



Law Reform
Commission of
Saskatchewan

Proposals for Amendments to *The Sale of
Goods Act*

Consultation Report

September 2023

YOUR COMMENTS AND OPINIONS ARE WELCOME.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* (proclaimed in force in November 1973) and began functioning in February 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues a background or consultation paper to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

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This consultation report and other Law Reform Commission of Saskatchewan publications are available on the Commission's website (<http://www.lawreformcommission.sk.ca>) and on the Publications Saskatchewan website (<http://www.publications.gov.sk.ca/departement.cfm?d=72&cl=1>).

Professor Emeritus Ronald Cuming KC was the principal consultant for this project.

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Call for Responses

The Law Reform Commission of Saskatchewan is interested in your response to the tentative recommendations for reform of *The Sale of Goods Act* as set out in this report. Your comments and opinions on the topic are welcome and will be an important part of the Commission's deliberations on its final recommendations on this project.

How to Respond

Responses may be sent by December 31, 2023

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If you would like to contribute to the consultation process but are unable to give individual or written feedback, please contact the Director to discuss the possibility of providing feedback through alternate means. Any comments you provide in your written response may be included in the Commission's final report to the Ministry of Justice. Respondents may be identified by name in the final report, unless they expressly advise the Commission to keep their names confidential. Submissions and responses will generally not be posted on the Commission's website, however respondents should be aware that the Commission may be required to release information contained in consultation responses under the terms of *The Freedom of Information and Protection of Privacy Act*.

I. Background

- [1] The total value of wholesale trade in Saskatchewan was over \$2.5 billion over the course of 2020/2021, which represents the fifth largest volume among Canadian provinces. However, the great bulk of the contracts entered into to support this wholesale trade were made in the context of legislation largely based on an 1893 English statute (the “1893 Act”¹) and supplemented by a complex pattern of case law established by Canadian and United Kingdom courts. This anomaly is more glaring when comparing Saskatchewan sale of goods law to the law applicable to international sales transactions and consumer sale transactions which is relatively modern and largely complete. While other common law provinces and territories have retained legislation almost identical to *The Sale of Goods Act*, other countries with modern commercial systems – including the United Kingdom which adopted the 1893 Act– have long since modified some of its provisions or completely replaced it with a new, modernized wholesale sale of goods legislation.
- [2] The inadequacies of *The Sale of Goods Act* of Saskatchewan (the “Act”) are highlighted by the fact that the 1893 Act was designed to codify important features of English sale of goods case law as it existed when Sir Mackenzie Chalmers drafted it. As might be expected, it reflected an economic structure that was vastly different from the one currently existing in Canada. Furthermore, the Act was not designed to be a complete code of sale of goods law; a great deal was left to the common law of contract. While a positive aspect of this approach was to allow judicial development of many features of sales law, the negative result was to create complexity and obscurity.

II. Canadian Reform Proposals

- [3] While wholesale sale of goods law is multifaceted and complex, Canadian legislators have had available for many years proposals for its modernization proffered by experts. In 1979, the Ontario Law Reform Commission published an extensive and detailed report proposing modernization of Ontario sale of goods law. In the same year, the Uniform Law Conference of Canada (“ULCC”) established a committee to review the Ontario Law Reform Commission Report and to develop proposals for a *Uniform Sale of Goods Act* (“USGA”). In its 1981 Report,² the Committee recommended a USGA based largely on the Ontario proposals. Thereafter, the Legislative Drafting Section of the ULCC made what were thought to be only drafting changes in the proposed legislation. However, the review Committee objected to many of those changes. In 1987, a ULCC Progress Report recommended amendments to USGA and in 1989, further amendments were made. All amendments were approved by the ULCC in 1989, and Saskatchewan was asked to set them out

¹ *Sale of Goods Act*, 1893, c. 71.

² See Uniform Law Conference of Canada, “Uniform Sale of Goods Act”, online: <<https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Sale-of-Goods-Act>>.

in a consolidated document. In 2000, the ULCC decided to address the 1982 USGA as part of its Commercial Law Strategy.³

- [4] In 1982, the Alberta Law Reform Institute published a report in which it examined and, with some amendments, recommended the ULCC-proposed USGA for enactment by the Alberta Legislature. The Manitoba Law Reform Commission published in 1983 a report recommending enactment of USGA with minor changes. Notwithstanding the abundance of expert proposals for modernization, the 1893 Act has been retained, largely unchanged, in all common law jurisdictions.

III. The Case for Reform

- [5] Given the history of attempts to reform sale of goods law in Canada, there is some basis for skepticism that any new proposal from the Law Reform Commission of Saskatchewan for the modernization of Saskatchewan's sale of goods law will be any more successful than past efforts of the ULC and other provincial law reform agencies. However, there is precedent for Saskatchewan leadership in law reform that should dispel some of this skepticism. The Saskatchewan Legislature has established a reputation for enacting legislation addressing important aspects of provincial commercial law such as *The Personal Property Security Act*, (which was significantly amended in 2017), *The Commercial Liens Act* in 2001, *The Enforcement of Money Judgments Act* in 2010 and *The Reviewable Transactions Act* in 2021.
- [6] One can only speculate as to the reasons legislators in common law jurisdictions have not taken advantage of the draft legislation prepared by law reform agencies to modernize outdated Canadian sale of goods law. It would strain credulity to argue that the 1893 Act provides an adequate legal structure for contemporary wholesale sales contracts. A few "explanations" come to mind when seeking the reasons for failure of Canadian legislators to update wholesale sale of goods law.
- [7] One such explanation is that the need for modernizing sale of goods law has been met through creative judicial interpretation of the 1893 Act, and application of basic contract principles. A very rough measure of court involvement in addressing sale of goods law in Canada is the number of reported cases over the last 125 years. During this time there was an average of 21 cases each year that resulted in reported decisions. During the period of 2016-2021, there were a total of 149 reported cases in all jurisdictions, 21 of those reported cases were decided by Saskatchewan courts. One may extrapolate from these figures that litigation plays an important, but not dominant, role in sale of goods law. However, there is reason to question reliance on the amount of litigation as a measure of the problems associated with inadequate sale of goods law. Litigation costs are high and many parties to sale contracts cannot afford to litigate. This can result in parties

³ See Uniform Law Conference of Canada, "Proceedings of the Eighty-Second Annual Meeting" (August 2000) at 50, online (pdf): <<https://www.ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/2000-Victoria-Proceedings.pdf>>.

agreeing to settle disputes or conceding their positions without being able to protect their economic interests.

- [8] Another possible explanation is that, given the freedom of contract, parties to sales contracts are able to address most potential problems without the need for a detailed statutory structure setting out their rights. However, this explanation ignores the reality of many sales markets. In many cases involving the sale of goods there is a significant disparity of bargaining power between the parties. This is often characteristic of situations where one party is economically strong and legally sophisticated, whereas the other party is a small business owner with limited resources. Default rules contained in a modern code of statutory law can protect weaker parties against sharp practices occurring during the formation or performance stages of a relationship between sellers and buyers. A modern sale of goods law could be the basis for requiring good faith and fair dealing in the formation of the contract and performance of the parties' obligations.
- [9] A modern sale of goods law applicable to wholesale transactions is relevant even in cases where there is no disparity of economic power between the parties. It is important for parties to be able to minimize transaction costs associated with negotiating the many facets of the relationship between the parties, particularly those relating to performance of goods involved and remedies in the event of default by one of the parties. A modern code of sales law can minimize costs and delays by providing rules that match modern commercial expectations. Parties may still want to contract around aspects of those rules, but they are likely to have less need for doing so when the law reflects parties' expectations.
- [10] Another possible explanation for legislative inaction is the law reform version of "follow the leader." Since the 1893 Act is essentially uniform throughout common law jurisdictions, there may be a tendency on the part of legislators (if they consider the matter at all) to conclude that, while modernization of wholesale sale of goods law is important, it is best to wait until most other jurisdictions (particularly neighboring jurisdictions and Ontario) have modernized their sales law before they act on it. In its 1983 Report, the Manitoba Law Reform Commission qualified its recommendation that the Manitoba Legislature enact new sales law based on the USGA, with the recommendation that, before the bill is proclaimed, the Government of Manitoba should be satisfied that at least one other province has proclaimed USGA in force, or will proclaim USGA to be in force on or about the same time.⁴
- [11] While there is obvious merit in having interjurisdictional uniformity in a country like Canada that has a federal constitutional structure, this should not be a dominant factor in the decision of legislators to address much needed changes and modernization of legislation. When the uniformity is based on obsolete law, it has a negative effect. A policy of maintaining inadequate law simply

⁴ Manitoba Law Reform Commission, "Uniform Sale of Goods Act Report #57" (1 November 1983) at 4, online (pdf): http://www.manitobalawreform.ca/pubs/pdf/archives/57-full_report.pdf.

because one jurisdiction fails to modernize equivalent law robs every other jurisdiction the benefits resulting from general improvements in the law to all jurisdictions. It was not a factor with respect to the modernization of Saskatchewan sale of goods law relating to consumer transactions in 1974, nor was it a factor in the decision of the Saskatchewan Legislature to enact modern legislation in other important areas of the law, some of which has provided patterns for law reform in other jurisdictions.

- [12] Perhaps the most significant factor underlying the reluctance to adopt USGA in any Canadian common law jurisdiction has been the conclusion that the perfect is the enemy of the good - a complete revision of wholesale sale of goods law, as proposed by the ULCC, was too much for the legal and business communities to absorb at one time.

IV. A Complete Code or Targeted Amendments?

- [13] Apart from Article 2 of the United States *Uniform Commercial Code*, reform of sale of goods law in other common law jurisdictions has been accomplished through piecemeal changes to the 1893 Act. This approach avoids the criticism that USGA is “too much of a good thing”, or “too much to swallow in one gulp.” Comprehensive sale of goods law is complex and multifaceted. While a complete reform of sale of goods law was accomplished and adopted in all of the United States, prior experience in Canada indicates that, at best, modest changes to the existing Act may stand a better chance of being accepted by a legislature. A modest reform approach would result in the Act being changed only to the extent necessary to address what are determined to be significant matters. This is the approach that has been adopted in the preparation of this report. When developing the recommendations set out below, sale of goods law is examined to identify those features of the Act and associated laws that are outdated, inadequate, or a source of confusion and needless complexity. When addressing these features, careful attention would be paid to *The International Sale of Goods Act*, *The Consumer Protection and Business Practices Act*, Article 2 of the *Uniform Commercial Code* and changes made to the *United Kingdom Sale of Goods Act*.

V. Principal Objective

- [14] The approach adopted in the preparation of this report involved an assessment of all features of the Act and related common law principles to determine which provisions require modernization, clarification, supplementation, or replacement. While several of the recommended amendments deal with technical matters or embody public policy choices, most are the result of the need to provide clarity to the law. The assumption is that existing vagueness and inadequacy in the law relating to the sales transaction do not serve the interests of the parties involved and are a detri-

ment to the economy of the province. Persons who engage in sales contracts must make risk assessments associated with those contracts, one aspect of which is an *a priori* assessment of their legal obligations and their rights should a problem arise that requires a legal solution. A legal structure for determining these rights and obligations that requires *ex post facto*, costly, and protracted litigation does not facilitate legal risk assessment or efficient dispute settlement. The principal amendments recommended in this report have been designed to give clarity to central features of the law that the current system does not provide. If adopted by the Legislature, Saskatchewan's sale of goods law will not be dramatically different from that of other provinces. However, it would be much more in line with the expectations of commercial practices. As such, it would not create any surprises for parties whose sales contracts would be governed by it.

- [15] There are two related features of this report that involve significant conceptual departure from existing Saskatchewan sale of goods law: elimination of the condition-warranty structure of the Act; and adoption of a perfect-tender-with-cure approach to performance by the parties to the contract. Each of these features are examined in the following paragraphs.

VI. Elimination of the Condition-Warranty Structure of the Act

- [16] The Act divides contractual provisions in two categories: conditions or warranties. A “warranty” is defined in section 2(n) as “an agreement... the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.” In the case of a buyer, this means that the buyer must keep the defective goods and bring an action in damages or seek to get a price reduction. While the term “condition” is not defined (and is sometimes used in the Act in the non-statutory sense), in the context of the condition-warranty distinction, it refers to a term of the contract, the breach of which gives the affected party a right to treat the contract as repudiated. This permits a buyer to reject the defective tender. Subsections 13(2)-(3) and subsection 52(1) provide:

13(2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract.

13(3) A stipulation may be a condition though called a warranty in the contract.

52(1) Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat a breach of a condition on the part of the seller as a breach of warranty the buyer is not by reason only of the breach of warranty entitled to reject the goods; but he may:

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

[17] The specified implied contractual obligations of the seller labelled “conditions” are the right to sell (subsection 14(a); the requirement that goods correspond to contract description (section 15); the requirement that goods be of merchantable quality and suitable for communicated purpose (section 16); the requirement that goods delivered correspond to sample (section 17); and the obligation to deliver and pay (section 28). In subsection 31(2) a failure that allows a buyer to treat the contract as repudiated is not labelled a condition.

[18] In some contexts, a party must treat a breach of condition as a breach of warranty, such as found in sections 13(4) and 35 below:

13(4) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof or where the contract is for specific goods the property in which has passed to the buyer, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there is a term of the contract expressed or implied to that effect.

35 The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he does any act in relation to them that is inconsistent with the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

[19] As a result of these provisions, a buyer’s right to reject defective performance that amounts to a breach of condition may be lost by acceptance (or deemed acceptance) of the whole or part of the goods, or when the contract is for the sale of specific goods and the property in the goods has passed to the buyer. In the latter case, the right of rejection is always lost since, as result of subsection 20 *Rule 1*, the property in specific goods passes as soon as the contract is entered into. The seller’s right to treat the contract as repudiated by the buyer’s refusal to pay the price as set out in the contract is equally arbitrary. This right depends upon whether timely payment is specifically identified in the contract as being the “essence of the contract.” Otherwise, as a result of subsection 12(1), it does not amount to a breach of condition.

[20] The warranty-condition structure of the Act was rejected as a feature of general contract law. The result is that it is confined to those aspects of the Act where it is expressly made applicable. The contractual terms classification system of the 1893 Act was rejected by the English Court of Appeal in *Hong Kong Fir Shipping Co. Ltd. V Kawasaki Kisen Kaisha Ltd*⁵ and by the House of Lords in *Bunge Corporation v Tradax Export SA*.⁶ In *Hong Kong Fir*, the Court concluded that some contractual

⁵ *Hong Kong Fir Shipping Co. Ltd. v Kawwasaki Kisen Kaisha Ltd.*, [1962] 2 QB 29, [1962] 1 All ER 474 [*Hong Kong Fir*].

⁶ *Bunge Corporation v Tradax Export SA* [1981] UKHL 11 [*Bunge*].

terms could only be considered innominate or intermediate terms at the time of formation. For these terms, the classification as conditions (allowing the affected party to treat the contract as repudiated) or warranties (giving the affected party only the right to recover damages for breach of contract) would only emerge at the time of the breach based on the severity of detriment to the value of the contract. Lord Justice Diplock stated:

Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?...

Does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

There are, however, many contractual undertakings of a more complex character which cannot be categorized as being “conditions” or “warranties” ... Of such undertakings, all that can be predicated is that some breaches will, and others will not, give rise to an event which would deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of the breach of such an undertaking, unless provided for expressly in that contract, depend on the nature of the event to which the breach gives rise and do not follow automatically from *a priori* classification of the undertaking as a “condition” or a “warranty”.⁷

- [21] In *Bunge Corporation v Tradax Export SA.*, Lord Scarman stated that the 1893 Act should not be viewed as an indication that the law knows no terms other than conditions and warranties. To view the provisions of the 1893 Act as a comprehensive guide, “is to convert it into a will-o’-the-wisp leading the unwary away from the true path of the law.”⁸
- [22] Under the approach prescribed by the English Courts, a contractual undertaking should not be categorized as being either a condition or a warranty until it is determined how severe the consequences of its breach are. Whether or not the breach is sufficient to give the other party a right to treat the contract as repudiated is ultimately up to the courts. While this approach has generally been accepted by Canadian courts, the condition-warranty structure continues to prevail in the context of the Act with disruptive and anomalous consequences.

⁷ *Hong Kong Fir*, *supra* note 5 at 69-70.

⁸ *Bunge*, *supra* note 5 at 543.

- [23] Under current Canadian law, other than those provisions of the Act that dictate otherwise, whether a contractual provision is to be categorized as warranty or a condition involves the application of a range of factors. The essential question is whether the breach in question results in substantial non-performance by a party. The factors that are addressed in this context are (a) the ratio of the party's obligation not performed to the obligation as a whole; (b) the seriousness of the breach to the innocent party; (c) the likelihood of repetition of the breach; (d) the seriousness of the consequences of the breach; and (e) the relationship of the part of the obligation performed to the whole obligation. The test used by the courts to determine whether a contractual obligation is a breach which gives rise to a right of rejection is not applicable when the obligation is labelled a condition under the Act. Where there is a breach of an implied condition, the consequences to the other party may be very significant. Nevertheless, as noted above, that party may be required to treat it as a breach of warranty and rely on recovery in damages. However, somewhat anomalously, a breach of an implied condition may have only minor consequences for the other party or may be such that the deficiency in performance can be readily cured and the party in breach has expeditiously offered cure. Nevertheless, the innocent party is entitled to treat the contract as repudiated.
- [24] *The Consumer Protection and Business Practices Act* replaces the condition-warranty characterization of the Act with an approach designed to be more precise in setting the rejection rights of consumer buyers. However, it retains a bifurcated approach to the availability of remedies for breach by a seller. If the breach is "substantial" the buyer has the right of rejection; if the breach is not "substantial" (i.e., remediable) the seller is given the right to provide remediation. If this is not provided, the buyer can reject the goods. While this approach avoids anomalies produced by the condition-warranty structure of the Act, it does not avoid a post-default assessment of the significance of the breach as a per-requisite to determining the buyer's remedy.
- [25] *The International Sale of Goods Act* rejects the *a priori* characterization of contractual terms required by the Act, but, like *The Consumer Protection and Business Practices Act*, focuses on the significance of a breach in specifying the right of the affected party to "declare the contract avoided". Avoidance is available only when there has been a "fundamental breach."
- [26] Article 2 of the *United States Uniform Commercial Code* employs what is described as a "perfect-tender-with-cure" approach that eschews both *a priori* characterization of contractual terms and post default assessment of the effect of a breach of contract. Under this approach, any breach (other than a minor breach treated as generally acceptable) gives rise to a right of rejection by the affected party subject to the right of the party in breach to correct (cure) the performance failure.

VI. Major Conceptual Change

- [27] The approach recommended in this report is to reject the condition-warranty categorization of contractual provisions in the Act, the approach prescribed by the English Courts in the context of common law contracts and the approaches contained in *The Consumer Protection and Business Practices Act* and *The International Sale of Goods Act*. Underlying the central recommendation for changes to the Act in this report is the recognition that the context in which modern wholesale sale of goods transactions occurs is very different from that of the United Kingdom in the 19th century or in the context of international or consumer sales.
- [28] Modern commercial supply contracts are often based on “just-in-time” arrangements between the parties. Under these arrangements, goods are not received and stored in a warehouse until they are needed by a buyer. It is assumed the buyer will use the goods very shortly after they are received or resell them before or immediately after delivery. This approach reduces buyers’ costs in maintaining warehouse facilities and tying up capital until goods are resold or used. A “just-in-time” supply arrangement is seriously disrupted if the buyer is placed in the legal position of having to make time-limited assessments as to the significance of a breach by a seller. Under current Saskatchewan sale of goods law, a buyer to whom non-conforming goods have been delivered must determine: (i) whether the non-conformity is a breach of a statutory obligation or separate contractual undertaking; (ii) if a statutory obligation has not been discharged, whether the obligation is a “condition” or “warranty” under the categorization system of the Act; and; (iii) if it is a condition, whether the circumstances are such that the buyer must treat the condition as a warranty and retain the goods and seek compensation through negotiation or action in court; and (iv) if a breach of a common law warranty is involved, whether the breach will be treated by a court as sufficient magnitude such that it amounts to repudiation by the other party. The necessity to engage in this highly technical analysis can significantly reduce the benefits associated with the modern system used in wholesale distribution of goods through sale contracts. Furthermore, a buyer who is required by law to retain defective goods and claim damages is placed in the position of having to resell the defective goods in order to mitigate a damage claim. This can be very onerous for a buyer whose business involves dealing only with goods that are not defective or in a market where there are few buyers of defective goods.
- [30] In very simple terms, the approach recommended in this report is one in which the party affected by the breach of an express or implied warranty (for example, a buyer to whom non-conforming goods have been tendered or delivered) is entitled to treat the non-conformity (other than minor matters generally accepted as not affecting the resale value or use of the goods) as a reason for rejection of the goods on tender or delivery. However, this right can be exercised only after the party in breach is given notice of the deficient performance and a short period of time to cure the non-conformity if this can be effected without serious negative consequences to the other party.

- [31] The elimination of the condition-warranty categorization of contractual terms ties directly with the approach to remedies recommended in this report. Non-performance of any undertaking of a party to the contract, whether express or implied by the Act, gives rise to essentially the same remedy: the right of the affected party to treat the contract as repudiated by the non-performing party unless the non-performance has been appropriately cured. The affected party has alternative or supplementary remedies: in the case of a buyer, in the form of damages and reduction of the price and, in the case of a seller, the retention or recaption of possession, and action for the price and damages.
- [32] A perfect-tender-with-cure approach is not likely to result in a significant number of rejections on the part of the affected party. It is in the interests of both parties to ensure that a minor non-conformity is addressed either by correcting the non-conforming aspects of the goods or other aspects of the seller's performance or by inducing the seller to respond favourably to the buyer's proposal that the price of the goods be reduced to reflect the performance deficiency. The approach will have the effect of inducing sellers to take more care in ensuring that the requirements of the contract are met.

VIII. Other Significant Changes

- [33] Set out below is a list of other recommended changes. The list is not exhaustive as there are many other changes that are explained in the Comments following the recommendations (See Appendix B).
- Confining the scope of the Act to contracts of sale where both parties to the contract are engaged in commercial business activity. [section 3(1)]
 - Imposition of a universally applicable standard of good faith and commercial reasonableness. [subsections 2(3)-(4)]
 - Expanded concept of "express warranty" and approach to contractual provisions affecting them. [clause 2(1)(h) and section 12]
 - Inclusion of software associated with goods sold. [subsection 3(2)]
 - Elimination of a statutory requirement of a note or memorandum (or a substitute). [Current sections 5-6]
 - Inclusion of a "battle of the forms" structure. [section 6]
 - Elimination of the concept of "sale by description". [existing section 15]
 - A definition of "merchantable quality" that reflects the current judicial approach. [clause 16(1)(a)]
 - Rules relating to contractual provisions designed to exclude implied warranties. [subsection 16(8)-(9)]
 - Complete reformulation and simplification of the rules applicable to transfer of title from sellers to buyers. [sections 19-20]

- Reformulation of “sale on approval” and “sale or return” concepts. [section 21]
- Separation of “risk” and “insurable interest” from title. [section 23]
- Expansion of sale under voidable (and void) title exception to the *nemo dat* principle. [section 24]
- Reformulation and simplification of “seller-in-possession” and “buyer-in-possession” exceptions to the *nemo dat* principle. [section 25]
- Refinement and supplementation of seller’s delivery obligations. [subsection 29(4) and sections 30 and 31]
- The perfect tender-with-cure approach in the context of the seller’s obligations. [sections 35 and 48]
- Elimination of the concept of “time of essence” relating to payment by the buyer. [current section 12 and section 45]
- Expanded scope of seller’s right to treat the contract as repudiated. [section 45]
- Refinement of rules dealing with seller’s action for the price. [section 46]
- Refinement of rules dealing with the buyer’s right to treat the contract as repudiated. [section 48]
- Expanded scope for specific performance orders. [section 49]
- Remedies for breach of a collateral contract or for fraudulent misrepresentation relating to a contract of sale. [section 53]

Appendix A: Proposed Amended Sale of Goods Act

Sale of Goods Act with Proposed Amendments

NOTE: Provisions in nonbolded italic type are those contained in *The Sale of Goods Act SS 1978, C. S-1*. Provisions in bolded italic type are recommended changes or additions to the Act.

CHAPTER S-1

An Act respecting the Sale of Goods

Short title

This Act may be cited as *The Sale of Goods Amendment Act 202__*.

INTERPRETATION

2(1) In this Act:

(a) *“action” includes counterclaim and set-off;*

(b) *“buyer” means a person who buys or agrees to buy goods;*

(c) ***“commercially reasonable” means, with respect to a requirement of this Act and the obligations of parties to a contract of sale, the standard of conduct a reasonable person would meet in the circumstances taking into account the standard in the relevant business or industry; and may include, but shall not be limited to, reasonable standards of performance provided in the contract; that are not manifestly unreasonable.***

(d) ***“conforming goods” means goods that, subject to minor deviations generally accepted in the market, conform to the requirements of the contract, including the warranties implied by this Act if any;***

(e) *“contract of sale” includes an agreement to sell as well as the sale;*

(f) *“delivery” means voluntary transfer of possession from one person to another;*

(g) *“document of title to goods” has the same meaning as it has in The Factors Act;*

(h) ***“express warranty” means:***

(i) a term of the contract; and

(ii) a statement, in any form made by a person before or at the time of the contract, including a promise or a representation of fact or opinion, whether or not made fraudulently, negligently or with contractual intention, that relates to the subject matter of the contract, except where the person to whom the statement was made did not rely, or it

was unreasonable for that person to rely, on the statement when deciding to enter into the contract;

(i) “fault” means a wrongful act or default;

(j) “future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale;

(k) “goods” means **movable** property other than things in action, **a security as defined in section 2(1)(ff) of The Securities Transfer Act** or money and includes:

(i) unborn young of animals; and

(ii) **growing crops, timber, fixtures, minerals, hydrocarbons and other substances to be extracted from land** and other things attached to or forming part of the land that are agreed to be severed **even though the subject matter forms part of the real property at the time of contracting;**

(l) “good faith” means **honesty in the performance of a contract of sale or compliance with the requirements of this Act;**

(m) “insolvent” has the same meaning as in section 2 of the **Bankruptcy and Insolvency Act (Canada);**

(n) “sale” includes a bargain and sale as well as a sale and delivery;

(o) “seller” means a person who sells or agrees to sell goods;

(p) “specific goods” means **already existing goods that are to be tendered or delivered under a contract of sale;**

(2) The rights of a buyer of goods described in clause 2(1)(k)(ii) are subject to rights of third parties in the goods as land under The Land Titles Act 2000, The Enforcement of Money Judgments Act and other the law relating to interests in land.

(3) All rights, duties or obligations that arise pursuant to a contract of sale, this Act or any other applicable law are to be exercised or discharged in good faith and in a commercially reasonable manner.

(4) The obligations of good faith and commercial reasonableness may not be waived by agreement.

(5) Goods are in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

PART I

CONTRACT OF SALE

Contract of Sale Defined

3(1) This Act applies to contracts of sale where both parties to the contract are engaged in commercial business activity and does not apply to:

(a) to a contract to which The Consumer Protection and Business Practices Act, applies, except as provided in that Act;

(b) any agreement to sell intended to operate only as a secured transaction; or

(c) aspects of a contract of sale that are governed by The Personal Property Security Act, 1993.

(2) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the **title goods to the buyer for a money consideration called the price and includes:**

(a) a contract for the supply of goods to be made, created, or produced by the seller, whether or not to the buyer's order;

(b) a contract for the supply of goods that involves the provision of services associated with the goods;

(c) a contract in which the seller retains a security interest in the goods;

(d) a contract under which the seller agrees to transfer only such interest as the seller, or another person has;

(e) a contract for the transfer of a specified undivided share in an identified bulk of fungible goods; and

(f) a contract including the sale, agreement for sale or grant of a licence to software as part of the sale or agreement for sale of goods where giving the buyer of the goods access to or use of the software is ordinarily a substantial purpose of transactions in goods of the type sold.

(3) There may be a contract of sale between one part owner and another.

(4) A contract of sale may be absolute or conditional.

(5) Where under a contract of sale **an interest in the goods is transferred from the seller to the buyer the contract is called a sale;**

(6) Where the transfer of **the interest in the goods is to take place at a future time or is subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.**

(7) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Capacity to buy and sell

4(1) Subject to subsection (2), capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

*(2) Where necessaries are sold and delivered to an infant or minor or to a person who is by reason of mental incapacity or drunkenness is incompetent to **contract**, the buyer must pay a reasonable price therefor.*

*(3) "Necessaries" in this section means goods suitable to the condition in life of the infant or minor or other person and to **that person's** actual requirements at the time of the sale and delivery.*

CONTRACT FORMATION

No writing requirement

5(1) Subject to the provisions of any other Act and the agreement of the parties or usage of the trade in which the parties are engaged, a contract of sale need not be concluded in or evidenced by writing and may be proved by any means.

(2) A provision in a written contract designed to invoke a rule of law or equity respecting evidence does not preclude a court from determining what constitutes a term of the contract.

Offer and Acceptance

6(1) A reply to an offer that purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) A reply to an offer that purports to be an acceptance but contains additional or different terms that do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, rejects the additional or different terms and notifies the offeree of the rejection.

(3) If the offeror does not object as provided in subsection (2), the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(4) Additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes materially alter the offer.

(5) Subsections (1)-(3) do not apply where the offeror indicates to the offeree an intention not to be bound unless by terms other than those set out in the offer.

SUBJECT-MATTER OF CONTRACT

Existing or future goods

7(1) The goods that form the subject of a contract of sale may be either existing goods or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where a contract of sale the seller purports to effect a present sale of future goods the contract operates as an agreement to sell the goods.

Goods perishing before agreement of sale

8 *Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.*

Goods perishing before sale

9 *Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer the agreement is thereby avoided.*

THE PRICE

Ascertainment of price

10(1) *The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.*

(2) Where the price is not determined in accordance with subsection (1) the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each case.

Agreement to sell at valuation

11(1) *Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party who cannot or does not make the valuation, the agreement is avoided; but if the goods or any part thereof have been delivered to and **accepted** by the buyer, **the buyer** must pay a reasonable price therefor **determined as of the date of delivery**.*

*(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may **treat the contract as avoided or may fix a reasonable price**.*

WARRANTIES

Modification, limitation, or exclusion of warranties

12(1) *A warranty implied by this Act, the effect of a statement that amounts to an express warranty, or the remedies for breach of a warranty may be modified, limited, or excluded by the parties by terms in the contract, a course of dealing between the parties, usage of trade or conduct that in common understanding make it clear to the buyer that the seller assumes no responsibility for the quality or fitness of the goods.*

(2) Words or conduct relevant to the creation of an express warranty and contractual terms or conduct tending to negate or limit a warranty are to be construed as consistent with one another except when this is not reasonable, in which case the negation or limitation has no effect.

(3) For the purpose of subsection (2), the following presumptions apply:

(a) exact or technical specifications supersede an inconsistent sample or model or general language of description;

(b) a sample from an existing bulk supersedes inconsistent general language of description;

(c) express warranties supersede inconsistent implied warranties.

(4) A seller is deemed to make any statement of a manufacturer, distributor or other person relating to the goods that by word or conduct the seller has adopted.

(5) A seller is deemed to make any statement relating to the subject matter of the contract and made by the manufacturer, distributor or other person on the container or label of goods or a brochure, pamphlet or other writing associated with the goods, except when, it is apparent that the seller did not adopt the statement or that the buyer did not rely on the statement.

Warranties as to Title

14(1) In a contract of sale unless the circumstances of the contract are such as to show a different intention there is:

(a) an implied warranty on the part of the seller that in the case of a sale it has a right to sell the goods and that in the case of an agreement to sell it will have a right to sell the goods at the time when the title is to pass;

(b) an implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party not disclosed or known to the buyer before or at the time when the contract is made; and

(c) an implied warranty that the buyer will be entitled to quiet possession of the goods except insofar as it may be disturbed by a person entitled to the benefit of a lien, security interest, encumbrance or industrial or intellectual property right that is disclosed or known to the buyer and the time the contract is made.

(2) Where the parties intend that the seller will transfer only such title as the seller or another person may have, there is an implied warranty by the seller:

(a) that all defects in title and all security interests, liens, and encumbrances or industrial or intellectual property rights known to the seller and not known to the buyer were disclosed to the buyer before the contract was made; and

(b) that the seller, the other person, and any person claiming through or under the seller or the other person, otherwise than under a security interest, lien, encumbrance or industrial or intellectual property right disclosed or known to the buyer before the contract was made, will not disturb the buyer's quiet possession of the goods.

(3) Where the seller retains a security interest in the goods, the seller's implied warranty of title takes effect when the goods are delivered to the buyer.

Contractual Obligations of the Seller

15 The seller must deliver conforming goods as required by the contract and this Act.

16(1) In this section and section 17, "merchantable quality" means:

(a) that the goods, whether new or used, are:

(i) are as fit for at least one of the purposes for which goods described in the contract are commonly bought or used; and

(ii) are of such quality and in such condition that they will be accepted without objection and without price abatement in the market under the contract description by buyers fully acquainted with the goods;

(b) without limiting the generality of clause (a), that the goods;

(i) in the case of fungible goods, are of fair or average quality within the description;

(ii) within the variations permitted by the agreement, are of the same kind, quality and quantity within each unit and among all units involved;

(iii) are adequately contained, packaged, and labeled as the nature of the goods or the agreement require; and

(iv) will remain fit, perform satisfactorily, and continue to be of such quality and in such condition for any length of time warranted by the seller or, for a time that is reasonable having regard to all the circumstances; and

(c) in the case of a new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a period of time warranted by the seller or, in the absence of a seller's warranty, for a time that is reasonable having regard to all the circumstances.

(2) Where the seller is a person who deals in goods of the kind supplied under a contract, there is an implied warranty that the goods are of merchantable quality.

(3) The implied warranty of merchantable quality does not apply:

(a) to defects specifically drawn to the buyer's attention or are otherwise known to the buyer before the contract was made; or

(b) if the buyer examines the goods before the contract was made, to any defect that the examination by the buyer should have revealed.

(4) Where the buyer, expressly or impliedly, makes known to the seller a particular purpose or purposes for which the buyer is acquiring the goods and the seller deals in goods of that kind, there is an implied warranty that:

(a) the goods supplied under the contract are reasonably fit for that purpose or those purposes, whether or not the purpose or purposes are those for which goods of that kind are commonly supplied; and

(b) the goods will so remain for a period of time warranted by the seller or, in the absence of a seller's warranty, for a time that is reasonable having regard to all the circumstances.

(5) The implied warranty mentioned in subsection (4) does not apply where the circumstances show that the buyer does not rely, or that it is unreasonable for the buyer to rely, on the seller to supply goods reasonably fit for the buyer's communicated purpose or purposes.

(6) Subsections (1)-(5) apply, with necessary modifications, to goods supplied under a contract of work and materials.

(7) An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(8) Unless words or conduct indicate otherwise, the implied warranties of this section are excluded by contractual terms such as "as is", "with all faults" or other language which in common understanding indicating the parties' intention to exclude the application of the warranties.

(9) The implied warranties of this section are not excluded by a general clause in the contract purporting to exclude all express or implied warranties.

Sale by Sample

17(1) A contract of sale is a contract for sale by sample where there is a term in the contract express or implied to that effect.

(2) In the case of a contract for sale by sample:

*(a) there is an implied **warranty that** the bulk shall correspond with the sample in quality;*

*(b) there is an implied **warranty** that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;*

*(c) there is an implied **warranty** that the goods shall be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample;*

*(d) there is an implied warranty that the **quantity, quality and description and packaging of the bulk comply with the requirements of the contract.***

PART II

Effects of the Contract

TRANSFER OF TITLE AS BETWEEN SELLER AND BUYER

18(1) Except as otherwise provided in this Act, the provisions of this Act relating to the rights, obligations and remedies of the seller, buyer and any third party apply without regard to the person who has title to the goods.

(2) Subject to subsections (3), title to conforming goods passes from the seller to the buyer at the time and in the manner agreed upon by the parties.

(3) Unless the context indicates otherwise, reservation by the seller of the title in goods is a security interest to which The Personal Property Security Interest applies.

Presumptions for Appropriation of the Goods

19(1) Unless the parties otherwise agree, conforming goods are appropriated to the contract when:

(a) at the time when and the place at which the seller completes the seller's performance with reference to the physical delivery of the goods, even though a document of title is to be delivered at a different time or place;

(b) where delivery is to be made without moving the good:

(i) where the seller is required to deliver a document of title, at the time when and the place at which the document is delivered;

(ii) when the goods are held by a bailee other than the seller and the seller is not required to deliver a document of title, when the bailee acknowledges to the buyer the buyer's right to possession of the goods;

(c) in the case of a contract for the sale of a crop, when the crop becomes a growing crop;

(d) in the case of a contract for the sale of unborn young to be born within 12 months after contracting, when the young are conceived;

(e) when in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for the purpose of delivery of the goods to the buyer and does not reserve the right of disposal; and

(f) in a case other than referred to in clauses (a)-(e), when the goods are marked, set aside, separated from a bulk of fungible goods or otherwise designated by the seller as goods to which the contract refers.

Passage of title

20(1) Subject to subsections (2), title to conforming goods passes from the seller to the buyer at the time and in the manner agreed upon by the parties.

(2) A buyer who has paid all or substantially all of the contract price acquires an equitable interest in goods falling within the description of the goods in the contract immediately on the seller acquiring goods or a right to goods of that description.

(3) Except as otherwise provided and subject to subsection (3), where there is no agreement between the parties with respect to the time at which the title to goods passes to the buyer, or the circumstances do not indicate otherwise, even though the agreement provides for a security interest in favour of the seller, title to conforming goods passes to the buyer:

(a) under a contract for the sale of specific goods in a deliverable state as provided in the contract, when the contract is made; and

(b) in other cases when the goods are appropriated to the contract.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, revests title to the goods in the seller.

(5) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, revests title to the goods in the seller.

Sale on Approval or Return

21(1), in this section:

(a) “sale on approval” means a contract in which the goods are delivered primarily for use and in which the person who received the goods has the right to return them even though they conform to the contract; and

(b) “sale or return” means a contract in which the goods are delivered for resale and in which the person who received the goods has the right to return them if they are unsold.

(2) When goods are delivered to the buyer on approval or other similar terms title and risk of loss passes to the buyer when the goods are delivered, but revests when the buyer elects to return the goods.

(3) A buyer referred to in subsection (2) is deemed to have elected to keep the goods if the buyer retains the possession of them without giving notice of rejection at or before the time fixed for their return or, if no time has been fixed, on the expiration of a reasonable time.

(4) For the purposes of subsection (3), use of the goods consistent with the purpose of trial is not an election to keep them.

(5) When goods are delivered to a person under a contract providing for sale or return:

(a) title passes to the person in possession when the person does any act indicating the person’s intention to retain the goods rather than sell them; and

(b) goods are at the buyer's risk until they are returned to the seller and the buyer is responsible for their return.

Reservation of a right of disposal

22(1) In this section and section 21, a right of disposal means:

(a) procurement by the seller of a negotiable bill document of title or delivery instrument to the seller’s order or to the order of a financing agency; or

(b) any other measure through which the seller reserves control over delivery of goods by a person who is to deliver the goods;

(2) *Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may reserve the right of disposal of the goods until certain conditions are fulfilled and in such case notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer the **title to** the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.*

(3) *Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange the buyer is bound to return the bill of lading if the **buyer** does not honor the bill of exchange and if the **buyer** wrongfully retains the bill of lading **the title to** the goods does not pass from **the seller** to him.*

(4) *Subject to this Act where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by conduct is precluded from denying the seller's authority to sell.*

(5) *Nothing in this Act affects:*

*(a) the provisions of The Factors Act or any enactment enabling the apparent owner of goods to dispose of them as if **that person** were the true owner thereof;*

(b) the validity of any contract or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Risk and insurable interest

23(1) Except as otherwise provided in the contract of sale, this section and section 27(1), unless otherwise agreed, risk relating to goods passes to the buyer to the extent of any deficiency in the seller's insurance coverage:

(a) when the seller tenders delivery in accordance with the contract;

(b) when the seller gives written notice to the buyer that the goods are placed at the disposal of the buyer in accordance with the contract;

(c) where the buyer is bound to take possession or control of the goods at a place other than a place of business of the seller, when the buyer is aware of the fact that the goods are placed at the buyer's disposal at that place;

(d) on the buyer's receipt of a negotiable document of title covering the goods;

(e) on written acknowledgement by a bailee to the buyer of the buyer's right to possession of the goods; or

(f) after the buyer's receipt of a non-negotiable document of title or other written direction to a bailee or carrier to deliver the goods to the buyer, but the risk of loss remains on the seller:

(i) until the buyer has had a reasonable time to present a non-negotiable document of title or direction; or

(ii) when the bailee fails to honor the document of title or to obey the direction.

(2) Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault.

(3) Nothing in this section affects the properties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

(4) Where a tender or delivery of goods fails to conform to the contract, the risk of loss arising before acceptance by the buyer or cure by the seller remains with the seller to the extent of any deficiency in the buyer's insurance coverage.

(5) Where the buyer of goods appropriated to the contract unjustifiably repudiates the contract, the risk of loss to goods in the buyer's possession is on the buyer to the extent of any deficiency in the seller's insurance coverage until the goods are delivered to the seller.

(6) Whether or not title has passed to the buyer, and even though the buyer has a right to return or reject them, the buyer has an insurable interest in goods:

(a) when the goods are at the buyer's risk as provided in this or any other Act;

(b) at any time and in any manner expressly agreed upon by the parties;

(c) in the absence of agreement:

(i) in the case of a contract for the sale of specific goods, when the contract is made;

(ii) in other cases, when the goods are appropriated to the contract;

(iii) in the case of a contract for the sale of a crop, when the crop is planted or becomes a growing crop;

(iv) in the case of a contract for the sale of unborn young to be born within 12 months after contracting, when the young are conceived.

(7) The seller has an insurable interest in goods so long as the seller has title, the risk of loss or a security interest in the goods.

Sale under voidable title

24 A sale of goods by a seller, who at the date of the sale had possession of the goods under a contract that is void at common law or voidable because of fraud by the seller, is effective to transfer title to the goods to a buyer who receives possession of the goods in good faith, for value and without notice of the defect in or lack of title of the seller.

25(1) A reference in this section to the Personal Property Registry is a reference to the registry referred to in section 42 of The Personal Property Security Act, 1993 and a reference to registration is to be read as registration in compliance with the requirements 1993 of The Personal Property Regulations relating to serial numbered goods and non-serial numbered goods, as the case may be.

(2) A person who is in possession of goods as a seller or a buyer has the power to:

(a) transfer all rights of the person consenting to that person's possession to a person who enters into a contract to buy or lease the goods and who receives the goods in good faith, for value and without notice of the title of the consenting person;

(b) grant a security interest in the goods to a person who, at the time of the security agreement, is without notice of the title of the consenting person.

(3) Subsection (2) does not apply:

(a) where a registration has been effected in the Personal Property Registry prior to the transfer of the goods referred to in clause (2)(a) recording the interest of the person consenting to the transferor's possession;

(b) a security interest referred to in clause (2)(b), when a registration has been effected in the personal property registry prior to the perfection of the security interest recording the interest of the person consenting to the transferor's possession; or

(c) to a transaction between a transferor and transferee to which The Personal Property Security Act applies.

(4) Subsection (3)(a) does not apply to a sale or lease of goods made in the ordinary course of business of the person in possession.

Acquisition of title to grain

26(1) Where grain is sold and delivered at an elevator licensed under the Canada Grain Act, to the manager or operator thereof as defined in the said Act, or to a track buyer licensed under the said Act, the buyer acquires a good title to the grain so bought and delivered, provided he buys it in good faith and without actual notice of any defect or want of title on the part of the seller in the grain.

(2) Where the manager or operator or any track buyer or other party licensed under the Canada Grain Act advances money on the security of grain delivered pursuant to subsection (1), the party advancing the money shall have a charge or lien on the grain to the extent of the advance made and any charges that may accrue for storage or interest in priority to any other claim, provided that the advance is made in good faith and without actual notice of any adverse claim or lien or of any defect or want of title on the part of the party receiving the advance on the grain so delivered.

PART III

Performance of the Contract

DUTIES OF SELLER AND BUYER

27(1) Sections 23, 28 and 29 apply subject to change or modification by a term in the contract or related contract that makes applicable one of the Incoterms promulgated by the International Chamber of Commerce or an equivalent term.

(2) It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Payment and delivery concurrent conditions

28 *Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.*

Rules as to delivery

29(1) *Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending on the contract express or implied between the parties and apart from a contract express or implied the place of delivery is the seller's place of business-*

(2) If the contract is for the sale of specific goods that to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(3) Where under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed the seller is bound to send them within a reasonable time.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved, unless the parties agree otherwise, tender requires:

(a) that the seller delivers to the buyer a copy of a written direction to the bailee to deliver conforming the goods to the buyer along with an acknowledgement by the bailee of the buyer's right to possession of the goods;

(b) that the seller delivers to the buyer a non-negotiable document of title covering the goods under which the buyer is entitled to take possession of the goods; or

(c) that the seller tenders to the buyer a negotiable document of title covering the goods;

(5) A refusal by the bailee to honour a document or to obey the direction defeats the tender and the risk reverts in the seller.

(6) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour in the circumstances.

(7) Unless otherwise agreed the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Delivery of wrong quantity

30(1) Except as provided in section 31, where the seller delivers to the buyer a quantity of goods less than the quantity the seller contracted to sell, subject to subsections 35(7)-(10), the buyer may accept or reject the goods delivered, but must pay for accepted goods at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than **the seller** contracted to sell, the buyer may accept the goods included in the contract and reject the rest, and if the buyer accepts the whole of the goods delivered, the **buyer** must pay for them at the contract rate.

(3) Where the seller delivers to the buyer goods **the seller** contracted to sell mixed with goods of a different description not included in the contract the buyer may accept the goods which are in accordance with the contract and reject the rest or may reject the whole.

(4) This section is subject to usage of trade, or course of dealing between the parties.

Instalment deliveries

31(1) Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by instalments to be separately accepted, the buyer may treat the contract as repudiated if:

(a) the seller makes a defective delivery in respect of one or more instalments and the breach of contract is not cured as provided in subsections 35(7)-(10); or

(b) the buyer would suffer unreasonable prejudice or commercial disruption because of the interdependence of the defective delivery made with future deliveries, even if the defective delivery were cured.

(3) A buyer who accepts goods delivered must pay for them at the contract rate.

Delivery to carrier

32(1) Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not for the purpose of transmission to the buyer is prima facie a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer the seller must make such contract with the carrier on behalf of the buyer as is reasonable having regard to the nature of the goods and the other circumstances of the case and if the seller omits to do so and the goods are lost or damaged in course of transit the buyer may decline to treat the delivery to the carrier as a delivery **under the contract**.

Buyer's right of examination

33(1) Where goods are delivered to the buyer that the buyer had not previously examined, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed when the seller tenders delivery of goods to the buyer, the seller, **on request of the buyer**, shall **give to** the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Buyer's deemed acceptance

34 Subject to subsections 35(9) and (10), the buyer is deemed to have accepted the goods when:

(a) after having a reasonable opportunity to examine the goods, the buyer indicates to the seller that the buyer has accepted them; or

(b) after the lapse of a reasonable time, the buyer retains the goods without indicating to the seller that the buyer has rejected them.

Buyer's rights on improper delivery

35(1) For the purposes of this section, "cure" includes:

(a) tender or delivery of any missing part or quantity of conforming goods;

(b) tender or delivery of other conforming goods or documents or, in the case of a sale of goods other than specific goods, goods that differ in no material respect from those goods; or

(c) the remedying of any other non-conformity in performance.

(2) Subject to section 31, if the goods or the tender of delivery are non-conforming, the buyer may:

(a) reject the whole;

(b) accept the whole;

(c) accept those commercial units of the goods that are conforming and reject the remainder, or

(d) propose a reduction of the price of the goods.

(3) The buyer shall notify the seller of the buyer's rejection of the goods or proposal for a reduction in the price as soon as practicable after discovering the non-conformity.

(4) Subject to subsections (7)-(10), on rightful rejection, the buyer has a lien on rejected goods in the buyer's possession or control for any payments made on their price and any reasonable costs incurred in their transportation, care and custody, and may sell the goods in a commercially reasonable manner.

(5) A person who buys in good faith takes the goods free of any rights in the goods of the seller, even though the buyer fails to comply with one or more of the requirements of this section.

(6) The buyer shall pay at the contract rate or at the rate agreed between the parties for any accepted goods.

(7) Where a buyer rejects a non-conforming tender, whether before or after the time for performance has expired, the seller has a reasonable time to cure the non-conformity, if:

(a) the non-conformity can be cured expeditiously and without prejudice or commercial disruption to the buyer;

(b) after being notified of the buyer's rejection, the seller immediately notifies the buyer of the seller's intention to cure, the type of cure and the date on which it will be provided; and

(c) the seller has the capacity to provide the type of cure offered by the seller as indicated in the notice referred to in (b).

(8) When the buyer agrees with or without consideration that the seller has additional time to cure a non-conforming tender, the buyer may not treat the contract as repudiated unless the seller fails cure the non-conformity before the expiry of the agreed period.

(9) The buyer does not accept goods by reason only that:

(a) the buyer has not rejected them in the reasonable belief, induced by the seller, that they are conforming or that their non-conformity will be cured as provided in subsections (7), or

(b) the acceptance occurred without discovery of the non-conformity if it was induced by the difficulty of discovery.

(10) The buyer may revoke an acceptance of a non-conforming tender if:

(a) it was made on the reasonable assumption that the non-conformity would be cured but this has not occurred, or

(b) the parties fail to agree on a reduction in the price.

Buyer not bound to return rejected goods

36(1) Where goods are delivered to the buyer and the buyer rightfully rejects them, the buyer is not bound to return them to the seller.

(2) After rightful rejection by the buyer, goods that are in the buyer's possession:

(a) are at the seller's risk to the extent of deficiency in the buyer's insurance; and

(b) shall be held by the buyer with reasonable care at the seller's disposition for a time sufficient to permit the seller to retake possession of them.

(3) If the seller gives no instructions for redelivery of rejected goods within a reasonable time after notification of rejection, the buyer may:

(a) arrange for redelivery of the goods to the seller and recover from the seller the redelivery costs; or

(b) resell them for the seller's account and recover reimbursement for storage and costs of selling the goods.

(4) A buyer referred to in subsections (2) and (3) is entitled to reasonable expenses of care and custody of the goods in the buyer's possession.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Unpaid seller defined

38(1) The seller of the goods is deemed to be an "unpaid seller" within the meaning of this Act:

(a) when the contract price has not been paid or tendered as required by the contract and:

(i) the goods have been sold without any stipulation as to credit or the goods have been sold on credit, but the term of credit has expired; or

(ii) the buyer becomes insolvent;

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Part “seller” includes a person who is in the position of a seller, as for instance, an agent of the seller to whom the bill of lading has been endorsed or a consignor or agent who has paid or is directly responsible for the price.

Unpaid seller’s rights

39(1) Subject to the provisions of this Act or any other Act, an unpaid seller has until the price of the goods is paid or tendered a right to retain possession of undelivered goods, and a right to stop goods in transit as hereinafter provided even though the seller has parted with the possession of them.

(2) As against the buyer, an unpaid seller may stop delivery until:

(a) receipt of the goods by the buyer; or

(b) negotiation to the buyer of any negotiable document of title covering the goods.

40 Where an unpaid seller has made part delivery of the goods, whether under an indivisible contract or under an instalment contract, the seller may withhold delivery of the remainder until payment of all amounts that are due, unless the part delivery has been made under circumstances that show an agreement by the seller to waive the right to withhold delivery.

Right of stoppage - Duration of transit

41(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water or other bailee for the purpose of transmission to the buyer until the buyer or **the buyer’s agent in that behalf takes delivery of them from the carrier or other bailee.**

*(2) If the buyer or **the buyer’s** agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.*

*(3) If after the arrival of the goods at the appointed destination the carrier or other bailee acknowledges to the buyer or **the buyer’s** agent that the carrier or bailee ~~he~~ holds the goods as bailee for the buyer or **the buyer’s** agent the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.*

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the case whether they are in the possession of the master as a carrier or as agent for the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or the buyer’s agent the transit is deemed to be at an end.

*(7) Where part delivery of the goods has been made to the buyer or **the buyer's** agent, the remainder of the goods may be stopped in transit unless the part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.*

How stoppage effected

42(1) *The unpaid seller may exercise **the** right of stoppage in transit either by taking actual possession of the goods or by giving notice **of stoppage** to the carrier or other bailee in whose possession the goods are.*

*(2) A notice pursuant to subsection (1) may be given either to the person in actual possession of the goods or to **that person's** principal and in the latter case the notice must be given at such time and under such circumstances that the principal by the exercise of reasonable diligence may communicate it to that **person's** servant or agent in time to prevent a delivery to the buyer.*

*(3) Subject to subsection (4), when notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, **the carrier or other bailee** must redeliver the goods to or according to the direction of the seller, and the expenses of redelivery must be borne by the seller.*

(4) If a negotiable document of title has been issued for goods, the carrier or bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.

(5) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

Effect of sub-sale or pledge by buyer

43(1) *Subject to this Act, the unpaid seller's right of-retention or stoppage in transit is not affected by any sale, or other disposition of the goods that the buyer may have made **or a security interest in the goods granted by the buyer**, unless the seller has assented thereto.*

*(2) Where a negotiable document of title to goods has been lawfully transferred to a person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration then if the last mentioned transfer was by way of sale **or pursuant to a security agreement**, the unpaid seller's right of retention or stoppage in transit can only be exercised subject to the rights of the transferee.*

44 *A contract of sale is not rescinded by the mere exercise by an unpaid seller of a right of retention or stoppage in transit.*

PART V

Actions for Breach of the Contract ADDITIONAL REMEDIES OF THE SELLER

Right to treat the contract as repudiated

45(1) The seller may treat the contract as repudiated by the buyer when:

(a) the buyer fails to make payment, take delivery of the goods or perform any other commercially significant obligation on the date or within the time provided in the contract or a specified reasonable period of time after the date for payment provided in the contract set by the seller;

(b) the buyer wrongfully rejects the seller's tender or delivery of conforming goods as required by the contract; or

(c) the buyer's actions otherwise amount to repudiation of the contract by the buyer.

(2) A seller is bound by any express or implied undertaking to allow the buyer to make payment other than as provided in clause (a).

(3) For the purpose of subclause (1)(a):

(a) a failure to pay includes a failure to take steps or comply with formalities that are required under the contract and any relevant law to enable payment to be made or to ensure that it will be made; and

(b) a failure to take delivery includes a failure to perform any acts that are required of the buyer under the terms of the contract to enable the seller to make delivery.

(3) A seller who is entitled to treat the contract as repudiated may recover damages as provided in sections 47.

Action for price

46(1) Where the buyer wrongfully neglects or refuses to pay for goods that have been appropriated to the contract, the seller may maintain an action for the price of the goods.

(2) A seller does not lose rights under sections 39-44 by reason only of bringing an action for the price.

(3) Subject to subsections (4)-(5), unless the seller has treated the contract as repudiated, the seller who sues for the price shall hold for the buyer any goods in the seller's control that have been appropriated to the contract and shall make the goods available to the buyer in accordance with the contract when the judgment for the price has been discharged by payment.

(4) A seller who has obtained a judgment for the price may resell the goods if the judgment is not discharged by payment within a reasonable period of time after it has been entered.

(5) The net proceeds of a resale referred to in subsection (4), shall be credited to the judgment and upon discharge of the judgment by payment, the buyer is entitled to any goods not resold.

(6) A purchaser who buys in good faith at a sale referred to in subsection (4) takes the goods free of any rights of the buyer, even though the seller fails to comply with a requirement of this Act when effecting the sale to the purchaser.

(7) Nothing in this Part limits the damages recoverable by the seller when the amount recovered by the seller in a lawful sale of the goods is inadequate to put the seller in as good a position as performance by the buyer would have done.

(8) The seller may set-off damages against any surplus from the sale.

(9) Nothing in this section shall prejudice the right of the seller to recover interest on the price from the date from the date on which the price was payable.

Damages for non-acceptance

47(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may maintain an action for damages for non-acceptance.

(2) The measure of damages is the estimated loss that the buyer should have foreseen at the time of the contract as likely to result from the breach of contract.

(3) A seller who has treated the contract as repudiated as provided in subsection 45(1) may recover as damages the difference between the contract price and the price that could have been obtained by a disposition within or at a reasonable time and place after the seller learned of the breach less any expenses saved in consequence of the breach.

(4) A claim for damages under this Part may include a claim for incidental or consequential damages.

(5) Nothing in this section limits the damages recoverable by the seller when the measure of damages as provided in subsections (2) or (3) would be inadequate to put the seller in as good a position as performance by the buyer would have done.

BUYER'S REMEDIES

Repudiation and damages for non-delivery

48(1) In addition to any other remedy of a buyer provided in this Act, where the seller neglects to deliver conforming goods to the buyer, the buyer may:

- (a) subject to subsections 35(7-10), treat the contract as repudiated in total or, in the case of instalment delivery, as provided in subsection 31(2), and bring an action against the seller for return of any part of the purchase price paid to the seller;**
- (b) maintain an action against the seller for damages.**

(2) A buyer who has accepted goods may recover as damages for any non-conformity of tender for the loss resulting in the ordinary course of events from the seller's breach.

Damages for breach of contract

49(1) Where the seller is in breach of the contract, the buyer may maintain an action in damages in an amount that the seller should have foreseen at the time of the contract as likely to result from the breach of contract.

(2) Where there is a breach of contract by the seller and the buyer has accepted the goods, the buyer may set up against the seller the breach in diminution or extinction of the price and maintain an action for damages.

(3) Where the seller fails to tender or deliver conforming goods and buyer rightfully treats the contract as repudiated by the seller, the buyer may recover as damages for the difference between the contract price and the price of equivalent conforming goods obtainable in the market at the date the seller was required under the contract to tender or delivery goods less any expenses saved in consequence of the breach.

(4) Nothing in this section limits the damages recoverable by the buyer when the measure of damages would be inadequate to put the buyer in as good a position as performance by the seller would have done.

(5) A claim for damages may include a claim for incidental or consequential damages.

Specific performance

50(1) In an action for breach of contract to deliver specific goods or goods appropriated to the contract, the court may on the application of the plaintiff by its judgment direct that the contract shall be performed specifically without giving the defendant the option of retaining the goods on payment of damages.

(2) A judgment pursuant to subsection (1) may be unconditional or upon such terms and conditions as to damages, payment of the price and otherwise as to the court seems just and the application by the plaintiff may be made at any time before judgment.

(3) In an application for an order of specific performance of the contract of sale, the court shall take into consideration:

(a) whether an award of damages would be sufficient to meet the buyer's reasonable expectations when entering into the contract and the buyer's substantial and legitimate interests under the contract;

(b) whether the buyer has paid any portion of the price of the goods;

(c) whether or not the contract was for the sale of specific goods;

(d) the ability of the buyer to obtain goods of the same kind and quality without significant delay, difficulty or costs;

(e) whether the assessment of damages would be difficult, expensive or time-consuming;

(f) whether the goods are of the kind for which there is a volatile market;

(g) whether a judgment for damages against the seller would be difficult to enforce because of:

(i) the insolvency or impending insolvency of the seller;

(ii) the absence of exigible assets of the seller in Saskatchewan;

(h) the conduct of the seller.

SUPPLEMENTAL PROVISIONS
PART VI

Damages for breach of collateral contract

51 (1) Nothing in this Act impairs any remedy of a buyer or seller for breach of any obligation or promise collateral or ancillary to the contract of sale.

(2) Except as otherwise provided in this Act, the remedies for breach of a warranty relating to the goods that does not constitute a term of the contract are the same as the remedies for breach of a contract of sale.

(3) The remedies available for fraudulent misrepresentation inducing the formation of a contract include a right to recover damages as provided in this Act for breach of warranty and, the aggrieved party does not have to elect between rescission of the contract and damages for breach of warranty.

Rights enforceable by action

51 Where a right, duty or liability is declared by this Act it may unless otherwise provided by this Act to be enforced by action.

Auction sales

52 In the case of a sale by auction:

(a) Where goods are put up for sale by auction in lots each lot is prima facie deemed to be the subject of a separate contract of sale;

(b) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made a bidder may retract a bid;

(c) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller it shall not be lawful for the seller to bid himself or to employ any person to bid at the sale or for the auctioneer knowingly to take a bid from the seller or any such person. A sale contravening this rule may be treated as fraudulent by the buyer;

(d) A sale by auction may be notified to be subject to a reserve or upset price and the right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved but not otherwise the seller or any one person on the **seller's** behalf may bid at the auction.

Existing laws preserved subject to Act

53(1) The principles of the common law and equity except to the extent that they are inconsistent with this Act, supplement this Act and continue to apply.

(2) Nothing in this Act affects the enactments relating to bills of sale or any enactment relating to the sale of goods that is not expressly repealed by this Act.

CHAPTER S-1

An Act respecting the Sale of Goods

NOTE: Provisions in nonbolded italic type are those contained in *The Sale of Goods Act SS 1978, C. S-1*. Provisions in bold type are recommended changes or additions to the Act.

Short title

This Act may be cited as ***The Sale of Goods Amendment Act 202__***.

INTERPRETATION

2(1) *In this Act:*

(a) *“action” includes counterclaim and set-off;*

(b) *“buyer” means a person who buys or agrees to buy goods;*

(c) ***“commercially reasonable” means, with respect to a requirement of this Act and the obligations of parties to a contract of sale, the standard of conduct a reasonable person would meet in the circumstances taking into account the standard in the relevant business or industry; and may include, but shall not be limited to, standards of performance provided in the contract that are not manifestly unreasonable.***

COMMENT

The concept of “commercial reasonableness” pervades all aspects of the obligations of parties to a contract of sale. See subsection (3) and the associated comments.

(d) ***“conforming goods” means goods that, subject to minor deviations generally accepted in the market, conform to the requirements of the contract, including the warranties implied by this Act if any;***

COMMENT

This definition is basic to any contract of sale. It is the obligation of the seller to deliver goods that conform to the requirement of the contract. Its inclusion allows replacement of current section 15 which has been a source of conceptual confusion requiring the difficult determinations as to whether a feature of a contract relates to identity or quality of the goods involved. The proposed replacement section 15 states the simple concept that the goods delivered must be in conformity with the requirements of the contract. However, depending upon the market involved, there need not be perfect conformity. If it is generally accepted in the market in which the contract occurs that minor deficiencies are overlooked, the goods are treated as conforming to the contract even though they have these types of deficiencies.

(e) *“contract of sale” includes an agreement to sell as well as the sale;*

(f) “delivery” means voluntary transfer of possession from one person to another;

(g) “document of title to goods” has the same meaning as it has in The Factors Act;

(h) “express warranty” means:

(i) a term of the contract; and

(ii) a statement, in any form made by a person before or at the time of the contract, including a promise or a representation of fact or opinion, whether or not made fraudulently, negligently or with contractual intention, that relates to the subject matter of the contract, except where the person to whom the statement was made did not rely, or it was unreasonable for that person to rely, on the statement when deciding to enter into the contract.

COMMENT

The effect of this definition is to substantially consolidate in the context of contracts of sale the complex law of contract dealing with representations (innocent or fraudulent) of fact, opinion, collateral warranties, and collateral contract. The effect of the provision is to eschew the common law categorization system and focus on the effect on the person to whom the representation is addressed. If the statement reasonably led a party of the contract to conclude that the party making the statement is giving a contractual undertaking with respect to the matter represented, it is treated as a warranty. As to whether statements made in the contracting process can be treated by the parties as not having contractual effect, see section 12.

(i) “fault” means a wrongful act or default;

(j) “future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale;

(k) “goods” means:

~~all chattels tangible personal~~ **movable** property other than things in action, **a security as defined in section 2(1)(ff) of The Securities Transfer Act** or money and includes:

(i) unborn young of animals; and

(ii) **growing crops, timber, fixtures, minerals, hydrocarbons and other substances to be extracted from land** and other things attached to or forming part of the land that are agreed to be severed ~~before sale or under the contract of sale~~ **even though the subject matter forms part of the real property at the time of contracting;**

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COMMENT

This provision clarifies the scope of the current provision to ensure that the word “goods” includes items such as fixtures and minerals that, at the time of the contract, are land and not goods but, are to be severed thereafter thereby becoming goods. The result is that the parties can make an effective sale of goods contract relating to these items at a time when they are land. However, while the items are land, land law governs third party rights in the items. See, below, subsection (2).

(l) “Good faith” means honesty in the performance of a contract of sale or compliance with the requirements of this Act;

COMMENT

See subsection 2(3) below.

~~*(l) “property” means the general property in goods and not merely a special property;*~~

COMMENT

The amendments set out below refer not to the transfer of “property” but to the transfer of the seller’s or other person’s “title” to goods. This change, reflected in both the ULC *Uniform Sales of Goods Act* and Article 2 of the *Uniform Commercial Code*, has been designed to address a potential misunderstanding of aspects of the current Act. The word “property” suggests that what is transferred under a contract of sale is full “ownership” of the goods that can be asserted against third parties. The term “title” is used to indicate that what is involved is title to the interest the seller undertakes to transfer. This may be title that is sufficiently complete to be labelled as “ownership”, however, it may be a more limited interest. In this case, the seller agrees to transfer to the buyer whatever interest the seller has or has the power to transfer which may be less than “ownership.” See redrafted section 3(2). Under subsection 14(1) a seller implicitly warrants that the seller has the “right to sell”, and that the goods will be free from undisclosed third-party rights or claims. In effect, the seller warrants that all the incidents of “ownership” in the goods are passed to the buyer. Subsection 14(2) addresses cases where it is understood that the seller will pass less than full “ownership” in the goods.

(m) “insolvent” has the same meaning as in section 2 of the Bankruptcy and Insolvency Act (Canada);

~~*(k) “quality of goods” includes their state or condition;*~~

~~*(n) “sale” includes a bargain and sale as well as a sale and delivery;*~~

~~*(o) “seller” means a person who sells or agrees to sell goods;*~~

~~*(p) “specific goods” means goods identified and agreed upon at the time a contract of sale is made; already existing goods that are to be tendered or delivered under a contract of sale;*~~

COMMENT

The changes to this definition are designed to focus on the present existence of the goods.

~~(p) “warranty” means an agreement with reference to goods that are the subject of a contract of sale but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.~~

COMMENT

The current definition reflects the condition-warranty characterization of terms that is not part of the amended Act.

(2) The rights of a buyer of goods described in clause 2(1)(k)(ii) are subject to rights of third parties in the goods as land under The Land Titles Act 2000, The Enforcement of Money Judgments Act and other the law relating to interests in land.

(3) All rights, duties or obligations that arise pursuant to a contract of sale, this Act or any other applicable law are to be exercised or discharged in good faith and in a commercially reasonable manner.

COMMENT

The terms “good faith” and “commercially reasonable” are defined above. “Good faith” involves a subjective test and entails honest conduct of the part of parties in the formation and performance of a contract of sale.

“Commercial reasonableness” involves an objective test. What is reasonable is determined by the standards of performance generally accepted in the context of the market to which the sale of goods contract relates. The parties may set the standard so long as it is not lower than that acceptable in the relevant market.

~~(4) A thing is deemed to be done “in good faith” within the meaning of this Act when it is in fact done honestly whether it be done negligently or not.~~

(4) The obligations of good faith and commercial reasonableness may not be waived by agreement.

~~(6) A person is deemed to be insolvent within the meaning of this Act who has in the ordinary course of business to pay the person’s his debts in the ordinary course of business or cannot pay his debts as they become due.~~

COMMENT

See definition of “insolvency” above.

(5) Goods are in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

CONTRACT OF SALE

Contract of Sale Defined

3(1) This Act applies to contracts of sale where both parties to the contract are engaged in commercial business activity and does not apply to:

(a) to a contract to which The Consumer Protection and Business Practices Act, applies, except as provided in that Act;

(b) any agreement to sell intended to operate only as a secured transaction; or

(c) aspects of a contract of sale that are governed by The Personal Property Security Act, 1993.

(2) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the ~~title the~~ ~~property~~ in goods to the buyer for a money consideration called the price and includes:

(a) a contract for the supply of goods to be made, created, or produced by the seller, whether or not to the buyer's order;

(b) a contract for the supply of goods that involves the provision of services associated with the goods;

(c) a contract in which the seller retains a security interest in the goods;

(d) a contract under which the seller agrees to transfer only such interest as the seller, or another person has;

(e) a contract for the transfer of a specified undivided share in an identified bulk of fungible goods; and

(f) a contract including the sale, agreement for sale or grant of a licence to software as part of the sale or agreement for sale of goods where giving the buyer of the goods access to or use of the software is ordinarily a substantial purpose of transactions in goods of the type sold.

COMMENT

This provision is designed to remove uncertainty with respect to the applicability of the Act to the enumerated types of contracts.

Subsection 2(a) addresses situations where the role of the seller involves much more than supplying goods. The seller may also be a manufacturer of goods made to the specifications of the buyer or maybe an assembler of goods containing some parts supplied by the buyer. If one party is providing nothing more than assembly facilities of parts supplied by the other party, no interest in personal property transfers to the supplier. In such a case, the Act does not apply.

Where the contract provides for services and the associated supply of goods (e.g., expert repair of equipment involving supply of repair parts), the Act applies to those aspects of the contract relating to the supplied goods.

The Act applies to the software that is sold along with hardware where the operation of the hardware is dependent upon or directly associated with the software.

(3) There may be a contract of sale between one part owner and another.

(4) A contract of sale may be absolute or conditional.

*(5) Where under a contract of sale **an interest** ~~the property~~ in the goods is transferred from the seller to the buyer the contract is called a sale;*

*(7) Where the transfer of **the interest** ~~property~~ in the goods is to take place at a future time or is subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.*

(8) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Capacity to buy and sell

4(1) Subject to subsection (2), capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

*(2) Where necessaries are sold and delivered to an infant or minor or to a person who is by reason of mental incapacity or drunkenness is incompetent to **contract, the buyer** ~~he~~ must pay a reasonable price therefor.*

*(3) "Necessaries" in this section means goods suitable to the condition in life of the infant or minor or other person and to **that person's** ~~his~~ actual requirements at the time of the sale and delivery.*

CONTRACT FORMATION FORMALITIES OF THE CONTRACT

~~*5(1) Subject to the provisions of any other this Act, and of any Act in that behalf, a contract of sale may be made wholly or partially orally, in writing, either with or without seal, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.*~~

~~*(2) Nothing in this section affects the law relating to corporations.*~~

No writing requirement

5(1) Subject to the provisions of any other Act and the agreement of the parties or usage of the trade in which the parties are engaged, a contract of sale need not be concluded in or evidenced by writing and may be proved by any means.

(2) A provision in a written contract designed to invoke a rule of law or equity respecting evidence does not preclude a court from determining what constitutes a term of the contract.

COMMENT

This provision eliminates the 1677 *Statute of Frauds* features of the current Act. The *Statute of Frauds* was designed to address “fraud” in court proceedings at a time when rules of evidence were very primitive, allowing parties to escape contractual liability through reliance on false testimony. However, the solution of writing requirements for specified types of contracts created as many or more problems of fraud than it resolved. The result was an elaborate case law structure, much of it developed by the courts to avoid application of the 1677 Statute. Provisions equivalent to section 5 were deleted from the Sale of Goods Legislation of British Columbia, Ontario and the United Kingdom.

In a contemporary context, there is little reason for a legal requirement that contracts between persons involved in business activities be in writing. In the great bulk of cases, the realities of modern business activity (e.g., accounting, record keeping, taxation rules) necessitate tangible evidence of contracts. There is no need for the law to require this. In the few situations where terms of an agreement have not been recorded, disputes as to their existence and content can be established by modern rules of evidence. There is nothing to prevent the parties from making it clear that a written record of the relationship defines all aspects of the relationship. However, under subsection 5(2), the fact that a written contract exists does not preclude a court from finding that the writing is not the definitive sources of the parties’ obligations. See proposed section 12. When persons use electronic methods of communication, sections 18-22 of *The Electronic Information and Documents Act, 2000* provide rules applicable to the creation of a contract between them.

~~When contract enforceable by action~~

~~6(1) A contract for the sale of goods of the value of \$50 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.~~

~~1. This section applies to every such contract notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of the contract be actually made, procured or provided or fit or ready for delivery or that some act may be requisite for the making or completing thereof or rendering the same fit for delivery.~~

~~There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.~~

Offer and Acceptance

6(1) A reply to an offer that purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) A reply to an offer that purports to be an acceptance but contains additional or different terms that do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, rejects the additional or different terms and notifies the offeree of the rejection.

(3) If the offeror does not object as provided in subsection (2), the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(4) Additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes materially alter the offer.

(5) Subsections (1)-(3) do not apply where the offeror indicates to the offeree an intention not to be bound unless by terms other than those set out in the offer.

COMMENT

This provision is designed to facilitate the creation of a sales contract where there is a minor lack of coincidence between the offer made by one party and the response to that offer in the form of an apparent acceptance containing additional or different terms that do not materially change the terms of the offer. At common law, an "acceptance" containing even minor changes in the offer results in a rejection of the offer.

This issue often arises in the context of what is referred to as "the battle of the forms." A battle of forms usually occurs when a seller and buyer exchange order forms with their own small print terms on the reverse side of the forms. When the forms are exchanged, typically the transaction proceeds without having to sign a contract or reach an agreement on the specific terms and conditions of the relationship. This is done so that business can run efficiently and expeditiously and without having to waste time consulting with lawyers or requiring the parties to have a signed contract or necessitate further correspondence, whenever an order is placed. This presents a problem when a dispute arises between the seller and buyer. Each believes that its own terms and conditions must apply to the relationship and govern the dispute. The provision sets out an approach that can be used to resolve any dispute as to the terms of the contract without the necessity of treating the differences between the offer and the acceptance as resulting in no contract.

A party is always free to make it clear in the offer or during the negotiation stage that, unless the terms are accepted as set out in the offer, no contract will result.

SUBJECT-MATTER OF CONTRACT

Existing or future goods

7(1) The goods that form the subject of a contract of sale may be either existing goods ~~owned or possessed by the seller~~ or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods the contract operates as an agreement to sell the goods.

Goods perishing before agreement of sale

8 Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

Goods perishing before sale

9 Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer the agreement is thereby avoided.

THE PRICE

Ascertainment of price

10(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with subsection (1) the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each case.

Agreement to sell at valuation

11(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party who cannot or does not make the valuation the agreement is avoided but if the goods or any part thereof have been delivered to and ~~accepted appropriated~~ by the buyer, **the buyer** must pay a reasonable price therefor **determined as of the date of delivery.**

(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may **treat the contract as avoided or may fix a reasonable price.**

CONDITIONS AND WARRANTIES

Modification, limitation, or exclusion of warranties

12(1) A warranty implied by this Act, the effect of a statement that amounts to an express warranty, or the remedies for breach of a warranty may be modified, limited, or excluded by the parties by terms in the contract, a course of dealing between the parties, usage of trade or conduct that in common understanding make it clear to the buyer that the seller assumes no responsibility for the quality or fitness of the goods.

(2) Words or conduct relevant to the creation of an express warranty and contractual terms or conduct tending to negate or limit a warranty are to be construed as consistent with one another except when this is not reasonable, in which case the negation or limitation has no effect.

(3) For the purpose of subsection (2), the following presumptions apply:

(a) exact or technical specifications supersede an inconsistent sample or model or general language of description;

(b) a sample from an existing bulk supersedes inconsistent general language of description;

(c) express warranties supersede inconsistent implied warranties, other than any implied warranties other than the warranty in subsection 17(4).

(4) A seller is deemed to make any statement of a manufacturer, distributor or other person relating to the goods that by word or conduct the seller has adopted.

(5) A seller is deemed to make any statement relating to the subject matter of the contract and made by the manufacturer, distributor or other person on the container or label of goods or a brochure, pamphlet or other writing associated with the goods, except when, it is apparent that the seller did not adopt the statement or that the buyer did not rely on the statement.

COMMENT

This provision addresses a range of matters associated with the central feature of a sale of goods contract: the express or implied warranties given or deemed to have been given by the parties. A warranty is a contractual obligation undertaken or deemed to have been undertaken by a party to a contract of sale. See the definition of “express warranty” in new section 2(h) above.

Parties are free to control through the terms of the contract the existence, effect, and consequences of breach of express or implied warranties. However, when a contract is ambiguous or internally contradictory with respect to the existence or scope of a warranty, subsections (2) and (3) provide interpretative rules for determining the obligations of the parties under the contract. Under these rules, a clause that on the surface appears to negate express warranties contained in the contract is to be interpreted as not having this effect. An express warranty overrides an inconsistent implied warranty except the warranty of suitability in section 17(4). Subsection (3) provides focused application of the general principle of subsection (2).

Subsections (4) and (5) address the contemporary practice of manufacturers or distributors making statements on labels on goods or brochures, pamphlets or other writings associated with the goods relating to the quality, performance, or other characteristics of goods they have supplied to sellers. These statements have the same effect as express warranties in that they are intended to induce buyers to purchase the goods from sellers of those goods. The effect on buyers is the same as if the statements were made by the sellers. Buyers generally assume that sellers are repeating the statements as warranties in the sale contracts. Very often, the decision of buyers to enter sales contracts is directly induced by the statements. This is so whether or not the sellers have expressly adopted the statements. The effect of subsection (5) is to treat the statements as warranties of the sellers of the goods supplied to sellers and sold to buyers unless it is apparent that the sellers do not adopt the statements or that their buyers did not rely on them.

Stipulation as to time

~~***12(1) Unless a different intention appears from the terms of the contract stipulations as to time of payment are not of the essence of a contract of sale.***~~

~~***(2) Whether any contract stipulation as to time other than one described in subsection (1) is of essence of the contract depends on the terms of the contract.***~~

~~***(3) In a contract for sale “month” means prima facie calendar month.***~~

COMMENT

This provision conflicts with the proposed perfect-tender-with-cure approach under which the parties to a contract of sale are required to discharge their obligations as provided in the contract. This applies to payment of the price of the goods by the buyer. See sections 28 and 45. The concept of “essence of the contract” plays no role in the operation of this principle. Subsection 45(1)(a) provides for a short grace period after the contract date for a buyer to pay the contract price but, thereafter, the failure of the buyer to pay gives to the seller the right to treat the contract as repudiated.

Condition treated as warranty

~~13(1) Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.~~

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

2. ~~A stipulation may be a condition though called a warranty in the contract.~~

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

4. ~~Nothing in this section affects a condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.~~

COMMENT

The condition-warranty categorization of contractual terms contained in the current Act as it applies to implied conditions would no longer apply. See, above, pages 7-11.

Warranties as to Title

14(1) *In a contract of sale unless the circumstances of the contract are such as to show a different intention there is:*

*(a) an implied **warranty** ~~condition~~ on the part of the seller that in the case of a sale ~~he-it~~ has a right to sell the goods and that in the case of an agreement to sell ~~he-it~~ will have a right to sell the goods at the time when the **title** ~~property~~ is to pass,*

(b) an implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party not ~~disclosed~~ declared or known to the buyer before or at the time when the contract is made, and

*(c) an implied warranty that the buyer will be entitled to quiet possession of the goods **except insofar as it may be disturbed by a person entitled to the benefit of a lien, security interest, encumbrance or industrial or intellectual property right that is disclosed or known to the buyer and the time the contract is made.***

(2) Where the parties intend that the seller will transfer only such title as the seller or another person may have, there is an implied warranty by the seller:

(a) that all defects in title and all security interests, liens, and encumbrances or industrial or intellectual property rights known to the seller and not known to the buyer were disclosed to the buyer before the contract was made; and

(b) that the seller, the other person, and any person claiming through or under the seller or the other person, otherwise than under a security interest, lien, encumbrance or industrial or intellectual property right disclosed or known to the buyer before the contract was made, will not disturb the buyer's quiet possession of the goods.

(3) Where the seller retains a security interest in the goods, the seller's implied warranty of title takes effect when the goods are delivered to the buyer.

COMMENT

This provision sets out in greater detail than current section 14 the implied warranty of a seller with respect to title to the goods. It addresses specifically the implied warranty given when the intention of the parties is to transfer only such title as the seller has.

Sale by description

~~**15** When there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description, and if the sale be by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.~~

Contractual Obligations of the Seller;

15 The seller must deliver conforming goods as required by the contract and this Act.

COMMENT

The concept of "sale by description" in current section 15 has been a source of confusion in the case law. It is not clear what it was designed to address. On the surface, it appears to apply to contracts of sale where it is necessary to rely on the description in the contract to determine what kind, quality, quantity, etc. of goods are involved. However, the courts have extended the concept to cases where specific goods are involved, and the seller has described aspects of the goods. This invokes the debate as to whether the statements relate to quality or essential attributes. This confusion has been particularly problematic

since, under current subsection 16(1), the existence of the implied warranty of merchantable quality is dependent upon the contract being a sale of goods by description. See, e.g., *Thoms (c.o.b. Ron's Trucking) v. Louisville Sales & Service Inc. (Canada West Truck Centre)*, [2006] S.J. No. 614 (Q.B.). The proposed replacement section 15 states the simple, basic proposition that the goods delivered must conform to the requirements (the applicable seller's express or implied warranties) of the contract. These requirements may address essential characteristics of the goods or their qualities. Characterization is not relevant when determining the remedy available to the buyer when the requirements have not been met.

Merchantable Quality and Suitability

~~16 Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:~~

- ~~1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for that purpose;~~
- ~~2. Where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality but if the buyer has examined the goods there shall be no implied condition with regard to defects which such examination ought to have revealed;~~
- ~~3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;~~
- ~~4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.~~

16(1) In this section and section 17, "merchantable quality" means:

(a) that the goods, whether new or used, are:

(i) are as fit for at least one of the purposes for which goods described in the contract are commonly bought or used; and

(ii) are of such quality and in such condition that they will be accepted without objection and without price abatement in the market under the contract description by buyers fully acquainted with the goods;

(b) without limiting the generality of clause (a), that the goods;

(i) in the case of fungible goods, are of fair or average quality within the description;

(ii) within the variations permitted by the agreement, are of the same kind, quality and quantity within each unit and among all units involved;

(iii) are adequately contained, packaged, and labeled as the nature of the goods or the agreement require; and

(iv) will remain fit, perform satisfactorily, and continue to be of such quality and in such condition for any length of time warranted by the seller or, for a time that is reasonable having regard to all the circumstances; and

(c) in the case of a new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a period of time warranted by the seller or, in the absence of a seller's warranty, for a time that is reasonable having regard to all the circumstances.

(2) Where the seller is a person who deals in goods of the kind supplied under a contract, there is an implied warranty that the goods are of merchantable quality.

(3) The implied warranty of merchantable quality does not apply:

(a) to defects specifically drawn to the buyer's attention or are otherwise known to the buyer before the contract was made; or

(b) if the buyer examines the goods before the contract was made, to any defect that the examination by the buyer should have revealed.

(4) Where the buyer, expressly or impliedly, makes known to the seller a particular purpose or purposes for which the buyer is acquiring the goods and the seller deals in goods of that kind, there is an implied warranty that:

(a) the goods supplied under the contract are reasonably fit for that purpose or those purposes, whether or not the purpose or purposes are those for which goods of that kind are commonly supplied; and

(b) the goods will so remain for a period of time warranted by the seller or, in the absence of a seller's warranty, for a time that is reasonable having regard to all the circumstances.

(5) The implied warranty mentioned in subsection (4) does not apply where the circumstances show that the buyer does not rely, or that it is unreasonable for the buyer to rely, on the seller to supply goods reasonably fit for the buyer's communicated purpose or purposes.

(6) Subsections (1)-(5) apply, with necessary modifications, to goods supplied under a contract of work and materials.

(7) An implied warranty ~~or condition~~ as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(8) Unless words or conduct indicate otherwise, the implied warranties of this section are excluded by contractual terms such as "as is", "with all faults" or other language which in common understanding indicating the parties' intention to exclude the application of the warranties.

(9) The implied warranties of this section are not excluded by a general clause in the contract purporting to exclude all express or implied warranties.

COMMENT

The opening words of current section 16 are superfluous; they state the obvious. Unless the Act, other legislation, or usage of the trade in which the parties are engaged implies a warranty of the seller relating to quality or fitness, none exists.

The replacement provision contains a definition of “merchantable quality” that, for the most part, reflects the most recent judicial views of this concept. See, *Houweling Nurseries Oxnard, Inc. v. Saskatoon Boiler Mfg. Co. Ltd.*, [2011] S.J. No. 169.

Features contained in the definition not expressly addressed by the courts under the existing formulation are the requirements that the goods will remain fit, perform satisfactorily, and continue to be of such quality and in such condition for any length of time warranted by the seller or, for a time that is reasonable having regard to all the circumstances, [clause 16(1)(b)(iv)]; and that in the case of new goods, unless the circumstances indicate otherwise, spare parts and repair facilities will be available for a period of time warranted by the seller or for a time that is reasonable having regard to all the circumstances [Clause 16(1)(c)].

Subsections (4)-(5) do not introduce features other than minor wording changes not currently found in section 16(1).

Subsection (6) dovetails with subsection 3(2)(b) which provides application to a contract for the supply of goods that involves the provision of services associated with the goods. The implied warranties of merchantability and suitability apply to the goods supplied under the contract.

Subsections (8) and (9) address contractual exclusion of implied warranties. The purpose is to ensure that exclusion of the implied warranties is a clause in the contract to which both parties agree and not general “boiler-plate” wording that does not reflect the bargain.

SALE BY SAMPLE

17(1) *A contract of sale is a contract for sale by sample where there is a term in the contract express or implied to that effect.*

(2) In the case of a contract for sale by sample:

*(a) there is an implied **warranty condition** that the bulk shall correspond with the sample in quality;*

*(b) there is an implied **warranty condition** that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;*

*(c) there is an implied **warranty condition** that the goods shall be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample.*

*(d) there is an implied warranty that the **quantity, quality and description and packaging of the bulk comply with the requirements of the contract.***

~~bulk of the goods corresponds with the sample if the goods do not also correspond with the description.~~

PART II
Effects of the Contract

TRANSFER OF TITLE AS BETWEEN SELLER AND BUYER

18(1) Except as otherwise provided in this Act, the provisions of this Act relating to the rights, obligations and remedies of the seller, buyer and any third party apply without regard to the person who has title to the goods.

(2) Subject to subsections (3), title to conforming goods passes from the seller to the buyer at the time and in the manner agreed upon by the parties.

(3) Unless the context indicates otherwise, reservation by the seller of the title in goods is a security interest to which The Personal Property Security Interest applies.

COMMENT

Several of the recommended provisions set out below deal with a range of matters that are treated in their own context; their application does not depend upon whether title to the goods has passed from the seller to the buyer. In this respect, they do not replicate the approach contained in the current Act.

Goods must be ascertained

~~**18** Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.~~

Property passes when intended to pass

~~**19(1)** Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at the time the parties to the contract intend it to be transferred.~~

~~**(2)** For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.~~

Rules for ascertaining intention

~~**20** Unless a different intention appears the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:~~

~~Rule I. — Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed.~~

~~Rule II. — Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state the property does not pass until that thing be done and the buyer has notice thereof.~~

~~Rule III. — Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing be done and the buyer has notice thereof.~~

~~Rule IV. — When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer:~~

- ~~a. when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;~~
- ~~b. if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection then if a time has been fixed for the return of the goods, on the expiration of that time; and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.~~

Presumptions for Appropriation of the Goods

19(1) Unless the parties otherwise agree, conforming goods are appropriated to the contract when:

(a) at the time when and the place at which the seller completes the seller’s performance with reference to the physical delivery of the goods, even though a document of title is to be delivered at a different time or place;

(b) where delivery is to be made without moving the good:

(i) where the seller is required to deliver a document of title, at the time when and the place at which the document is delivered;

(ii) when the goods are held by a bailee other than the seller and the seller is not required to deliver a document of title, when the bailee acknowledges to the buyer the buyer’s right to possession of the goods;

(c) in the case of a contract for the sale of a crop, when the crop becomes a growing crop;

(d) in the case of a contract for the sale of unborn young to be born within 12 months after contracting, when the young are conceived;

(e) when in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for the purpose of delivery of the goods to the buyer and does not reserve the right of disposal; and

(f) in a case other than referred to in clauses (a)-(e), when the goods are marked, set aside, separated from a bulk of fungible goods or otherwise designated by the seller as goods to which the contract refers.

Passage of title

20(1) Subject to subsections (2), title to conforming goods passes from the seller to the buyer at the time and in the manner agreed upon by the parties.

(2) Unless the context indicates otherwise, reservation by the seller of the title in goods is a security interest to which *The Personal Property Security Act* applies.

(3) A buyer who has paid all or substantially all of the contract price acquires an equitable interest in goods falling within the description of the goods in the contract immediately on the seller acquiring goods or a right to goods of that description.

(4) Except as otherwise provided and subject to subsection (3), where there is no agreement between the parties with respect to the time at which the title to goods passes to the buyer, or the circumstances do not indicate otherwise, even though the agreement provides for a security interest in favour of the seller, title to conforming goods passes to the buyer:

(a) under a contract for the sale of specific goods in a deliverable state as provided in the contract, when the contract is made; and

(b) in other cases when the goods are appropriated to the contract.

(5) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, revests title to the goods in the seller.

COMMENT

The parties are free to determine by contract when title to conforming goods passes from the seller to the buyer. However, under subsection 2, a title retention clause in a security agreement under which the seller purports to retain title until the purchase price has been paid is not effective to prevent passage of title from the seller to the buyer. As a result of section 3 of *The Personal Property Security Act, 1993* the contract must be treated as one in which title passes to the buyer when the contract has been entered into. The effect of the retention of title provision is to recognize that the seller has a security interest in, not title to, the goods. However, this Act would apply to any aspect of the contract not governed by *The Personal Property Security Act, 1993*. See clause 3(1)(c), above and section 15 of *The Personal Property Security Act*.

This total reformulation of existing sections 18-20 removes much of the complexity and associated uncertainty with respect to the passage of title under current law.

Under the reformulated approach, title to goods (as distinct from an equitable interest referred to in subsection 20(3)) cannot pass from the seller to the buyer until goods that fall within the contract requirements (*i.e.*, “conforming goods” -see clause 2(1)(d)) have been appropriated to the contract. The act of appropriation involved the seller taking the steps with respect to goods that indicated the seller’s intention to make those goods available to the buyer pursuant to the terms of the contract. Subsection 19(1) describes a range of circumstances in which conforming goods are deemed to have been appropriated to a contract.

Under subsection 20(4), unless the parties have agreed otherwise, title to conforming non-specific goods passes to the buyer when they are allocated to the contract by the seller. When “specific goods” that are in a deliverable state are involved, title passes at the date of the contract. However, title will not pass if

the goods are not in a deliverable state because the seller must meet some requirement of the contract before being entitled to tender the goods.

Title does not pass to a buyer when the seller tender's goods that are non-conforming because they do not meet the requirements of the contract. The buyer's rights are not affected by the lack of transfer of title.

Sale on Approval or Return

21(1), in this section:

“sale on approval” means a contract in which the goods are delivered primarily for use and in which the person who received the goods has the right to return them even though they conform to the contract; and

“sale or return” means a contract in which the goods are delivered for resale and in which the person who received the goods has the right to return them if they are unsold.

(2) When goods are delivered to the buyer on approval or other similar terms title and risk of loss passes to the buyer when the goods are delivered, but reverts when the buyer elects to return the goods;

(3) A buyer referred to in subsection (2) is deemed to have elected to keep the goods if the buyer retains the possession of them without giving notice of rejection at or before the time fixed for their return or, if no time has been fixed, on the expiration of a reasonable time;

(4) For the purposes of subsection (3), use of the goods consistent with the purpose of trial is not an election to keep them.

(5) When goods are delivered to a person under a contract providing for sale or return:

(a) title passes to the person in possession when the person does any act indicating the person's intention to retain the goods rather than sell them; and

(b) goods are at the buyer's risk until they are returned to the seller and the buyer is responsible for their return.

COMMENT

This section would displace section 20 Rule IV of the current Act. Its role is to provide more precision and certainty with respect to when (if at all) title and the locus of risk passes before the goods are returned.

Reservation of a right of disposal

22(1) In this section and section 21, a right of disposal means:

(a) procurement by the seller of a negotiable bill document of title or delivery instrument to the seller's order or to the order of a financing agency; or

(b) any other measure through which the seller reserves control over delivery of goods by a person who is to deliver the goods;

~~(2) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled and in such case notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer the **title to property** ~~in~~ the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.~~

~~(3) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent the seller is prima facie deemed to reserve the right of disposal.~~

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange the buyer is bound to return the bill of lading if the ~~buyer~~ **buyer** does not honour the bill of exchange and if the ~~buyer~~ **buyer** wrongfully retains the bill of lading ~~the title to property in~~ the goods does not pass from ~~the seller~~ **the seller** to him.

(4) Subject to this Act where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by the ~~owner's~~ **owner's** ~~his~~ conduct precluded from denying the seller's authority to sell.

(5) Nothing in this Act affects:

(a) the provisions of The Factors Act or any enactment enabling the apparent owner of goods to dispose of them as if ~~that person~~ **that person** were the true owner thereof;

(b) the validity of any contract or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Risk

~~22(1) Subject to subsection (2), unless otherwise agreed goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.~~

Risk and insurable interest

23(1) Except as otherwise provided, and subject to subsection (2) and section 27(1), unless otherwise agreed, risk relating to goods passes to the buyer to the extent of any deficiency in the seller's insurance coverage:

(a) when the seller tenders delivery in accordance with the contract;

(b) when the seller gives written notice to the buyer that the goods are placed at the disposal of the buyer in accordance with the contract;

(c) where the buyer is bound to take possession or control of the goods at a place other than a place of business of the seller, when the buyer is aware of the fact that the goods are placed at the buyer's disposal at that place;

(d) on the buyer's receipt of a negotiable document of title covering the goods;

(e) on written acknowledgement by a bailee to the buyer of the buyer's right to possession of the goods; or

(f) after the buyer's receipt of a non-negotiable document of title or other written direction to a bailee or carrier to deliver the goods to the buyer, but the risk of loss remains on the seller:

(i) until the buyer has had a reasonable time to present a non-negotiable document of title or direction; or

(ii) when the bailee fails to honour the document of title or to obey the direction.

(2) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault.

(3) Nothing in this section affects the properties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

(4) Where a tender or delivery of goods fails to conform to the contract, the risk of loss arising before acceptance by the buyer or cure by the seller remains with the seller to the extent of any deficiency in the buyer's insurance coverage.

(5) Where the buyer of goods appropriated to the contract unjustifiably repudiates the contract, the risk of loss to goods in the buyer's possession is on the buyer to the extent of any deficiency in the seller's insurance coverage until the goods are delivered to the seller.

(6) Whether or not title has passed to the buyer, and even though the buyer has a right to return or reject them, the buyer has an insurable interest in goods:

(a) when the goods are at the buyer's risk as provided in this or any other Act;

(b) at any time and in any manner expressly agreed upon by the parties;

(c) in the absence of agreement:

(i) in the case of a contract for the sale of specific goods, when the contract is made;

(ii) in other cases, when the goods are appropriated to the contract;

(iii) in the case of a contract for the sale of a crop, when the crop is planted or becomes a growing crop;

(iv) in the case of a contract for the sale of unborn young to be born within 12 months after contracting, when the young are conceived.

(7) The seller has an insurable interest in goods so long as the seller has title, the risk of loss or a security interest in the goods.

COMMENT

Under this provision, insurable interest in the goods is not associated exclusively with ownership as it is under the current Act. The approach contained in the section is based on the conclusion of the Supreme Court of Canada in *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 SCR 2 at 29-30 in which Wilson J. (speaking for the Court) stated: “[I]f an insured can demonstrate, in Lawrence J.’s words in, “some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring”, that insured should be held to have a sufficient interest. To “have a moral certainty of advantage or benefit, but for those risks or dangers”, or “to be so circumstanced with respect to [the subject matter

of the insurance] as to have benefit from its existence, prejudice from its destruction" is to have an insurable interest in it."

Sale under voidable title

~~**24** When the seller of goods has a voidable title thereto but his title has not been voided at the time of sale the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title.~~

Sale under voidable title

24 A sale of goods by a seller, who at the date of the sale had possession of the goods under a contract that is void at common law or voidable because of fraud by the seller, is effective to transfer title to the goods to a buyer who receives possession of the goods in good faith, for value and without notice of the defect in or lack of title of the seller.

COMMENT

This provision goes beyond current section 24 in protecting buyers from sellers of goods who have void or voidable titles. Current section 24 is based on the common law principle of *nemo dat quod non habet*. If at the time of the sub-sale the seller (the person with the voidable title) does not have title because the contract has been avoided, the buyer is not protected. If the sub-sale occurred before the avoidance, the buyer acquires the title of the seller. Another limitation on the effectiveness of the current provision in protecting the buyer is that it does not apply when the initial sale is void rather than voidable. If under the law of contract, the initial sale is void for some reason (*e.g.*, mistake as to the identity of a party), current section 24 does not apply and the buyer of the goods in the re-sale gets no protection. The policy basis of the revised provision is that the buyer under the sub-sale will never be able to know when entering the contract whether the original sale was void or has been avoided.

In addition, there is uncertainty in existing law as to what steps are required to avoid the contract in cases of fraudulent misrepresentation. The protection provided by the reformulated provision is not dependent upon the time of avoidance by the original seller. Nor is it dependent upon the factual basis on which the avoidance is being asserted by that seller. All that matters is that the seller in the sub-sale has sold the goods to the sub-buyer who acquired the goods in good faith, for value and without notice of the defect in the title of the transferor.

Transfer of title to goods in possession

25(1) A reference in this section to the Personal Property Registry is a reference to the registry referred to in section 42 of The Personal Property Security Act, 1993 and a reference to registration is to be read as registration in compliance with the requirements 1993 of The Personal Property Regulations relating to serial numbered goods and non-serial numbered goods, as the case may be.

(2) A person who is in possession of goods as a seller or a buyer has the power to:

(a) transfer all rights of the person consenting to that person's possession to a person who enters into a contract to buy or lease the goods and who receives the goods in good faith, for value and without notice of the title of the consenting person;

(b) grant a security interest in the goods to a person who, at the time of the security agreement, is without notice of the title of the consenting person.

(3) Subsection (2) does not apply:

(a) where a registration has been effected in the Personal Property Registry prior to the transfer of the goods referred to in clause (2)(a) recording the interest of the person consenting to the transferor's possession;

(b) a security interest referred to in clause (2)(b), when a registration has been effected in the personal property registry prior to the perfection of the security interest recording the interest of the person consenting to the transferor's possession; or

(c) to a transaction between the transferor and transferee to which The Personal Property Security Act applies.

(4) Subsection (3)(a) does not apply to a sale or lease of goods made in the ordinary course of business of the person in possession.

~~26(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under a sale, pledge or other disposition thereof to a person receiving the goods or documents in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer was expressly authorized by the owner of the goods to do so.~~

~~((1.1) Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to the goods that is out of the ordinary course of business of the person having sold the goods, where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under The Personal Property Security Act, 1993, and Part IV of that Act applies, mutatis mutandis, to such registration. (1.2) Subsection (1.1) does not operate so as to prevent a person who receives the goods or the documents of title to the goods in good faith and without notice of the previous sale from selling, pledging or otherwise disposing of the goods or the documents of title to the goods to a person who receives the goods or the documents of title to the goods in good faith and without notice of the first sale, unless the goods are of a type or kind which are required by the regulations under The Personal Property Security Act, 1993 to be described by serial number and are so described in a registered financing statement.~~

~~(2) Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under a sale, pledge or other disposition thereof to a person receiving the goods or documents in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.~~

~~(3) In this section "mercantile agent" has the same meaning as in The Factors Act.~~

~~(4) Subsection (2) does not apply to a sale, pledge or other disposition of goods or documents of title to the goods by a person who has obtained possession of the goods pursuant to a security agreement under which the seller has a security interest as defined in The Personal Property Security Act, 1993. R.S.S. 1978, c.S-1, s.26; 1979.~~

COMMENT

Section 26 (and its counterpart in *The Factors Act RSS 1978 F-1, s. 9*) has been a source of much litigation and resulting uncertainty. Its significance has been diminished by the registry provisions that were included when the PPSA was enacted. Nevertheless, the concepts involved require clarification, the wording requires simplification and anomalies need to be removed. This is the role of the redrafted section 25. Section 25 (as is current section 26) is a statutory exception to the common law principle of *nemo dat quod non habet*.

The protection from the operation of the *nemo dat* principle extends to persons who have purchased goods and left the goods in the possession of the seller, and persons who have obtained possession of goods under a contract of sale without also obtaining title to the goods. Unlike current section 26, the provision extends protection to qualifying secured creditors without regard as to how they perfect their security interests. Current section 26 provides protection only to pledgees (i.e., secured creditors to perfect by taking possession of the collateral).

When a person transfers possession of that person's goods to another person under a contract of sale or leaves the goods in the possession of the seller, the owner places the possessor in the position of being able to deceive another other person (good faith buyer, lessee or secured party) into thinking that the possessor is the owner of the goods and, consequently, has the power to pass title in or right to possession of the goods to the buyer or lessee, or to give a security interest in the goods. Section 25 provides protection from the operation of the *nemo dat* principle to a buyer, lessee or secured party dealing in good faith with the possessor.

Third party protection is not legally justified in cases where the person who consents to the possession of a person who deals with the buyer or secured creditor can take prophylactic measures to avoid loss under the provision by conducting a search of the Personal Property Registry before entering into the transaction. This policy is reflected in subsection (3) which makes subsection (2) [the exception to *nemo dat*] inapplicable where the person consenting to possession of the goods by someone else has given public notice of that person's interest through registration in the Personal Property Registry.

An exception to the effect of registration in the Personal Property Registry relates to transactions in the ordinary course of business of the person in possession of the goods. This parallels section 30(2) of *The Personal Property Security Act, 1993* (the PPSA) which removes registration as a factor in determining the priority position of persons who acquire in the ordinary course of business.

Some transactions in which a buyer is in possession of the goods will be a purchase-money security agreement falling within the PPSA. The rights associated with these goods are determined under the PPSA's priority regime. Consequently, they are excluded from the operation of section 25.

Acquisition of title to grain

26(1) *Where grain is sold and delivered at an elevator licensed under the Canada Grain Act, to the manager or operator thereof as defined in the said Act, or to a track buyer licensed under the said Act, the buyer acquires a good title to the grain so bought and delivered, provided he buys it in good faith and without actual notice of any defect or want of title on the part of the seller in the grain.*

(2) Where the manager or operator or any track buyer or other party licensed under the Canada Grain Act advances money on the security of grain delivered pursuant to subsection (1), the party advancing the money shall have a charge or lien on the grain to the extent of the advance made and any charges that may accrue for storage or interest in priority to any other claim, provided that the advance is made in good faith and without actual notice of any adverse claim or lien or of any defect or want of title on the part of the party receiving the advance on the grain so delivered.

PART III

Performance of the Contract

DUTIES OF SELLER AND BUYER

27(1) *Sections 23, 28 and 29 apply subject to change or modification by a term in the contract or related contract that makes applicable one of the Incoterms promulgated by the International Chamber of Commerce or an equivalent term.*

(2) It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

COMMENT

The provisions in this Part and section 23 (risk) deal with matters that may well be addressed in the sales contract through the use of INCOTERMS or equivalent terms adopted from other sources. If so, these matters are being addressed by express terms of the contract and the sections of the Act that address them are displaced.

Payment and delivery concurrent conditions

28 *Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.*

Rules as to delivery

29(1) *Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending on the contract express or implied between the parties and apart from a contract express or implied the place of delivery is the seller's place of business ~~if he has one and if not his residence.~~*

(2) If the contract is for the sale of specific goods that to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(3) Where under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed the seller is bound to send them within a reasonable time.

~~1. *Where the goods at the time of the sale are in possession of a third person there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that the goods are held on behalf of the buyer he holds the goods on his behalf but that nothing in this section affects the operation of the issue or transfer of any document of title to goods.*~~

(4) *Where goods are in the possession of a bailee and are to be delivered without being moved, unless the parties agree otherwise, tender requires:*

(a) that the seller delivers to the buyer a copy of a written direction to the bailee to deliver conforming the goods to the buyer along with an acknowledgement by the bailee of the buyer's right to possession of the goods;

(b) that the seller delivers to the buyer a non-negotiable document of title covering the goods under which the buyer is entitled to take possession of the goods;

(c) that the seller tenders to the buyer a negotiable document of title covering the goods.

(5) *A refusal by the bailee to honour a document or to obey the direction defeats the tender and the risk reverts in the seller.*

*(6) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour **in the circumstances.** ~~What is a reasonable hour is a question of fact.~~*

(7) Unless otherwise agreed the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

COMMENT

Subsections (4)-(5) are designed to provide further clarification as to what constitutes tender where goods are in the possession of a third party.

Delivery of wrong quantity

30(1) Except as provided in section 31, where the seller delivers to the buyer a quantity of goods less than the quantity the seller he contracted to sell, subject to subsections 35(7)-(9), the buyer may accept or reject the goods delivered, them but if the buyer accepts the goods so delivered, must pay for accepted goods them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than the seller he contracted to sell, the buyer may accept the goods included in the contract and reject the rest or he may reject the whole and if the buyer accepts the whole of the goods so delivered, the buyer must pay for them at the contract rate.

(3) Where the seller delivers to the buyer goods the seller he contracted to sell mixed with goods of a different description not included in the contract the buyer may accept the goods which are in accordance with the contract and reject the rest or he may reject the whole.

(4) This section is subject to usage of trade, special agreement or course of dealing between the parties.

~~31(1) Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments.~~

~~(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments it is a question depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.~~

COMMENT

The amendment to subsection (1) makes it clear that this provision does not apply to instalment contracts. The provision ameliorates the strict tender of the current provision by permitting cure of the deficient tender. There is no good reason a seller should not be able to make up the shortfall in the amount delivered if this can be done under the conditions set out in section 35(7)-(9).

Instalment deliveries

31(1) Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by instalments to be separately accepted, the buyer may treat the contract as repudiated if:

(a) the seller makes a defective delivery in respect of one or more instalments and the breach of contract is not cured as provided in subsections 35(7)-(9); or

(b) the buyer would suffer unreasonable prejudice or commercial disruption because of the interdependence of the defective delivery made with future deliveries, even if the defective delivery were cured.

(3) A buyer who accepts goods delivered must pay for them at the contract rate.

COMMENT

Subsection (2) extends the rights of a buyer under a contract where the goods are to be delivered in separate instalments. Subsection 31(2) of the current Act applies only when the instalments are to be paid for separately. Subsection (2) applies without regard to the payment terms.

In addition, subsection (2) reflects the “perfect-tender-with-cure” policy contained in section 35 below. However, it provides an exception to the “cure” aspects of that section. If because of the late delivery or non-delivery of one or more instalments the buyer would suffer unreasonable prejudice or commercial disruption even if the defective delivery were cured, the buyer need not accept cure, but may declare the contract as repudiated.

Delivery to carrier

32(1) *Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not for the purpose of transmission to the buyer is prima facie a delivery of the goods to the buyer.*

*(2) Unless otherwise authorized by the buyer the seller must make such contract with the carrier on behalf of the buyer as is reasonable having regard to the nature of the goods and the other circumstances of the case and if the seller omits to do so and the goods are lost or damaged in course of transit the buyer may decline to treat the delivery to the carrier as a delivery **under the contract.** ~~to himself or may hold the seller responsible in damages.~~*

(3) ~~Unless otherwise agreed where goods are sent by the seller to the buyer by a route involving sea transit under circumstances in which it is usual to insure, the seller must give such notice to the buyer as will enable the buyer to insure them during their sea transit and if the seller fails to do so the goods shall be deemed to be at the seller’s risk during the sea transit.~~

~~Risk where goods delivered at distant place~~

~~**33** *Where the seller of goods agrees to deliver them at the seller’s risk at a place other than that where they are when sold the buyer must nevertheless unless otherwise agreed take the risk of deterioration in the goods necessary incident to the course of transit.*~~

Buyer’s right of examination

33(1) *Where goods are delivered to the buyer that the buyer had not previously examined ~~them~~, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.*

*(2) Unless otherwise agreed when the seller tenders delivery of goods to the buyer, the seller, ~~buyer is bound on request of the buyer~~, shall **give to afford** the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.*

~~35 The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he does any act in relation to them that is inconsistent with the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.~~

Buyer's deemed acceptance

34 Subject to subsections 35(9) and (10), the buyer is deemed to have accepted the goods when:

(a) after having a reasonable opportunity to examine the goods, the buyer indicates to the seller that the buyer has accepted them; or

(b) after the lapse of a reasonable time, the buyer retains the goods without indicating to the seller that the buyer has rejected them.

COMMENT

Under reformulated section 34, the buyer is given a reasonable time to inspect goods before being deemed to have accepted them as conforming to the contract requirements. Unlike the current section 34, there is no reference to “any act in relation to them that is inconsistent with the ownership of the seller” as a factor in determining whether the buyer has accepted the goods. As noted elsewhere, “ownership” of the goods does not play a significant role in determining the *inter se* rights of the parties. A buyer is not deemed to have accepted goods if they have been retained on the understanding that a defect in the seller’s performance will be cured. See subsections 35(9)-(10).

Buyer's rights on improper delivery

35(1) For the purposes of this section, “cure” includes:

(a) tender or delivery of any missing part or quantity of the goods;

(b) tender or delivery of other conforming goods or documents or, in the case of a sale of goods other than specific goods, goods that differ in no material respect from those goods;

(c) the remedying of any other non-conformity in performance.

(2) Subject to section 31, if the goods or the tender of delivery are non-conforming, the buyer may:

(a) reject the whole;

(b) accept the whole;

**(c) accept those commercial units of the goods that are conforming and reject the remainder,
or**

(d) propose a reduction of the price of the goods.

(3) The buyer shall notify the seller of the buyer’s rejection of the goods or proposal for a reduction in the price as soon as practicable after discovering the non-conformity.

(4) Subject to subsections (7)-(10), on rightful rejection, the buyer has a lien on rejected goods in the buyer's possession or control for any payments made on their price and any reasonable costs incurred in their transportation, care and custody, and may sell them in a commercially reasonable manner.

(5) A person who buys in good faith takes the goods free of any rights in the goods of the seller, even though the buyer fails to comply with one or more of the requirements of this section.

(6) The buyer shall pay at the contract rate or at the rate agreed between the parties for any accepted goods.

(7) Where a buyer rejects a non-conforming tender, whether before or after the time for performance has expired, the seller has a reasonable time to cure the non-conformity, if:

(a) the non-conformity can be cured expeditiously and without prejudice or commercial disruption to the buyer;

(b) after being notified of the buyer's rejection, the seller immediately notifies the buyer of the seller's intention to cure, the type of cure and the date on which it will be provided; and

(c) the seller has the capacity to provide the type of cure offered by the seller as indicated in the notice referred to in (b).

(8) When the buyer agrees with or without consideration that the seller has additional time to cure a non-conforming tender, the buyer may not treat the contract as repudiated unless the seller fails cure the non-conformity before the expiry of the agreed period.

(9) The buyer does not accept goods by reason only that:

(a) the buyer has not rejected them in the reasonable belief, induced by the seller, that they are conforming or that their non-conformity will be cured as provided in subsections (7), or

(b) the acceptance occurred without discovery of the non-conformity if it was induced by the difficulty of discovery.

(10) The buyer may revoke an acceptance of non-conforming goods if:

(a) it was made on the reasonable assumption that the non-conformity would be cured but this has not occurred, or

(b) the parties fail to agree on a reduction in the price.

COMMENT

This provision sets out, in the context of non-compliant performance by a seller, the “perfect-tender-with-cure” approach that is a central feature of the recommendations relating to remedies. The provision empowers the buyer to whom non-conforming goods have been tendered or delivered to reject the goods,

subject to the conditioned right of the seller to either cure the non-conformity or agree to reduce the price. Cure is possible only when it can be effected without prejudice or commercial disruption to the buyer.

Once the buyer notifies the seller of an election to reject the goods, the seller must immediately notify the buyer of the decision to cure the nonconformity. The notice must specify the type and date of cure. As an alternative to cure, the buyer may accept those portions of the tendered or delivered goods that are conforming and reject the rest. An alternative to cure is an agreement of the parties on a reduction of the price of the goods.

An undertaking by the buyer to give to the seller additional time to cure a non-conformity is binding on the buyer without additional consideration unless the seller fails to cure the non-conformity before the expiry of the agreed period.

A buyer who rightfully rejects non-conforming goods that have been delivered has a lien on goods for any payments made on their price and any reasonable costs incurred in their transportation, care and custody, and may sell them in a commercially reasonable manner. A person who buys in good faith takes the goods free of any rights of the seller, even though the buyer fails to comply with one or more of the requirements of section 35.

Buyer not bound to return rejected goods

36(1) ~~Unless otherwise agreed~~ Where goods are delivered to the buyer **and the buyer rightfully rejects them** ~~refuses to accept them having the right to do so,~~ the buyer is not bound to return them to the seller. ~~but it is sufficient if he intimates to the seller that he refuses to accept them.~~

(2) After rightful rejection by the buyer, goods that are in the buyer's possession:

(a) are at the seller's risk to the extent of deficiency in the buyer's insurance; and

(b) shall be held by the buyer with reasonable care at the seller's disposition for a time sufficient to permit the seller to retake possession of them.

(3) If the seller gives no instructions for redelivery of rejected goods within a reasonable time after notification of rejection, the buyer may:

(a) arrange for redelivery of the goods to the seller and recover from the seller the redelivery costs; or

(b) resell them for the seller's account and recover reimbursement for storage and costs of selling the goods.

(4) A buyer referred to in subsections (2) and (3) is entitled to reasonable expenses of care and custody of the goods in the buyer's possession.

COMMENT

Sections 36 and 37 provide a buyer who has rightfully rejected non-conforming goods in the buyer's possession detailed guidance as to what measures must be taken to deal with the goods in a manner that recognizes both the interests of the seller and the buyer.

Seller's rights when buyer refuses to take delivery

~~**37(1)** When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after the request take delivery of the goods, the seller may treat the contract as repudiated if:~~

~~(a) the seller may treat the contract as repudiated by the buyer; the buyer is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods.~~

~~(2) Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.~~

COMMENT

See proposed section 45.

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Unpaid seller defined

38(1) The seller of the goods is deemed to be an **"unpaid seller"** within the meaning of this Act:

(a) when the contract price has not been paid or tendered as required by the contract and:

(i) the goods have been sold without any stipulation as to credit or the goods have been sold on credit, but the term of credit has expired; or

(ii) the buyer becomes insolvent; or.

~~(a) when the whole of the contract price has not been paid or tendered;~~

~~(b) when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.~~

(2) In this Part "seller" includes a person who is in the position of a seller, as for instance, an agent of the seller to whom the bill of lading has been endorsed or a consignor or agent who has ~~himself~~ paid or is directly responsible for the price.

Unpaid seller's rights

39(1) Subject to the provisions of this Act or any other Act, an unpaid seller has until the price of the goods is paid or tendered a right to retain possession of undelivered goods, and a right to stop goods in transit as hereinafter provided even though the seller has parted with the possession of them.

(2) As against the buyer, an unpaid seller may stop delivery until:

(a) receipt of the goods by the buyer; or

(b) negotiation to the buyer of any negotiable document of title covering the goods.

40 Where an unpaid seller has made part delivery of the goods, whether under an indivisible contract or under an instalment contract, the seller may withhold delivery of the remainder until payment of all amounts that are due, unless the part delivery has been made under circumstances that show an agreement by the seller to waive the right to withhold delivery.

COMMENT

Sections 39 and 40 enumerate the rights of an unpaid seller in relation to the goods when the buyer has failed to pay for them in accordance with the terms of the contract. The seller is empowered to refuse to deliver the goods or prevent their delivery after they have been placed in the possession of an independent carrier.

~~39(1) Subject to the provisions of this Act, and of any Act in that behalf, notwithstanding that the property in the goods may have passed to the buyer the unpaid seller of goods has by implication of law:~~

~~(a) a lien on the goods or right to retain them for the price while he is in possession of them;~~

~~(b) in the case of the insolvency of the buyer a right of stopping the goods in transitu after he has parted with the possession of them;~~

~~(c) a right of resale as limited by this Act.~~

~~(2) Where the property in goods has not passed to the buyer the unpaid seller has in addition to his other remedies a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.~~

UNPAID SELLER'S LIEN

Lien

~~40(1) Subject to this Act the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases:~~

~~(a) where the goods have been sold without any stipulation as to credit;~~

~~(b) where the goods have been sold on credit but the term of credit has expired~~

~~(c) where the buyer becomes insolvent.~~

COMMENT

The fact that title to the goods has passed to the buyer is not relevant since, under the changes proposed, the enforcement rights of the parties are not affected by the locus of title to the goods. Under sections

39-43, an unpaid seller may retain or regain possession of goods and resell them regardless of whether title to the goods had passed to the buyer or the buyer has resold the goods.

Part delivery

~~41 Where an unpaid seller has made part delivery of the goods he may exercise the seller's lien his right of lien or retention on the remainder unless the part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.~~

Termination of lien

~~42(1) The unpaid seller of goods loses his lien or right of retention thereon:~~

- ~~a. when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;~~
- ~~b. when the buyer or his agent lawfully obtains possession of the goods;~~
- ~~c. by waiver thereof.~~

~~(2) The unpaid seller of goods having a lien or right of retention thereon does not lose his lien or right of retention by reason only that he has obtained judgment for the price of the goods~~

STOPPAGE IN TRANSIT

~~43 Subject to the provisions of this Act when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say he may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price.~~

Right of stoppage - Duration of transit

~~41(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water or other bailee for the purpose of transmission to the buyer until the buyer or his **buyer's** agent in that behalf takes delivery of them from the carrier or other bailee.~~

~~(2) If the buyer or **the buyer's** his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.~~

~~(3) If after the arrival of the goods at the appointed destination the carrier or other bailee acknowledges to the buyer or **the buyer's** his agent that the carrier or bailee ~~he~~ holds the goods ~~on his behalf and continues in possession of them~~ as bailee for the buyer or **the buyer's** his agent the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.~~

~~(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end.~~

~~(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the case whether they are in the possession of the master as a carrier or as agent for the buyer.~~

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or the buyer's ~~his agent in that behalf~~ the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or **the buyer's** ~~his agent in that behalf~~ the remainder of the goods may be stopped in transit unless the part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage effected

42(1) The unpaid seller may exercise ~~a his~~ right of stoppage in transit either by taking actual possession of the goods or by giving notice ~~of his claim of stoppage~~ to the carrier or other bailee in whose possession the goods are.

(2) A notice pursuant to subsection (1) may be given either to the person in actual possession of the goods or to **that person's** ~~his~~ principal and in the latter case the notice ~~to be effectual~~ must be given at such time and under such circumstances that the principal by the exercise of reasonable diligence may communicate it to that **person's** servant or agent in time to prevent a delivery to the buyer.

(3) Subject to subsection (4), when notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, **the carrier or other bailee** ~~he~~ must redeliver the goods to or according to the direction of the seller, and the expenses of redelivery must be borne by the seller.

(4) If a negotiable document of title has been issued for goods, the carrier or bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.

(5) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

RESALE BY BUYER OR SELLER

Effect of sub-sale or pledge by buyer

43(1) Subject to this Act, the unpaid seller's right of ~~lien or~~ retention or stoppage in transit is not affected by any sale, or other disposition of the goods that the buyer may have made **or a security interest in the goods granted by the buyer**, unless the seller has assented thereto.

(2) Where a negotiable document of title to goods has been lawfully transferred to a person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration then if the last mentioned transfer was by way of sale **or pursuant to a security agreement**, the unpaid seller's right of ~~lien or~~ retention or stoppage in transit can only be exercised subject to the rights of the transferee.

Sale not rescinded by stoppage

44 Subject to this section, A contract of sale is not rescinded by the mere exercise by an unpaid seller of his a right of lien or retention or stoppage in transit.

~~9. Where the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within a reasonable time pay or tender the price the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by the his breach of contract.~~

~~(3) Where an unpaid seller who has exercised his right of retention or stoppage in transit resells the goods, the buyer acquires the seller's a good title thereto as against the original~~

~~(5) Where the seller expressly reserves a right of resale if the buyer makes default and on the buyer making default resells the goods, the original contract of sale is thereby rescinded but without prejudice to any claim the seller may have for damages~~

PART V

Actions for Breach of the Contract

ADDITIONAL REMEDIES OF THE SELLER

Right to treat the contract as repudiated

45(1) The seller may treat the contract as repudiated by the buyer when:

(9) the buyer fails to make payment, take delivery of the goods or perform any other commercially significant obligation on the date or within the time provided in the contract or a specified reasonable period of time after the date for payment provided in the contract set by the seller;

(b) the buyer wrongfully rejects the seller's tender or delivery of conforming goods as required by the contract; or

© the buyer's actions otherwise amount to repudiation of the contract by the buyer.

(2) A seller is bound by any express or implied undertaking to allow the buyer to make payment other than as provided in clause (a).

(3) For the purpose of subclause (1)(a):

(a) a failure to pay includes a failure to take steps or comply with formalities that are required under the contract and any relevant law to enable payment to be made or to ensure that it will be made, and

(b) a failure to take delivery includes a failure to perform any acts that are required of the buyer under the terms of the contract to enable the seller to make delivery.

(4) A seller who is entitled to treat the contract as repudiated may recover damages as provided in sections 47.

COMMENT

This provision describes the circumstances in which a seller may treat the contract as being repudiated by the buyer. It reflects the “perfect-tender-with-cure” approach found in other recommended provisions. The section accommodates arrangements under which the seller gives to the buyer additional time to perform. The remedy of a seller who elects to treat the contract as having been repudiated is to bring action for damages against the buyer. However, the seller may not bring an action for the price since such an action is inconsistent with terminating the primary contractual obligations of both parties.

Action for price

~~46(1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for goods that have been appropriated to the contract, according to the terms of the contract the seller may maintain an action against him for the price of the goods. Where under a contract of sale the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price the seller may maintain an action for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.~~

(2) A seller does not lose rights under sections 39-44 by reason only of bringing an action for the price.

(3) Subject to subsections (4)-(5), unless the seller has treated the contract as repudiated, the seller who sues for the price shall hold for the buyer any goods in the seller’s control that have been appropriated to the contract and shall make the goods available to the buyer in accordance with the contract when the judgment for the price has been discharged by payment.

(4) A seller who has obtained a judgment for the price may resell the goods if the judgment is not discharged by payment within a reasonable period of time after it has been entered.

(5) The net proceeds of a resale referred to in subsection (4), shall be credited to the judgment and upon discharge of the judgment by payment, the buyer is entitled to any goods not resold.

(6) A purchaser who buys in good faith at a sale referred to in subsection (4) takes the goods free of any rights of the buyer, even though the seller fails to comply with a requirement of this Act when effecting the sale to the purchaser.

(7) Nothing in this Part limits the damages recoverable by the seller when the amount recovered by the seller in a lawful sale of the goods is inadequate to put the seller in as good a position as performance by the buyer would have done.

(8) The seller may set-off damages against any surplus from the sale.

(9) Nothing in this section shall prejudice the right of the seller to recover interest on the price from the date of tender of the goods or from the date on which the price was payable.

COMMENT

Under this provision, an unpaid seller may retain the seller's rights of retention and stoppage and, at the same time, bring an action for the price. A judgment for the price is an order of the court requiring the buyer to pay the price; consequently, the right of recovery of the seller is limited to enforcing the judgment and damages. If the seller obtains a judgment, the goods must be surrendered to the buyer only upon satisfaction of the judgment. If the buyer fails to discharge the judgment by paying the purchase price and costs of the judgment, the seller can re-sell the goods, but must credit the net proceeds, other than an amount in excess of the judgment, to the buyer. Any deficiency between the proceeds of the sale and the amount of the judgment can be enforced against the buyer as damages.

Any surplus from the sale over the amount of the judgment can be the basis for set-off of damages suffered by the seller.

Damages for non-acceptance

47(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may maintain an action ~~against him~~ for damages for non-acceptance.

(2) The measure of damages is the estimated loss that the buyer should have foreseen at the time of the contract as likely to result from the breach of contract.

~~(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.~~

(3) A seller who has treated the contract as repudiated as provided in subsection 45(1) may recover as damages the difference between the contract price and the price that could have been obtained by a disposition within or at a reasonable time and place after the seller learned of the breach less any expenses saved in consequence of the breach.

(4) A claim for damages under this Part may include a claim for incidental or consequential damages.

(5) Nothing in this section limits the damages recoverable by the seller when the measure of damages as provided in subsections (2) or (3) would be inadequate to put the seller in as good a position as performance by the buyer would have done.

~~*(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or if no time was fixed for acceptance then at the time of the refusal to accept.*~~

COMMENT

This provision states the standard tests under which damages for breach of a sales contract are determined. However, as a result of subsection (6), the court is given the power to order recovery of damages on an alternative basis where recovery under the standard tests would be inadequate to put the seller in as good a position as performance by the buyer would have done.

BUYERS' REMEDIES

Repudiation and damages for non-delivery

48(1) In addition to any other remedy of a buyer provided in this Act, where the seller wrongfully neglects or refuses to deliver conforming the goods to the buyer, the buyer may:

(a) subject to subsections 35(7-10), treat the contract as repudiated in total or, in the case of instalment delivery, as provided in subsection 31(2), and bring an action against the seller for return of any part of the purchase price paid to the seller;

(b) maintain an action against the seller for damages.

(2) A buyer who has accepted goods may recover as damages for any non-conformity of tender for the loss resulting in the ordinary course of events from the seller's breach.

Damages for breach of contract

49(1) Where the seller is in breach of the contract, the buyer may maintain an action in damages in an amount that the seller should have foreseen at the time of the contract as likely to result from the breach of contract.

(2) Where there is a breach of contract by the seller and the buyer has accepted the goods, the buyer may set up against the seller the breach in diminution or extinction of the price and maintain an action for damages.

(3) Where the seller fails to tender or deliver conforming goods and buyer rightfully treats the contract as repudiated by the seller, the buyer may recover as damages for the difference between the contract price and the price of equivalent conforming goods obtainable in the market at the date the seller was required under the contract to tender or delivery goods less any expenses saved in consequence of the breach.

(4) Nothing in this section limits the damages recoverable by the buyer when the measure of damages would be inadequate to put the buyer in as good a position as performance by the seller would have done.

(5) A claim for damages may include a claim for incidental or consequential damages.

~~50(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may maintain an action against the seller for damages for non-delivery.~~

~~(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.~~

~~(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed then at the time of the refusal to deliver.~~

~~52(1) Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat a breach of a condition on the part of the seller as a breach of warranty the buyer is not by reason only of the breach of warranty entitled to reject the goods; but he may:~~

~~a. — set up against the seller the breach of warranty in diminution or extinction of the price (b) treat the contract as repudiated or~~

~~(c) maintain an action against the seller for damages or the breach of warranty.~~

~~(6) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.~~

~~(3) In case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have answered to the warranty.~~

~~(4)~~

~~(3) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining *the seller's breach of contract*.~~

~~(7) Where there is an action for the same breach of warranty if he has suffered further damage.~~

COMMENT

This provision states the standard tests under which damages for breach of a sales contract are determined. However, the court is given power to order recovery of damages on an alternative basis where recovery under the standard tests would be inadequate to put the seller in as good a position as performance by the buyer would have done.

Specific performance

50(1) In an action for breach of contract to deliver specific *goods or goods appropriated to the contract, ascertained goods* the court may if it thinks fit on the application of the plaintiff by its judgment direct that the contract shall be performed specifically without giving the defendant the option of retaining the goods on payment of damages.

(2) A judgment pursuant to subsection (1) may be unconditional or upon such terms and conditions as to damages, payment of the price and otherwise as to the court seems just and the application by the plaintiff may be made at any time before judgment.

(3) In an application for an order of specific performance of the contract of sale, the court shall take into consideration:

(a) whether an award of damages would be sufficient to meet the buyer's reasonable expectations when entering into the contract and the buyer's substantial and legitimate interests under the contract;

(b) whether the buyer has paid any portion of the price of the goods;

- (c) whether or not the contract was for the sale of specific goods;*
- (d) the ability of the buyer to obtain goods of the same kind and quality without significant delay, difficulty or costs;*
- (e) whether the assessment of damages would be difficult, expensive or time-consuming;*
- (f) whether the goods are of the kind for which there is a volatile market;*
- (g) whether a judgment for damages against the seller would be difficult to enforce because of:
 - (i) the insolvency or impending insolvency of the seller;*
 - (ii) the absence of exigible assets of the seller in Saskatchewan;**
- (h) the conduct of the seller.*

COMMENT

Subsection (3) provides guidance to the court in an application for specific performance. The subsection implicitly rejects the requirement at equity that the remedy be limited to contracts involving the sale of “unique” or otherwise unobtainable goods. It focusses on factors that relate to the expectations of the parties at the time the contract was entered into and on difficulties that would be encountered by the buyer should the buyer’s remedy be limited to damages.

Interest and special damages

~~53 Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case whereby law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.~~

SUPPLEMENTAL PROVISIONS
PART VI

Damages for breach of collateral contract

51 (1) Nothing in this Act impairs any remedy of a buyer or seller for breach of any obligation or promise collateral or ancillary to the contract of sale.

(2) Except as otherwise provided in this Act, the remedies for breach of a warranty relating to the goods that does not constitute a term of the contract are the same as the remedies for breach of a contract of sale.

(3) The remedies available for fraudulent misrepresentation inducing the formation of a contract include a right to recover damages as provided in this Act for breach of warranty and, the aggrieved party does not have to elect between rescission of the contract and damages for breach of warranty.

COMMENT

These provisions recognize that the Act does not preclude application of established law dealing with collateral contracts and recovery in cases of fraudulent misrepresentation when a warranty in a collateral contract or the fraudulent misrepresentation does not amount to a warranty under the Act. The effect of subsections (2) and (3) is to treat the term of the collateral contract or the fraudulent misrepresentation as a warranty under the Act for the purposes of the remedies of the affected party. Subsection (3) provides for cumulative remedies of rescission and damages in the case of fraudulent misrepresentation.

~~Exclusion of implied terms and conditions~~

~~55 Where a right, duty or liability would arise under a contract of sale by implication of law it may be negated or varied by express agreement or by the course of dealing between the parties or by usage if the usage be such as to bind both parties to the contract.~~

~~Reasonable time a question of fact~~

~~52 Where by this Act reference is made to a reasonable time the question what a reasonable time is a question of fact.~~

~~Rights enforceable by action~~

~~53 Where a right, duty or liability is declared by this Act it may unless otherwise provided by this Act to be enforced by action.~~

Auction sales

52 *In the case of a sale by auction:*

1. Where goods are put up for sale by auction in lots each lot is prima facie deemed to be the subject of a separate contract of sale;

2 A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made a bidder may retract ~~a~~ his bid;

3 Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller it shall not be lawful for the seller to bid himself or to employ any person to bid at the sale or for the auctioneer knowingly to take a bid from the seller or any such person. A sale contravening this rule may be treated as fraudulent by the buyer;

4 A sale by auction may be notified to be subject to a reserve or upset price and the right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved but not otherwise the seller or any one person on the ~~seller's~~ his behalf may bid at the auction.

Existing laws preserved subject to Act

53(1) *The principles of the common law and equity except to the extent that they are inconsistent with this Act, supplement this Act and continue to apply.*

(2) Nothing in this Act affects the enactments relating to bills of sale or any enactment relating to the sale of goods that is not expressly repealed by this Act.

~~*(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale that is intended to operate by way of mortgage, pledge, charge or other security.*~~