers who are not in the business of selling that good.

- *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 acts and practices, as well as content requirements for many types of consumer contracts. The *BPCPA* also gives consumers the right, under some circumstances, to cancel contracts where the consumer has ongoing obligations, such as time shares and gym memberships. In addition, the Act regulates businesses that offer such contracts and other types of transactions that are open to abusing consumers, such as direct sales and payday loans. 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* sets out the requirements for motor dealers selling vehicles to retail consumers. It requires disclosure of the prior history of a car (e.g. its use as a taxi), any damage suffered over $2,000, and other important information. Clients with consumer complaints regarding car dealers should be directed to the Vehicle Sales Authority of British Columbia, which has the authority to investigate consumer complaints and provide dispute resolution. Note that the *MDA* underwent several amendments in 2018-01-01 including amendments to the Consumer Advancement Fund that enacted ss 24.02-24.05, and provisions regarding the powers and undertakings of the registrar in ss 26.01-26.12.

- *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 is used to determine who retained title; however, recent cases abolished title as the most important factor. See also **Section VI: Conditional Sales Contracts and Security Agreements**.

- *Bills of Exchange Act*, RSC 1985, c. B-4 [*BEA*], ss. 188-192.
  The *BEA* states that a promissory note is a written promise, like an "I owe you", 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 their material obligations and the other party still has some or all outstanding.
- *Class Proceedings Act*, RSBC 1996, c 50 [CPA].
  The CPA governs the application for and certification of class action proceedings.

- *Ticket Sales Act*, SBC 2019, c 13 [TSA].
  The TSA regulates ticket sales in both primary and secondary markets. The act prohibits the use of certain software and sets out requirements for ticket service providers and suppliers.

B. Resources

A list of resources which clients might find useful:

- **Consumer Protection BC [CPBC]**
  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 CPBC to report the infraction. This office has a mandate to receive and act on consumer complaints generally.

NOTE: 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.

- **Vehicle Sales Authority of British Columbia [VSA]**
  Telephone: (604) 574-5050
  Website: http://www.mvsabc.com
  The VSA is a regulatory agency that oversees the retail sales of motor vehicles in British Columbia. This is the office to contact if a consumer believes that the *MDA* has been violated or has questions regarding the provisions in the *MDA*.

- **Better Business Bureau**
  Telephone: (604) 682-2711 or 1-888-803-1222
  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 or 1-800-565-5297
  Website: http://www.cbabc.org/For-the-Public/Dial-A-Law
  This service provides pre-recorded summaries on the law pertaining to a wide variety of issues in consumer law. Some useful tapes include:
  a) Door-to-Door Sales, Time-Shares and Contracts You Can Cancel: 255
  b) Shopping by Phone, Mail or the Internet: 256
  c) Buying Defective Goods: 257
  d) Dishonest Business Practices and Schemes: 260

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 may 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 and not meant to be taken literally as a contractual term (see Section IV.G).

Whether a statement is a term, representation, or puff affects the remedy available to the consumer: damages (see Section D below), rescission (under a claim of misrepresentation; see Section IV.G), or no remedy, respectively. For this Chapter, we are concerned with terms of a contract.

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 (*Wickman Machine Tool Sales Ltd. v L. Schuler A.G.*, [1974] AC 235). The three types of terms are as follows (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, [1962] 2 QB 26, [1962] 1 All ER 474 at para 49):

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. If a manufacturer/supplier/seller breaches a condition, the buyer is entitled to terminate any further obligations under the contract and sue for damages.

Anticipatory breach is where one party (say, the seller) communicates their intention to breach in the future. The aggrieved party (here, the buyer), if aware of the impending breach, could accept the repudiation by the seller and terminate the contract, ending all future obligations except for the seller's obligation to pay the damages that stem from non-performance. Or, the aggrieved party could **not** accept the repudiation and may wait for the future breach to actually occur before pursuing damages (e.g., if they think 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 contract is **not** terminated, meaning that the innocent party must continue to perform its own obligations under the contract (e.g., the buyer must still pay for the good) but can sue for damages for breach of warranty.

3. Innominate or Intermediate Terms

Innominate or intermediate 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: For certain terms, the *SGA* specifies whether they are conditions or warranties. The *SGA* also implies some terms as conditions or warranties even if they are not expressly included in the contract (see Section C below).

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(1), the *SGA* applies only where the purchaser agrees to buy goods with money as consideration. Hence gifts, barters, 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 (which is the value being exchanged in the contract, 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 rather than money.

According to s 6(3) of the *SGA*, a contract of sale may be absolute or conditional. If the contract is subject to some condition to be fulfilled later, it is called an agreement to sell.

Under s 8 of the *SGA*, it provides that the contract may be either written or oral.

3. Lease Contracts

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

C. Provisions of the Sale of Goods Act

Under ss 16 – 19 of the *SGA*, many terms are implied into contracts for the sale of **new** items. When these implied terms can and cannot be expressly waived by the seller is governed by s 20. The *SGA* also defines these terms as conditions or warranties, thus determining 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)

Under s 16(a), the *SGA* 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)

Under ss 16(b) and (c), the *SGA* provides implied **warranties** that in the future the buyer will enjoy undisturbed possession of the goods, free from any liens, charges, security interests, or other encumbrances in favour of third parties that are unknown to the buyer at the time the contract is made. For example, a contract of sale for a good may be made between a seller and buyer where a third-party lender made a loan to the seller with this good as collateral. If the secured creditor (the lender) subsequently makes claims against the buyer who was unaware of this security interest in the good at the time of sale, 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.

NOTE: **Description** refers to generic characteristics of a good and does not include words of praise about the good.

Most sales will be sales by description. The notable exception is where a buyer makes it clear that they are 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, online shopping, and purchases of products sealed in containers by the manufacturer are also sales by description.

If a sale is made by description and by sample, it is not enough that the bulk of the goods correspond with the sample; the delivered goods must also correspond with the description by which they were sold (s 17(2)).

NOTE: **Specific goods** (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 proferentem* rule. The *contra proferentem* rule states that a contract, if ambiguous, is construed as against the party who wrote it. Where a standard form contract (a "take it or leave it" contract that is drafted entirely by one party without any negotiations with the other party) is used, it is construed as against the party who offered it (usually the seller).

A sale by description may also raise s 18(b) issues (see below).

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

Under s 18(a), if:

a) 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 they rely on the seller's skill and judgment; and
b) The goods are of a description which 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 because the buyer is no longer relying on the seller's skill and judgement.

To establish a claim under s 18(a) of the *SGA*, three factors must be satisfied on a balance of probabilities (*Nikka Traders Inc v Gizella Pastry Ltd*, 2012 BCSC 1412 at 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 at para 71, the court held that s 18(a) provides a warranty that a car is "a reliable vehicle

for use in driving in safety on the roads" and a car being sold must be reasonably fit for such purpose. 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. See *Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd*, 2002 BCCA 78 at 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 the description, the seller is bound by an implied **condition** that the goods are of merchantable quality.

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 (*BS Brown & Son v Craiks 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 (*International Business Machines v Shcherban*, [1925] 1 DLR 864 (Sask CA), [1925] 1 WWR 405).

This section also applies to the sale of **used goods** as well (s 18(b)). 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 (Eng CA).

The CRT has sometimes granted compensation for repair costs for used cars that broke down immediately after purchase from a dealer, on the basis that they violated the implied warranty under section 18(b). For example, in the case of *Sosa v. Reg Midgley Motors Ltd., 2019 BCCRT 487*, the CRT granted the cost of repairs when a serious transmission issue arose just a few days after the sale. The decision was made because the car did not demonstrate durability for a reasonable period. Similarly, in the case of Scoretz et al v. Kolenberg Motors Ltd., 2019 BCCRT 549, the CRT ruled in favour of compensating the Claimant for engine repair expenses, as the engine failed within two months of the purchase.
In any case, where the buyer seeks recovery of the full purchase price based on the implied condition of merchantable quality, they 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.

Sale by Description

This section only applies to a sale by description (s.18(b)). 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 them apart from any representations (see Section III.C.1.d).

Seller who Deals in Goods of that Description

In addition to requiring that the sale be by description, s 18(b) also requires that the seller must "deal in goods of that description." In *Hartmann 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 s 18(b). In paragraphs 43-47, the BC Supreme Court held that the seller was not one "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.

Effect of Examination by the Buyer

There is an **exception** where the buyer has examined the goods; then, there is no condition of merchantable quality to the extent that the examination ought to have revealed the defect. However, if the average person would not have been able to spot the defect, 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 examination.

NOTE: There is no obligation on the buyer to make a reasonable examination or even any examination.

Implied Condition of Reasonable Durability

The goods must be durable for a reasonable period of time with regard to their normal use (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)).

Three implied **conditions** of a sale or lease by sample are set out in s 19(2):

1. The bulk must correspond with the sample in quality;
2. The buyer or lessee must have a reasonable opportunity of comparing the bulk with the sample; and
3. The goods must be free from any defect rendering them unmerchantable that 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 s 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." Exemption or exclusion clauses are subject to the *contra proferentem* rule that such a clause, if ambiguous, may be interpreted strictly against the drafter.

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:

a) The goods are used (except s 16, which also applies to used goods);
b) The purchaser, even a private individual, intends to resell the goods;
c) The lease is to a lessee for the purpose of subletting the goods;
d) The purchaser intends to use the goods primarily for business;
e) The purchaser is a corporation or commercial enterprise; or
f) The seller is a trustee in bankruptcy, a liquidator, or a sheriff.

Where a commercial dealer includes a disclaimer clause exempting the transaction from ss 16 – 19, the clause is void (no legal force or effect), unless one of the above exceptions applies. A seller who does not ordinarily sell the goods in the contract may also exclude themselves out of ss 17 – 19.

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

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.

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*

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 instalments 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 other bailee (not the seller's agent) without reserving a right of disposal (s 46(1)(a));
c) The buyer or the buyer's agent lawfully obtains possession (s 46(1)(b)); or
d) There is a waiver (s 46(1)(c)).

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.

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

The seller has the right to resell:

a) If the goods are perishable, or if notice of an intention to resell is given to the buyer by the unpaid seller, and the buyer does not pay within a reasonable time. In this case, the seller may resell the goods and recover damages from the original buyer for any loss from the breach of contract (s 51(3));
b) If the seller has expressly reserved the right to resell in the contract (s 51(4));

NOTE: 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

Under s 14, unless there is a different intention, stipulations as to the time of payment do not go to the essence of a contract of sale (i.e. they are <u>not</u> 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) Instalments

Under s 35(1), a buyer need not accept delivery by instalments unless that is agreed to. Where a contract is for separately paid instalments, 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 instalment.

6. Rules as to Transfer of Title and Risk

The *SGA* sets out five key rules regarding the transfer of title (and thus risk) of goods between the seller and the consumer in ss 22 – 23. Generally, the intent of the parties is the overriding consideration in determining when title to the goods passes (s 22). However, if the parties did not consider or address the issue of transfer of title in the contract, then the rules under s 23 apply.

The first four rules pertain to specific goods, while the fifth rule pertains to unascertained goods.

NOTE: Recall that specific goods are goods that are agreed to be the only goods whose transfer will satisfy the contract, while unascertained goods are goods that are agreed to be the subject matter of the contract.

1. For an unconditional contract for the sale of specific goods in a deliverable state, then title (and thus risk) passes at the time of contract formation, regardless of when the payment or delivery is made (s 23(2));
2. For a sale of specific goods where the seller is bound to perform something to put the goods in a deliverable state, then title (and thus risk) passes when the task has been performed and the buyer has been notified (s 23(3));
3. For a sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or perform any other task to appraise (set the price of) the good, then title (and thus risk) passes when the appraisal has been performed and the buyer has been notified (s 23(4));
4. For the sale of goods subject to approval, then the title (and thus risk) passes when the consumer signifies their approval or after a specified or reasonable amount of time (ss 23(5) and 23(6)); and
5. For the sale of unascertained or future goods by description, then title passes when the goods are unconditionally appropriated to the contract by the seller (i.e. set aside specifically for sale to the consumer) with the assent of the buyer or the seller delivers the goods to a carrier pursuant to a contract and does not reserve a right of disposal (ss 23(7) and 23(8)). See *Bevo Farms Ltd. v Veg Gro Inc.*, 2008 BCCA 66 for an example of unascertained goods (tomato seedlings) that became unconditionally appropriated when the seller contracted with the carrier for delivery, and thus title and risk had passed to the consumer when the goods were destroyed.

The timing of transfer of title affects the consumer's legal rights in ways including, but not limited to, the following:

- If property was supposed to pass to the consumer by a specified time, but the seller does not deliver by that time, then this is a breach of contract. See Section III.A Identifying and Classifying the Terms of a Contract to determine whether this is a breach of condition or breach of warranty, which determines the remedies available to the buyer;
- Whichever party has property of the goods is presumptively the person who is responsible for the goods if something happens to the goods. See *Kovacs v Holtom*, [1997] A.J. 775 for an example where a convertible was destroyed while being

restored at the defendants' garage shop, and the defendant was liable to the consumer for damages as title (and thus risk) did not yet pass to the consumer under rule #2 (s 23(3)); and

- Whether the seller or the buyer has title to the goods may affect third party claims to the property (e.g., a creditor who has a security interest in the goods).

D. Remedies for Breach of Contract

Actions for breach of contract are covered in ss 52 – 57 of the *SGA*. 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 they 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 unperformed 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), 156 ER 145 (Eng Ex Div)). 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 their expected savings and the market price. Under s 57, it 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 (innocent) party can affirm the contract and seek damages in the future, or terminate the contract which discharges future obligations but still allows for the recovery of 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 aggrieved (innocent) party 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 they 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 their *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.

When a Breach of Condition is Treated as a Breach of Warranty

Under s 15(4), it 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.

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* (1967), 60 WWR 284, 61 DLR (2d) 462 (Sask QB) at para 22, (2) finding a total failure of consideration: see *Rowland v Divall* (1923), 2 KB 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.

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. They may:

1. Accept the repudiation, terminate the contract, and sue for damages right away. In this scenario the buyer is no longer responsible for their obligations under the contract; or
2. If they have 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 their duty to mitigate the loss. In a sale of goods, purchasing the goods from someone else can often mitigate damages because generally, no special interest exists in purchasing the particular goods from a particular vendor, so any substitute should suffice.

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 (*Sky Petroleum Ltd v VIP Petroleum Ltd*, [1974] 1 WLR 576, [1974] 1 All ER 954). Specific performance is a discretionary (for judges to award) equitable remedy and will only be granted if damages are inadequate; for example, where the goods are unique or otherwise unavailable. According to s 3(1)(c) of the *Small Claims Act*, RSBC 1996, c 430, the Small Claims Division of the Provincial Court of British Columbia can grant specific performance in an agreement relating to personal property (e.g. not real property like land or real estate).

4. Rescission

The remedy of rescission seeks to undo a contract and is available for misrepresentation. See Section IV.G 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 in contract law can be claimed beyond the restitution necessary to return the parties to their pre-contractual positions; however, damages may be available in tort law, such as for deceit or fraud. Because rescission is an equitable remedy, 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 s 1.

Each of the three criteria must be fulfilled before relying on the *BPCPA.*

The only exceptions to the applicability of the *BPCPA* are those listed under s 2 of the *BPCPA* and include credit reporting and debt collections practices. These sections apply regardless of whether the transaction or matter involves a consumer or not. Additionally, s 2(2) outlines the limited application of the *BPCPA* to contracts involving the sale, lease, mortgage of, or charge (such as a lien or security interest) on land or a chattel real.

1. Consumer Transaction

A consumer transaction is a dealing that:

a) Involves a supply of goods, services, or real property by a supplier to a consumer for primarily personal, family or household purposes; **or**

b) Is a solicitation, offer, advertisement or promotion by a supplier with respect to the above-mentioned types of transactions.

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 *BPCPA* **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

Generally, the consumer may reside inside or outside BC. In some circumstances, the *BPCPA* will only apply where the consumer resides in 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 (s 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 <u>in the course of business</u> 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 of the *BPCPA*, includes a person who solicits a consumer for a contribution of money or other property.

The definition of supplier in s 1 requires that the transaction occur "in the course of 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* (but keep in mind certain limitations or lower standards for used goods) or at common law. Some remedies in the *SGA* are also available only when goods are sold in the ordinary course of business (e.g. s 18 *SGA*).

Several suppliers can be involved in one transaction. Therefore, in order for the consumer to sue, they 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 (s 15). Recall, as well, that the definition of a supplier under s 1 includes successors and assignees. 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 s 6(2), advertisers who, on behalf of another supplier, publish a deceptive or misleading advertisement are not liable for damages, court actions, or offences, **if** they did not know and had no reason to suspect that its publication would contravene s 5. 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.

Under s 4, the *BPCPA* describes "deceptive" acts or practices. Under s 8, 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. An extensive but non-exhaustive list of deceptive practices is set out in s 4(3).

If a certain practice is not listed in s 4(3), it may still be considered deceptive. The term "deceptive act or practice" was also found in BC's old *Trade Practice 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 "deceptive practice" was interpreted by the court in *British Columbia (Director of Trade Practices) v Household Finance Corp*, [1976] 3 WWR 731, [1976] BCJ No 1316 (SC) at paras 19-23 [*Household Finance*] and later affirmed by the BC Court of Appeal. *Household Finance* suggests that a practice is deceptive for purposes of the *BPCPA* if it causes the consumer to commit an error of judgment. However, a practice of non-disclosure is not necessarily "a deceptive practice"

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

a) That they were actually deceived by the deceptive practice;
b) That they relied on the deception to the extent that an error of judgment resulted from the deception; and
c) That the error of judgment caused loss.

To enforce the *BPCPA* against a supplier, 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.

The *BPCPA*, similarly to the *Trade Practice Act*, should be interpreted as imposing "a high standard of candour, especially on suppliers who choose to commend their wares" (*Rushak v Henneken*, [1991] 6 WWR 596, [1991] BCJ No 2692 (CA) at para 17 [*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*).

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*).

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 Ltd*, [1999] BCJ No 2033 (SC) (QL).

For a list of statutorily defined deceptive acts and practices, see the following link: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_02#section4.

2. Unconscionable Acts

Section 8 of the BPCPA "largely codifies the common law of unconscionability" (*Connor Financial Services International Inc. v. Laughlin*, 2015 BCSC 587 at 27). There are circumstances listed in s 8(3) that the courts must consider when assessing unconscionability, but the essential elements of BPCPA unconscionability and common law unconscionability are the same (*Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para 54). The test for unconscionability is whether there is an "inequality of bargaining power and a resulting improvident bargain" (*Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para 65). Both essential elements are contextual, and the circumstances listed in s 8(3) can aid the court in their assessment. For example, in *A Speedy Solutions Oil Tank Removal Inc.*, 2021 BCCA 220, common industry practice and what terms competitors would have agreed to were both relevant in determining if the bargain was improvident. Furthermore, as per s 8(3)(b), the court will look at the particular vulnerabilities of the consumer to assess the inequality of bargaining power, 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.

One difference between common law and BPCPA unconscionability is the onus. 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. Another potential key difference between common law unconscionability and BPCPA unconscionability is timing. In *Uber v Heller* at para 74, the court states that "Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement now works a hardship upon them"". However, s 8(1) states that "An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.". This difference between common law unconscionability and BPCPA unconscionability is noted in *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699 at para 71.

NOTE: As noted 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 at the time of the contract. Ultimately, the essential elements of common law unconscionability need to be met.

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.

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 $35,000 (*Small Claims Rules*, BC Reg 261/93, Rule 1(4)).

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. Injunctions, Declarations and Class Actions

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 *Dahl v Royal Bank*, 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 a 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

Under s 189 is 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 under the *BPCPA* 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*; see Section IX.E: Determine the Limitation Period for Making a Claim.

E. Powers of the Director

Consumer Protection BC [CPBC] is responsible for the administration and enforcement of the *BPCPA* and is also empowered by another piece of legislation: the *Business Practices and Consumer Protection Authority Act*, SBC 2004, c 3. Part 10 of the *BPCPA* contains all inspecting and enforcement powers of CPBC, 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. Thus, although CPBC is not empowered to actually seize money, it is able to freeze accounts, which can be a way to encourage supplies to transfer funds to consumers;
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, they are 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) File an undertaking, compliance order, or a direct sales prohibition order with the Supreme Court. Doing so would mean that the undertaking or order is deemed to be a court order, and thus it will be enforceable as such (s 157). This can be useful in encouraging resolution amongst parties.
g) Seek a declaration and/or injunctive relief on behalf of a consumer, or a class of consumers, and make their applications *ex parte* (s 172); and
h) Impose an administrative penalty under s 164.

While there are a number of actions that CPBC is empowered to take, including pursuing civil and quasi-criminal enforcement, it is much more likely that CPBC will be involved in handling complaints and in investigations. Complaints can be initiated on Consumer Protection BC's website: https://www.consumerprotectionbc.ca/consumer-help/start-a-complaint/.

F. Deceptive Practices Under the Competition Act

In addition to the protections under the *BPCPA*, the *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(2)). 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 (see Section III.A).

- 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 they have 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.

1. 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:

- Third party rights have arisen;
- An undue delay occurred since the misrepresentation;
- The contract has been executed (not an absolute bar);
- The contract has been affirmed by the aggrieved party; or
- 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 & Co Ltd v Heller and Partners Ltd*, [1961] 3 All ER 891 (HL) is an example of a case involving negligent misrepresentation.

V. DIRECT SALES, FUTURE PERFORMANCE AND TIME SHARE CONTRACTS

The *BPCPA* has replaced the *Consumer Protection Act*, and the *BPCPA* now also covers door-to-door sales, payday loans, gym memberships, unsolicited goods and services, and a number of other contracts (note that this is a non-exhaustive list of things the BCPCA covers). 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. Furthermore, if a supplier will not provide a refund as required under Division 2 of the *BPCPA*, s 55 stipulates that a consumer may be entitled to recover the refund as a debt due.

A. Direct Sales

When a consumer is approached by a salesperson, instead of making a conscious decision to seek out a product or service, they may be taken unaware 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 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 funeral contract, interment right contract or preneed cemetery or funeral services contract (see *Cremation, Interment and Funeral Services Act* and its associated regulations which, like the *BPCPA* and its regulations, are enforced by Consumer Protection BC);
- A contract for which the total price payable by the consumer, not including the total cost of credit, is less than a prescribed amount of $50 (*Consumer Contracts Regulation* B.C. Reg 272/2004 s 4 [CCR]); and
- 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 (meaning any sort of arrangement where the individual/buyer can pay at a later date), there also needs to be a description of the subject matter of any security interest (such as collateral that the seller may hold in the buyer's property). This is **not** an exhaustive list; please consult the *BPCPA.*

Under s 5 of the CCR, there are several exemptions to the applicability of the *BPCPA* to direct sales contract. Such exemptions include:

- Certain classes of direct sellers who are selling goods or services for which they are licensed, registered or incorporated (s 5(4)).
- Direct sellers who enter into a direct sales contract at agricultural shows or fairs, trade shows, craft shows, temporary kiosks in shopping malls, or similar types of exhibits (s 5(5)).
- Direct sellers who attend the place following a request that was made at least 24 hours in advance by the consumer or a friend or relative of the consumer who is not an associate of the direct seller.

1. 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 their 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; and
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)). In the CCR, s 4(2) sets the amount of down payment prescribed under s 20(3)(b) as the lesser of $100 or 10% of the total price.

NOTE: Whether the purchaser has **accepted** the 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(3) requires that the seller gives a written copy of the contract to the buyer at the time of signing. Otherwise, the contract is not binding on the buyer.

Under s 54, the *BPCPA* 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 are 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) at para 10, 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 contract for which the total price payable by the consumer, not including the total cost of credit (amount to be paid later), is less than a prescribed amount of $50 (CCR s 6);
- 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;
- A time share contract; or
- A prepaid purchase card.

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 (meaning that the supplier allows the individual/ buyer to pay all or part of the purchase price at a later date), there also needs to be a description of the subject matter of any security interest (e.g. collateral). This is **not** an exhaustive list; please consult the *Act*.

Under s 23(4), 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).

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)). The required form and procedure for giving notice is set out in s 54.

C. Continuing Services Contracts: Gym Memberships, Travel or Vacation Clubs

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, or buys a membership in a vacation club.

Continuing services contracts must not exceed 24 months in duration, including all options to extend or renew the contract (s 24(3)), but may allow the consumer to renew the contract in writing within one month of the expiry of the contract (s 24(4)). If a contract does not comply with s 24(3) or is not validly renewed pursuant to s 24(4), alternative remedies are available under s 24(6):

a) The contract is not binding on the consumer for the period beyond 2 years;
b) Within 15 days of the consumer's request, the supplier must refund to the consumer all money paid for the period beyond 2 years; and
c) If the supplier does not comply with (b), the consumer may recover that money as a debt due.

1. Right of Cancellation

Because they are often sold at high-pressure presentations, 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)). A 10 day right of cancellation also applies to time-share interests that are not covered by the *Real Estate Development Marketing Act*, SBC 2004, c 41, such as resorts or condominiums (s 26(3)).

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.
- The buyer is mentally or physically unable to participate in the activity they signed up for.

- The buyer has relocated more than 30 km further from where they entered into the contract.

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 further from the buyer without provision of equivalent service within 30 km.

The required form and procedure for giving notice are set out in s 54.

Additionally, if the business has made significant changes to the services it originally offered, like closing down, moving, or removing certain amenities, it may be considered a material change by the supplier, and the buyer may have a right to cancel.

To exercise their right of cancellation, buyers of continuing services can fill out the following forms and send them to the other party:

- To cancel a continuing services contract within 10 days: https://www.consumerprotectionbc.ca/wordpress/wp-content/uploads/2017/06/Cont.-serv.-cancellation-within-10-days.pdf
- To cancel a contract because of the buyer's change in circumstances (buyer's material changes): https://www.consumerprotectionbc.ca/wordpress/wp-content/uploads/2017/06/To-cancel-your-contract-because-of-your-change-in-circumstances-fill-out-this-form..pdf

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:

- Goods or services supplied to a consumer who knew or ought to have known they were intended for delivery to another person;
- Goods or services for which the supplier does not require payment; or
- 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.

However, if 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 their 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 can establish that the consumer consented to the material change.

E. Distance Sales

Under s 17, a "distance sales contract" 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 but does not include a prepaid purchase card". 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. A supplier must give a consumer a copy of the contract within 15 days after the contract is entered into, as per s 48, which also sets out a list of requirements for distance sales contracts. The information that must be disclosed to the consumer prior to the consumer entering into the distance sales contract is set out in s 46. For example, the supplier must disclose a detailed description of the goods, the currency, delivery arrangements and the cancellation policy, if any. This is not an exhaustive list; please see the *Act*.

Additional requirements for contracts that are in electronic form are in s 47. Specifically, the supplier must make the information from s 46 available in a manner that the consumer can access, retain, and print. The supplier must also give the consumer the opportunity to correct errors and accept or decline the contract.

Consumer rights concerning cancellation of distance sales contracts are in s 49. Note that there are different time restrictions on cancellation rights for 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 (s 50). 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, and the consumer may also be entitled to recover the refund as a debt due (s 55).

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 (lender) 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 (borrowers) with a written statement of disclosure. Consult ss 66 – 93 for the specific requirements pertaining to your client's situation.
- Under ss 59 – 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 situations where a credit card is used with a personal identification number at an ATM (see *Plater v Bank of Montreal*, [1988] BCWLD 986, 22 BCLR (2d) 308 (Co Ct)).

1. Notice Required for Increased Interest Rates

Under s 98, there is a notice requirement for certain changes in credit card interest rates.

2. Unsolicited Credit Cards

A credit card issuer must not issue a credit card to an individual that has not applied for one (s 96). This does not affect the ability of a credit card issuer to provide a renewal or replacement card that has been applied for.

3. Prepaid Purchase Cards (Gift Certificates and Gift Cards)

The terms of prepaid purchase cards are regulated under ss 56.1 – 56.5. 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.

Under s 56.2, cards are prevented 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.

In *Sharifi v. WestJet Airlines Ltd.*, 2022 BCCA 149, West Jet issued WTB credits for a variety of reasons, including cancellation of flights. The court found that these credits were not prepaid purchase cards. This was because the credits were not directly purchased. The plaintiff purchased a prepaid flight, and the credits were contingent on future events that may never have happened. The Court stated that the credits were "an entirely different form of financial product or device than that which is contemplated in s. 56.1 of the BPCPA and the other relevant statutes." at para 61.

G. High-Cost Loans (Payday Loans)

1. Criminal Code

The *Criminal Code* prohibits loans that charge a criminal rate of interest (s 347), 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. Payday loan agreements are defined and are exempted from s 347 provided that the following three conditions are met (s 347.1):

1. The loan must be for $1500 or less and for 62 days or less;
2. The person must be licensed or specifically authorized under provincial law to enter into that payday loan agreement; and
3. The province must be designated by the Governor in Council (which will happen in a province that has adequate measures to protect recipients of payday loans)

2. Payday Loans

Under the *Payday Loans Regulation*, BC Reg 57/2009, s 2 designates payday lenders as a "designated activity" under s 142 of the *BPCPA*. A payday lender "means a person who offers, arranges, provides or otherwise facilitates payday loans to or for consumers" and includes "a person who, for compensation, arranges, negotiates or facilitates an extension of credit". Anyone who participates in a designated activity must carry a license (s 143). A payday lender must carry a separate license for each operating location. They must have a sign at each location displaying this license number, the maximum charges permitted in BC (15% of principal), the amount they charge, the total cost of borrowing $300 for 14 days, and the annual percentage rate they charge.

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 $15 for every $100 borrowed including all charges and fees;
- In addition, a payday loan cannot exceed 50% of the borrower's net pay to be received during a single pay period within the payday loan term; and
- If the repayment amount is not paid, default fees cannot exceed 30% per annum on the outstanding principal.

Thus, payday loans in BC are permitted under *Criminal Code* s 347.1, as long as they follow the provincial requirements.

These requirements do set out a number of additional restrictions on payday lenders (s 112.08 of *BPCPA*). Notably, a payday lender may **not**:

- Sell insurance to or for the borrower, or require or request that the borrower insure a payday loan;
- Issue a new payday loan to a borrower who already has a payday loan issued by the lender;
- Require, request or accept consent from a borrower to use or disclose the borrower's personal information for a purpose other than offering, arranging, providing or otherwise facilitating a payday loan;
- Require, request or accept any undated cheque;
- Require, request or accept any post-dated cheque, pre-authorized debit or future payment of a similar nature, for any amount exceeding the amount to repay the payday loan by the due date, including interest and permissible charges (although, a one-time fee of $20 is allowed for a dishonoured cheque or pre-authorized debit – see s 17(2)(b) of the Payday Loans Regulation);
- Require or request any payment from the borrower before it is due under the loan agreement;
- Grant rollovers (i.e. charge a fee to extend a loan's due date);
- Require, request or accept an assignment of wages from the borrower (and if they do the assignment of wages is not valid);
- Require, request or accept from the borrower or any other person, as security for a payday loan, any personal property, real property, or documentation that could be used to transfer title in personal property or real property; or
- Discount the principal amount of a payday loan by deducting or withholding from the initial advance an amount representing any portion of the total cost of credit.

Additionally, there is a mandatory period set out in the regulations where a consumer is allowed to return the money and cancel the payday loan. This period begins on the date that the borrower receives the first advance and expires at the end of the second day that the payday lender is open for business after that first advance (*Payday Loans Regulation* s 14.2(1)).

3. High-Cost Credit Products

High-cost credit products, set out in part 6.3 of the BPCPA, are loans or lines of credit that charge high interest rates and/or various fees. The formal definition of a **High-Cost Credit Product** is:

a) A fixed credit product that has an APR that exceeds the prescribed APR and meets other prescribed criteria;

b) An open credit product that has an annual interest rate that, calculated in accordance with the regulations, exceeds the prescribed annual interest rate and meets other prescribed criteria,
c) A lease that has an APR that exceeds the prescribed APR and meets other prescribed criteria, or
d) A prescribed product through which credit (e.g. a loan) is extended by a high-cost credit grantor to a borrower (e.g. the consumer) primarily for a personal, family or household purpose, but does not include a payday loan, mortgage on real property or prescribed credit product.

NOTE: Because interest rates can be compounded (interest on interest) at different frequencies (usually monthly, but can also be annually, semi-annually, quarterly, weekly, daily, or even continuously – which is set by the lender as a term of the contract for the loan or other credit arrangement), annual percentage rate (APR) is the convention for quoting interest rates on an annual basis. Since legislation also expresses interest rates in APR, this allows one to directly compare the APR-quoted interest rate from the contract to the APR-quoted limit in the statute.

The BPCPA limits the rate of high-cost credit products and sets out other limitations and prohibitions. A high-cost credit grantor is prohibited from accepting, requesting, or charging certain types of fees, including undisclosed amounts and penalties. The BPCPA also grants the borrower cancellation rights, including the right to cancel the agreement within the next day the credit grantor is open for business. There are required terms that a grantor must include in all high-cost credit agreements, and a grantor is prohibited from enticing potential borrowers by stating or implying that it will improve their credit, or by promising any prize or reward as an incentive to enter into a high-cost credit agreement. Furthermore, there are additional restrictions on collection and the use and disclosure of the borrower's information. The list available remedies can be found in s 112.31 of the BPCPA.

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

For any contraventions of the *BPCPA*, s 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.

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 (e.g. the contract is subject to some condition to be fulfilled later) and security contracts. The *PPSA* 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, regardless of the form of the agreement, even in agreements that do not appear to be security agreements, so long as it is creating a security interest in substance. A "**security interest**" is defined in s 1(1) as an interest in goods that secures payment or the performance of an obligation.

NOTE: For the purposes of this section, goods is used to define security interests. However, the actual definition is broader than that. For more information, see ss 1(a) and ss 1(b) "security interest".

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(1) as goods that are acquired primarily for personal, family, or household purposes.

A. Creditor's Remedies Against the Debtor

1. Control by the Creditor

Under s 58, the *PPSA* provides that, where the debtor defaults on a security agreement, the creditor can take control of the collateral item through any method authorised by law with a few select exceptions (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 (s 58(3))

2. Action by the Creditor

A creditor (lender) can sue the debtor (borrower) for breach of contract and seek repayment of the monies owed. Additionally, the creditor can enforce their interest in the collateral by seizure (s 58) or possession (s 61). Generally, the secured party (lender) can seize **and** sue for any deficiency. However, 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).

3. Acceleration Clauses

A security agreement provides that a creditor may accelerate payment (or performance) by the debtor if the creditor, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is about to be impaired or that the collateral is or is about to be placed in jeopardy (s 16).

B. Restrictions on the Creditor's Right to Dispose

Under s 59 of the *PPSA*, a creditor cannot sell the seized goods before the expiration of the **20-day** notice period, as every party entitled to notice under ss 59(6) or ss 59(10) via approved methods outlined in s 72 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 (i.e. debt owing to date) plus reasonable seizure fees (s 62(1)(b)). This is known as the **right of reinstatement**. 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 (borrower) is a company, a partnership of corporations, or a joint venture of corporations (s 55(4)(a));
b) 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
c) 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)).

NOTE: Accession means goods that are installed in or affixed to other goods. For example, a shovel attached to a truck. See ss 38 and 1(1) for more information about accessions.

The seizure of consumer goods generally extinguishes the debt in relation to the security agreement. However, there are exceptions under s 67:

- If the creditor (lender) 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, in the case that the lender exercises their rights under the mortgage or agreement of sale but **does not** seize the goods, the debt is not extinguished; or
- If the creditor (lender) 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.

For consumer goods only, if the creditor (lender) chooses not to enforce their interest in the collateral and chooses to seek judgement instead, the security interest in the collateral is also extinguished (s 67(10)(a)).

D. Third Party Purchaser's Rights

Under ss 30(3) and 30(4), 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 purchaser is known more commonly as a ***bona fide* purchaser for value without notice**.

The third party's priority over the creditor ends if there is knowledge of the pre-existing security interest. Under s 1(2), "knowledge" is judged **objectively** rather than subjectively (i.e. would a reasonable person know?).

NOTE: 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 of the security (collateral) by the debtor (borrower) to the *bona fide* purchaser if the original collateral is continuously perfected under s 28(2) or the proceeds are perfected within 15 days under s 28(3),

unless the creditor authorized the deal. For more information on perfection and attachment, see s 19 and s 12, respectively.

Security is perfected when the requirements under the *PPSA* are met and has attached, meaning that the collateral has come into existence (i.e. if security has not attached, then there is no collateral). Under s 12, a security interest attaches when:

a) Value is given;
b) The debtor has rights in the collateral; and
c) There is an enforceable security interest (see s 10 for writing requirements for security agreements) unless the parties specifically agree to postpone the time of attachment, in which case the security interest attaches at that specified date.

Generally, once security is perfected, the creditor's interest has priority over the interests of third parties, whereas unperfected security takes a lower priority (s 19). However, as described above, one exception to s 19 is in s 30 where a creditor's interest in the collateral does not continue because of a *bona fide* purchaser's interest, but the creditor's interest will continue in the proceeds.

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 *Daimler Chrsyler Services Canada Inc. v Cameron*, 2007 BCCA 144 for factors and *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 a promissory note (i.e. an "I owe you") 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* (1962), 32 DLR (2d) 86.

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.

A consumer bill is defined in s 189(1), and a consumer note is defined in s 189(2). A **consumer bill** or note is conclusively presumed if (s 189(3)):

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 the consumer would have for an action against them by the seller would also be available against subsequent noteholders (the seller sells a good to the consumer and, in exchange, receives a note from the consumer, which is like an "I owe you" or a promise to be paid back). Therefore, if the consumer does not get what they have paid for, the consumer may not be required to pay the loan back when pressed for payment by the lender's assignee. Also, if the seller does not fulfil obligations under a warranty, the consumer will be able to resist payment (*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.

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 (see "NOTE" below), 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.

NOTE: As of April 5, 2021, the definition of a "motor vehicle" under the *MDA* was amended under s 1 to exclude a farm tractor, motor assisted cycle or regulated motorized personal mobility device. The definitions of these three exclusions can be found in the *Motor Vehicle Act*.

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 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.

Under s 34 of the *MDA*, it is prohibited to disconnect or tamper 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 [MDCCFR]. 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 (s 7). For further information about making an application for compensation from the Motor Dealer Customer Compensation Fund, call the Vehicle Sales Authority at (604) 574-5050 or visit http://mvsabc.com/compliance-and-claims/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

Under s 20(2) of the *SGA*, 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*.

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. In *Thornton v Shoe Lane Parking Ltd.*, [1971] 2 QB 163, the exclusion clause was written on signs inside the parking lot and was found to not have been incorporated into the contract, as the contract was concluded when the parking ticket was given by the machine at the entrance to the parking lot.

b) Misrepresentation as to the Clause's Legal Effect

When the seller misrepresents 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. However, for a court to find there is a collateral contract, the collateral contract must also have all the elements of an enforceable contract (e.g. offer, acceptance, consideration, etc.)

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 (*Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601, 83 DLR (3d) 400 (Ont CA)).

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*; 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, c 2
- *Court Order Enforcement Act*, RSBC 1996, c 78
- *Repairer's Lien Act*, RSBC 1996, c 4047
- *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."

Under the *TLR*, s 4(1) requires that telemarketers have a license for each location from which they conduct business.

A telemarketer must keep various records for **each** sales contract entered into and the records be maintained for a period of two years after the contract is entered into by the consumer (s 7).

Under s 8 of the *TLR*, several acts and practices by telemarketers are prohibited. Under s 8(2), it is prohibited to contact a consumer by either phone or fax on:

- Statutory holidays;
- Outside of the hours of 10 a.m. – 6 p.m. on Saturdays or Sundays; and
- Outside of the hours of 9 a.m. – 9:30 p.m. on any other day.

A telemarketer is prohibited from contacting a consumer more than once in 30 days for the same transaction (s 8(3)) and blocking their number on the call display of the consumer (s 8(4)). Furthermore, before the consumer enters into a contract or commits to contributing money, a telemarketer acting on behalf of a supplier must disclose (s 8(5)):

- The name, business address and telephone number of the supplier, or
- The purpose of the contribution if requesting a donation.

D. Repairer's Liens

The *Repairer's Lien Act*, RSBC 1996, c 404 [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. Bailiffs frequently try to demand excessive seizure fees. A schedule to the *RLA* limits certain bailiff fees. See *Fees Regulation*, BC Reg 424/81. 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(4) of the *Motor Vehicle Act*, RSBC 1996, c 318, 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:

1. The electronic agent did not provide an opportunity to prevent or correct the error;

2. The individual notifies the other party that an error has been made as soon as practicable after learning of the error;
3. 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
4. The individual has not used or received any material benefit or value from the consideration.

H. Civil Resolution Tribunal

British Columbia's new *Civil Resolution Tribunal Act*, SBC 2012, c 25 (*CRTA*), establishes a new dispute resolution body, the Civil Resolution Tribunal (CRT). The Tribunal provides a new online venue for the resolution of small claims matters. It encourages 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.

NOTE: The CRT is relatively new and has been subject to ongoing amendments to its enacting legislation and associated regulations. Therefore, it is advisable to double check with the *CRTA* and its regulations to ensure that a potential claim can be brought under the CRT.

The Civil Resolution Tribunal is able to resolve (and has initial exclusive jurisdiction of):

Small claims disputes up to a maximum value of $5,000 (which is referred to as the "tribunal small claims" under s 118 of the *CRTA*, the amount of which is set under s 3 of the *Tribunal Small Claims Regulation*, BC Reg 232/2018) 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

Claims related to motor vehicle accidents up to $50,000 (which is referred to as the "tribunal limit amount" under s 133 of the *CRTA*, the amount of which is set under s 7 of the *Accident Claims Regulation*, BC Reg 233/2018), such as:

- Damages for injuries suffered due to a motor vehicle accident;
- Determination whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act*;
- Damage to property (such as vehicle) incurred due to a motor vehicle accident.

Strata disputes between owners of strata properties and strata corporations for a wide variety of matters such as (*CRTA* s 121):

- 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 (such as the Strata Property Act), regulations or bylaws; and
- Issues regarding the common property.

For more information on the Civil Resolution Tribunal and the Small Claims Court, see **Chapter 20: Small Claims**.

I. Air Passenger Protection Regulations

Passengers on aircraft recently received an additional set of legal protections in the cases of delayed flights, denied boarding, children under 14 travelling with or without family, and musical instrument transportation. The *Air Passenger Protection Regulations* SOR/2019-150 [APPR] under the *Canada Transportation Act* went into effect with some protections entering into force on July 15th, 2019 and fully entering force on December 15th, 2019. There are also differences in the requirements for a large carrier (defined as carrying over 2 million people worldwide per year for the past 2 years) and a small carrier. The information below applies to **large carriers**, and small carriers have similar but slightly different obligations. Please see the *APPR* itself for more information.

1. Communication with Passengers

Air carriers must make its terms and conditions surrounding:

- Flight delay, flight cancellation and denial of boarding;
- Lost or damaged baggage; and
- The assignment of seats to children who are under the age of 14 years

available in simple, clear and concise language (*APPR* s 5(1)). Additionally, they need to provide this information (or a hyperlink to this information) on all digital platforms that they use to sell tickets and on all documents on which the passenger's itinerary appears (s 5(2)).

In the airport, the carrier is required to display signage indicating that passengers have certain rights under the *APPR* in the case of lost/damaged baggage or denied boarding.

There are additional requirements on the carriers and sellers of tickets for air travel in terms of advertisement (ss 25 – 31). Please see the regulation for more information.

2. Delays, Cancellations, and Denial of Boarding

a) General

Under s 13(1), the *APPR* sets out the information that must be provided to passengers in the event of a delay, cancellation, or denial of boarding:

- The reason for the delay, cancellation or denial of boarding;
- The compensation to which the passenger may be entitled for the inconvenience;
- The standard of treatment for passengers, if any; and
- The recourse available against the carrier, including their recourse to the Agency.

In the case of a delay, the carrier is also required to give status updates every 30 minutes until a new departure time is set or alternative travel arrangements have been made (s 13(2)).

There are three possible categorizations for a delay, cancellation, or denial of boarding: it is not within the control of a carrier, it is in control of the carrier, or it is in the control of the carrier but is required for safety purposes. Determining the category of the incident is the first step for determining the benefits that are required to be afforded to the passenger.

The carrier is not at fault in situations such as weather conditions that render safe operation impossible, instructions from air traffic control, a medical emergency,

a labour disruption within the carrier, illegal acts or sabotage, a collision with wildlife, or a security threat. It also includes a delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation caused by something outside of the control of the carrier where the carrier took all reasonable measures to mitigate the impact of the earlier delay or cancellation. These are merely examples and other situations could potentially be classified as not within the control of the carrier (s 10).

This table below sets out the benefits that must be provided to passengers in the event of a delay, cancellation, or denial of boarding (ss 10 – 21):

Carrier Must:	**Carrier not at fault**	**Carrier at fault, but needed for safety**	**Carrier at fault**
Inform the passenger as set out in s 13 and detailed above	Yes	Yes	Yes
Provide food, drink, and access to communication free of charge in case of delay or cancellation	No	Starting 2 hours after original departure time, if passenger informed of delay/cancellation less than 12 hours before departure time	Starting 2 hours after original departure time, if passenger informed of delay/cancellation less than 12 hours before departure time
In the event of a cancellation, denial of boarding, or a delay of more than 3 hours where the passenger desires, provide alternate travel arrangements free of charge or a refund	A confirmed reservation for the next available flight with the carrier that is travelling to the destination within 48 hours; Or if that cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport; No refund need be offered	Provide a refund or, A confirmed reservation for the next available flight with the carrier that is travelling to the destination within 9 hours; If that cannot occur, a confirmed reservation for a flight to the destination by any other carrier from the original airport within the next 48 hours; Or, if that also cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport.	Provide a refund (minimum $400) or, A confirmed reservation for the next available flight with the carrier that is travelling to the destination within 9 hours; If that cannot occur, a confirmed reservation for a flight to the destination by any other carrier from the original airport within the next 48 hours; Or, if that also cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport.
Provide compensation for a delay or cancellation with less than 14 days of notice	No	No	Compensation depends on how long it delays arrival to destination: $400 if between 3 and 6 hours of delay $700 if between 6 and 9 hours of delay $1,000 if more than 9 hours of delay
Standard of Treatment for denial of boarding	No standard of treatment required by the regulations	Before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the	Before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the

		following treatment free of charge: (a) food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and (b) access to a means of communication. If a benefit is offered in exchange for a passenger giving up their seat, the carrier must provide the passenger with a written confirmation before the flight departs	following treatment free of charge: (a) food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and (b) access to a means of communication. If a benefit is offered in exchange for a passenger giving up their seat, the carrier must provide the passenger with a written confirmation before the flight departs
Provide compensation for denial of boarding	No	No	Compensation depends on how long it delays arrival to destination: $900 if between 3 and 6 hours of delay $1,800 if between 6 and 9 hours of delay $2,400 if more than 9 hours of delay

Compensation must be monetary unless (APPR s 21):

- [The carrier] offers compensation in another form that has a greater monetary value than the minimum monetary value of the compensation that is required under these Regulations
- The passenger has been informed in writing of the monetary value of the other form of compensation;
- The other form of compensation does not expire; and
- The passenger confirms in writing that they have been informed of their right to receive monetary compensation and have chosen the other form of compensation.

In the case of compensation for delay, cancellation, or a refund, compensation needs to be applied for to the carrier before the first anniversary of the day on which the flight delay or flight cancellation occurred (s 19(3)).

In the case where a passenger's class of ticket changes on an alternate travel arrangement made by the carrier because of a delay, cancellation, or denial of boarding, the carrier may not charge an additional fee if alternate travel arrangements are of a higher class and, if the carrier was at fault for the delay cancellation or denial of boarding, must compensate the passenger the difference in the ticket cost if the alternate travel arrangement is of a lower class (s 17(6)). To the extent possible, the carrier must provide services that are comparable to those of the original ticket (s 17(3)).

b) Denial of Boarding, Priority Rules

When a passenger is denied boarding in a case where the carrier is at fault (even if it is done for safety reasons), there is a procedure in place for determining who is to be denied boarding (APPR s 15):

1. The air carrier must ask all passengers if they would be willing to give up their seat, and cannot deny boarding to a passenger until it has done so;
2. The carrier must not deny boarding to a passenger that is already on the aircraft, unless it is required for safety reasons; and
3. If any passenger(s) must be denied boarding, the carrier must start by denying boarding to passengers that fall into the lowest category on this list that contains passengers who are still entitled to board the plane:
    a) An unaccompanied minor;
    b) A person with a disability and their support person, service animal, or emotional support animal, if any;
    c) A passenger who is travelling with family members;
    d) A passenger who was previously denied boarding on the same ticket; and
    e) All other passengers.

c) Delay on the Tarmac

There are additional protections in place if a delay occurs while waiting on the ground in the aircraft either before take-off or after landing. Once there is a delay, the air carrier is required to provide access to the following, free of charge (s 8(1)):

- If the aircraft is equipped with lavatories, access to those lavatories in working order;
- Proper ventilation and cooling or heating of the aircraft;
- If it is feasible to communicate with people outside of the aircraft, the means to do so; and
- Food and drink, in reasonable quantities, taking into account the length of the delay, the time of day and the location of the airport.
- If urgent medical assistance is required, the carrier must facilitate access to that assistance

In addition, after 3 hours of delay on the ground the carrier must provide an opportunity for the passengers to disembark provided that it is not likely for take-off to occur in less than 45 minutes after the 3-hour delay (s 9).

3. Lost or Damaged Baggage

In the case where baggage is lost (even temporarily) or damaged, the carrier must provide compensation of up to $2,100 (see *APPR*) and a refund of any baggage fees (s 23).

4. Priority Seating for Children under 14

By December 15th, 2019, the carrier must facilitate the assignment of a seat to a child who is under the age of 14 years by offering, at no additional charge,

a) In the case of a child who is four years of age or younger, a seat that is adjacent to their parent, guardian or tutor's seat;
b) In the case of a child who is 5 to 11 years of age, a seat that is in the same row as their parent, guardian or tutor's seat, and that is separated from that parent, guardian or tutor's seat by no more than one seat; and
c) In the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row (s 22).

The carrier must compensate the passenger for the difference in ticket cost if the seat assigned to the child is of a lower class and may ask for additional payment equal to the difference in ticket price if the passenger chooses a seat that is higher class than the ticket (s 22(3)).

5. Musical Instruments

All carriers must have policies in place for the transportation of musical instruments, including restrictions with respect to size, weight, quantity, and use of stowage space in the cabin; fees for transporting instruments; and the options available for a passenger if the airplane that the flight actually takes place on is different than expected and has insufficient storage space in the cabin.

Carriers must accept musical instruments as checked or carry-on baggage unless the specific instrument is too heavy, too large, or too unsafe according to the general terms and conditions of the carrier.

J. Cheque Cashing Fees for Government Issued Cheques

The *BCPCA* sets out a restriction on the amount allowed to be charged to a person in fees for cashing a government-issued cheque, such as a cheque issued under the Employment and Assistance Act for income assistance (s 112.13). Specifically, under the *Government Cheque Cashing Fees Regulation BC Reg 127/2018* (*GCCFR*), a person may not charge a cheque cashing fee of more than $2 plus 1% of the value of the cheque up to a maximum of $10 total (*GCCFR* s 3).

K. Consumers and Services Handling Human Remains

The *BPCPA* makes exceptions for contracts that can be considered funeral contracts, interment right contracts, and preneed cemetery or funeral services contracts (as defined in s 17). Part 4, Division 3 of this Act (ss 29 – 45) outlines contractual requirements and consumer protections for interactions between consumers and suppliers involved in the provision of these types of services.

Furthermore, the *Cremation, Interment and Funeral Services Act*, SBC 2004, c35 (*CIFSA*) governs much of the activity surrounding the handling of human remains, including the disposition, exhumation, removal, transportation, and storage of these remains. This legislation also dictates contractual requirements for contractual interactions between consumers and services including crematoria, funeral providers, and cemeteries, as well as containing stipulations for other types of interactions between consumers and these services.

L. Ticket Sales

The *Ticket Sales Act*, SBC 2019 [TSA], has come into force to regulate the conduct and practices of primary and secondary ticket sellers.

Primary ticket sellers are persons who are the original ticket seller or promoter. Secondary ticket sellers are persons who sell tickets that were originally made available by primary ticket sellers, in other words ticket re-sellers. Notably, the TSA prohibits software that is meant to circumvent security, access and control measures that are meant to ensure an equitable ticket buying process, in other words, many types of bots. It also requires disclosure of the total price of the ticket, including additional fees, and the face value of the ticket. The TSA also offers guarantees and protections to consumers in cases where their ticket is unusable because of counterfeit or cancellations.

Section 8 of the TSA also has prohibitions in respect to related primary and secondary ticket sellers. Secondary ticket sellers who are related to the primary ticket seller must not make a ticket available for sale unless the primary ticket seller already made that ticket available for sale to the public. For example, in *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699, Ticketmaster, a primary

ticket seller, was also participating in the secondary ticket market for resale tickets, and only on tickets where it was also the primary ticket seller. Section 8 of the TSA now means that for these types of tickets, Ticketmaster must make them available on the primary market to the public before they can re-sell them on the secondary market.

IX. FORUM OF REDRESS

There are multiple forums through which the client can seek a resolution. Once the client's issue has been diagnosed legally, it is still necessary for the client to know where and how they can bring their claim. This section will cover the 3 major options and outline the pros and cons of each.

A. Arbitration

Many consumer contracts have an arbitration clause. This clause means that instead of taking up the issue in court, the issue will be taken up in arbitration. There are, however, instances where an arbitration clause can be unenforceable, and therefore not binding on the consumer.

1. BPCPA s 172 Remedies

In *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, the SCC decided that consumers can always bring their action invoking s 172 of the BPCPA to the supreme court, and that this was a statutory right. However, the SCC also stated that the choice to restrict arbitration clauses in consumer contracts is a matter of legislation and the courts must therefore defer. This means that for other claims, whether under other sections of the BPCPA, other statues or common law, arbitration clauses are valid and enforceable unless otherwise restricted.

2. Unconscionability

On a case-by-case basis, courts will determine if an arbitration clause is unconscionable and therefore unenforceable. In *Uber Technologies Inc. v. Heller*, 2020 SCC 16 [*Uber v Heller*], the SCC found the arbitration clause to be unconscionable and therefore unenforceable. Much like unconscionability in other terms of a contact, the court evaluated two elements to determine unconscionability: whether there is an "inequality of bargaining power and a resulting improvident bargain" (*Uber v Heller* at para 65). In *Uber v Heller*, the SCC determined there was an inequality of bargaining power because it was a standard form contract, there was a large disparity in sophistication between the parties, and a person in Heller's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The SCC also determined that there was an improvident bargain because of the US$14 500 up-front cost of arbitration. Therefore, the term was determined to be unconscionable and therefore unenforceable.

B. Consumer Protection BC

Consumer Protection BC is the regulator of many types of consumer transactions in BC. They license and inspect regulated businesses, assist consumers by responding to inquiries and providing information, and investigate alleged violations of consumer protection laws. Consumers can report alleged violations to Consumer Protections BC, and CPBC has investigative and enforcement powers to respond to those complaints.

C. Civil Resolution Tribunal / Small Claims / Supreme Court

Claims less than $5000 must be taken to the Civil Resolution Tribunal (CRT). If the claim is between $5001 and $35 000, the claim must be taken to Small Claims. Claims for more than $35 000 are taken to the Supreme Court. Refer to the Small Claims chapter for more information about the CRT and Small Claims.

D. Class Action

In many cases, it is not economically justifiable for a consumer to pursue their individual claim through the courts. For example, if their claim is for $100, they may have to spend money and hours of their time to reach a successful outcome at the CRT. For many consumers, this is simply not economical. There is also an issue of risk and competence; there is no guarantee that the time spent

will result in a successful claim. Even though the CRT does not allow representation unless they grant permission, in *The Owners, Strata Plan NW 2575 v. Booth, 2018 BCSC 1605*, the court acknowledged that this does not bar the party from relying on counsel to prepare their submissions and assist, as long as the lawyer does not directly participate. Therefore, even if they are not directly represented, a big corporation keen on protecting their business interests will have access to more resources and legal advice than the average person bringing a claim to the CRT. This may make it difficult for a consumer to be successful, even if they commit a substantial amount of time making their claim.

Class Actions allow claimants to aggregate their individual claims. A lawyer can then represent the whole class, and will often work on a contingency fee arrangement, meaning the lawyer will take a percentage of the awarded amount. This shifts the risk to the lawyer and enables the class to get representation where they might not be able to individually. A representative plaintiff is appointed to act on behalf of the class as a whole. This is typically a member of the class, but there are exceptional circumstances where a person who is not a member of the class can be certified (*Class Proceedings Act*, RSBC 1996, c 50, s 2 (4) [CPA]). Class actions have an application process and either the plaintiff or defendant can apply.

1. Plaintiff Class Proceeding (CPA s 2)

A resident of British Columbia who is a member of the class can commence a proceeding on behalf of the class. They need to appoint a class representative and certify the proceeding as a class proceeding. Refer to CPA s 4 for additional requirements and responsibilities when applying for a class proceeding.

2. Class Certification (CPA s 4)

For a proceeding to qualify as a class proceeding, it needs to meet the certification requirements. The pleadings must disclose a cause of action, there must be an identifiable class of 2 or more persons, the claims of the members of the class need to raise common issues, a class proceeding needs to be the preferable procedure for the fair and efficient resolution of those common issues, there needs to be a representative who will fairly represent the interests of the class without a conflict of interest, and that representative needs to have produced a workable plan setting out how they will advance the proceeding and notify members of the class. CPA s 4 (2) outlines how to determine if a class action is the preferable procedure, and s 4(3) and s 4.1 lay out multi-jurisdictional considerations. The case *Gomel v Live Nation Entertainment (Ticketmaster)*, 2021 BCSC 699, offers an in-depth example of certification.

X. LSLAP CLINICIAN GUIDE FOR 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. The *SGA* permits a contract to be partly in writing and partly by word of mouth, or implied by the conduct of the parties (s 8). The *BPCPA* states that parole (verbal) or extrinsic evidence can be admissible evidence toward understanding what agreements the parties made (s 187). 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 their rights are or what solutions they would find acceptable.

- **When the client arranged the transaction, did they 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 their rights?** According to s 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". Furthermore, the *SGA* allows some of the rights or duties under a contract of sale to be set aside (ss 20 and 69). At common law, if a party waives rights, they may be estopped from later insisting on them.

- **Has the other party already performed all or part of the obligations?** 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 (s 15(4)). However, they 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 their 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 provides that a party to a contract may, instead of refusing to perform a disputed obligation, perform the obligation under protest if they give 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 (s 62). Letting the other party know may be the simplest 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 (BCSC), 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 or as terms of the agreement. Under s 8(1) of the *SGA*, it 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

To enforce the terms of a contract, there must be a contract and the particular terms must be enforceable under that contract.g

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.G 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 they ordered type 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 they have assumed. This is a difficult defence because a court is unlikely to excuse the party from obligations on account of their unilateral mistake unless the other party was aware of the mistake.

5. Laches or Acquiescence, Waiver, and Estoppel

If a party knowingly allows the other party in a contract to proceed according to a mistaken assumption that is to the other party's own detriment, then the initial party may have acquiesced to the mistaken assumption by inaction, and it may be enforceable against them.

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 their 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 Trees House*, [1947] 1 KB 130, [1956] 1 All ER 256.

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), 54 WWR 257, 55 DLR (2d) 710 (BCCA) and *Harry v Kreutziger* (1978), 95 DLR (3d) 231 (BCCA) 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, [1991] 5 WWR 389 for an example of undue influence.

Duress is the coercion of the will to the point where it vitiates consent. There must be a contractual promise that is extracted from pressure (such as a demand or threat), where there was no practical alternative but to agree to the demand, and the victim demonstrated they contested to the pressure (such as protesting). See *NAV Canada v Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28 for an example of duress, specifically economic duress.

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] 7 WWR 179, 135 DLR (4th) 423 (BCCA) 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 Canada (Minister of National Revenue)*, [1997] FCJ No 1622, [1998] 1 FC 549 (CA). The Court will consider the purpose and object of a statutory prohibition when deciding whether the contract is enforceable or not. *Continental Bank Leasing Corp v Canada*, [1998] 2 SCR 298 at para 67, in particular, offers a good summary of the law of illegality.

8. Duty of Honest Performance

The Supreme Court of Canada has recently recognized that there is a general organizing principle of good faith and duty of honest performance in the context of Canadian contract law (*Bhasin v Hrynew*, 2014 SCC 71 at para 33). The duty of honest performance requires contracting parties to act honestly in the performance of contractual obligations. Note that this is not a fiduciary duty and parties remain free to act in their own self-interest, as long as they do not lie or mislead the other party. Since the duty of honest performance applies generally, to all contracts, it would also apply to consumer transactions where one party has been dishonest or misled the other party.

E. Determine the Limitation Period for Making a Claim

The *Limitation Act*, SBC 2012, c 13 sets out a general time limit of **2 years** on starting any claim from the time that the claim is discovered (s 6(1)). Generally, a claim is **discovered** on the first day that a person knew or ought to have known that the injury, loss, or damaged had occurred and was caused (or contributed to) by an act or omission of the person against whom the claim is (or may be) made and that the court would be the appropriate means to seek a remedy (s 8). Usually, this will be at the time of the act, but not always. If the person was (or is) a **minor** or was (or is) otherwise incapable of managing their affairs due to a disability, special discovery rules apply (ss 18 – 19). There are also special discovery rules in the case of fraud, trust property, and securities amongst others (ss 12 – 17).

In addition, certain acts provide exceptions to the general limitation period set out in the *Limitation Act*. For example, the *Local Government Act*, RSBC 2015, c 1 sets out that an action against a municipality must be commenced within **6 months** after the cause of action first arises (s 735). Because of this, you must carefully check through the acts associated with your cause of action to ensure that you will not miss a limitation date.

If the claim was discovered before June 1, 2013, the former *Limitation Act* applies. At this point, the claim would be outside the limitation period unless there is an exception in the act for the type of claim brought. Under the former act, if the claim is 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 6 years. However, under s 3(2)(a), where damages claimed arise from physical damage to persons or property, the limitation period is 2 years**,** even where the claim is based on contract. In addition, if the claim is for negligence as well, the limitation period is 2 years.

F. Determine the Forum of Redress

Determine if there is an arbitration clause. If there is, determine if there are enforceability issues for that arbitration clause. If there is no arbitration clause or it is unenforceable, determine the eligibility of the claim as a class action. If the claim appears to meet the certification requirements for a class action, the client will need to be advised of the pros and cons of class actions and individual claims and the merits of their claim. Keep in mind what forum their individual claim qualifies for (CRT, Small Claims, Supreme Court), as this may impact the context and circumstances of their individual claim. The aggrieved consumer can also report the alleged violation to Consumer Protections BC.