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Notes and Comments

Hugh M. Kindred*

New Consumer
Legislation in
Nova Scotia

While political observers were commenting upon the dullness of the 1975¹ spring session of the Legislature, something approaching a quiet revolution was taking place in Consumer Law. Changes were heralded in January 1975 when the amendments of late 1973² to the Consumer Services Act³ were proclaimed in force. The amendments expanded the functions of the Consumer Services Bureau and, most importantly, permitted for the first time the appointment of a minister of Cabinet rank to administer the Act. A few days before the Legislature met in March, Dr. Maynard McAskill was named to that position.

The new minister wasted no time in acting. The first bill in the Assembly was introduced by him. In all, three consumer bills were passed during the sitting. In order of introduction they were Bill 1, the Collection Agencies Act,⁴ Bill 36,⁵ being amendments to the Consumer Protection Act,⁶ and Bill 116, The Direct Sellers' Licensing and Regulation Act.⁷ This note will comment on each in turn.

The greatest changes are wrought by the amendments contained in Bill 36 to the Consumer Protection Act. Previously the Act regulated credit granters and required disclosure of credit terms. Now it is supplemented by the addition of substantive clauses affecting the contractual conditions of consumer transactions. For

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1. January 24, 1975.

2. S.N.S. 1973 (2d Sess.), c.5.

3. S.N.S. 1968, c.5.

4. S.N.S. 1975, c.7, proclaimed July 29, 1975 to take effect September 30, 1975. Regulations made September 30, 1975 to take effect October 1, 1975. (Hereafter cited as 'CAA').

5. S.N.S. 1975, c.19, proclaimed July 8, 1975 to come into force August 15, 1975.

6. R.S.N.S. 1967, c. 53 as amended. (Hereafter cited as 'CPA').

7. S.N.S. 1975, c.9, proclaimed September 2, 1975 to come into force October 1, 1975. Regulations made September 2, 1975 to take effect October 2, 1975. (Hereafter cited as 'DSLRA').

the first time in Nova Scotia minimum standards of goods and services are inescapably imposed in consumer sales. Bill 36 achieved this end by the addition of three sections numbered 20(C) - (E) to the principal Act.

The prerequisite to the application of the Act is the presence of a "consumer sale". This transaction is defined by a mixture of inclusive and exclusive prescriptions. The result, if cumbersome, is reasonably precise. The first point to note is that a consumer sale includes transactions in services as well as in goods. The amendments to the Consumer Protection Act consequently have a significantly wider application than the well known implied terms of the Sale of Goods Act.⁸ The inclusion of service contracts will extend the Act not only to purchases exclusively of services, such as the professional work of lawyers, but also to mixed agreements for materials and labour, such as repair contracts. None of these arrangements were or are subject to the Sale of Goods Act and are questionably protected at common law by the judicial implication of analogous standards. Doubt about the extent of the seller's responsibilities is dispelled now that all these kinds of transactions will be regulated by the Consumer Protection Act when the purchaser is a consumer.

In principle, the Act distinguishes a consumer sale by the way the goods are employed by the purchaser. If they are for his personal use and consumption and not for resale or business purposes, then the transaction will be governed by the Consumer Protection Act. The distinction effectively protects all individual consumers, but is breached by the explicit exclusion of associations of individuals.⁹ To the extent that the intention of the legislation is to exclude unincorporated business associations, along with such expressly mentioned groups as partnerships and corporations, the clause is consistent but unnecessary. All varieties of purchases for business purposes are already excluded.¹⁰ Unfortunately, the phrase may envelope private individuals who are joint purchasers of a valuable item, and also groups of individuals organized for community or consumer purposes. The exclusion of such groups of individuals from the protections of the Act when engaged directly in consumer activities would seem regrettable and unnecessary.

8. R.S.N.S. 1967, c. 274, ss. 14-17.

9. CPA, s. 20C (1) (c).

10. CPA, s. 20C (1) (b).

The obligations of the seller under the amendments to the Consumer Protection Act are more extensive than his obligations under the Sale of Goods Act. That is to say, the seller is obliged to fulfil the condition that he has a right to sell the goods, the warranty that the purchaser shall have quiet enjoyment and unencumbered freedom of use of the goods, the conditions that the goods supplied match their contract description, are suitable for the particular purpose of the buyer if made known to the seller, and, in all cases, are at least of merchantable quality, and finally, the condition that the goods shall match both description and sample when sold by sample. In addition to these customary obligations imposed in all sales transactions, the amendments have also provided for several new duties upon the seller.

The first obligation is a second attempt at imposing a standard of merchantability. Such duplication is unfortunate since it may lead to uncertainty. The new obligation of merchantability is much more simply expressed than that contained in the Sale of Goods Act: "a condition that the goods are of merchantable quality, except for such defects as are described."¹¹ This implied condition is unencumbered with provisos for its operation, as is the first and original merchantability clause taken from the Sale of Goods Act. In particular, it is no longer necessary for the buyer to show that the goods "are bought by description from a seller who deals in goods of that description". Presumably a consumer purchaser may sue upon either or both of these implied conditions, and may recover under the new standard of merchantability notwithstanding his seller's technical defence to the traditional standard. To that extent, the easing of limitations upon the seller's obligation of merchantability from the consumer's point of view is to be approved. Nevertheless, there is a danger that the courts may interpret the words "merchantable quality" in accordance with the old cases over that phrase as contained in the original version of the obligation. By this means there is a risk that the new clause will in fact be no freer of restrictions and produce no greater advantages to the purchasing consumer than the old one. For fear of this danger, it might have been better to have used an entirely new phrase, or, at least, to have omitted the original version taken from the Sale of Goods Act. Possibly it would have been best to have redefined merchantability so as to reflect clearly its intended social purposes

11. CPA, s. 20C (3) (h).

today, as, for instance, has been done in the recent amendment to the United Kingdom Sale of Goods Act.¹²

At least a partial effort has been made to expand the scope of the phrase "merchantable quality" by the addition of two further implied conditions. The seller is now clearly responsible for the quality of the goods he delivers as if they are new and unused, unless he has otherwise described them to the purchaser at the time of negotiation.¹³ However, this new clause does not say that the standard of merchantable quality is applicable to the sale of used goods. Nor, incidently, does it say that it is not. Hence, to the extent that the cases have questioned the responsibility of the seller under the Sale of Goods Act, and therefore potentially under the Consumer Protection Act, for the quality of used goods, the matter is regrettably still at issue.¹⁴

The amendments have closed another ground of contention of injured consumers by additionally making sellers responsible for the durability of their goods. Previously, the notion of merchantability had involved a standard of quality of goods at the time of their sale, but not thereafter. The only subsequent responsibility of a seller was for breach of his contract by the discovery of a latent defect in the goods that could be proved to have been present at the time of the sale. Only in these circumstances could the seller be held responsible for the durable quality of the goods he sold. If they wore out in an unreasonably short period of time then the buyer had no recourse. *Caveat emptor*. This restriction was entirely unreasonable in view of the fact that most expensive goods today involve complicated, often electrical, machinery in which no average buyer, even no technically qualified purchaser, can tell in advance through ordinary observational tests whether the goods are likely or not to wear out in a short time. Whereas the seller or his manufacturers must be capable of knowing through their production process what the average expected useful life of any of their goods may be and may control that time period by improving the quality of the goods or their component parts, or alternatively by inbuilding their obsolescence.

12. 1893, 56 & 57 Vict., c. 71, s. 62 (1A) as amended by *Supply of Goods (Implied Terms) Act 1973*, 1973, c.13, s.7.

13. CPA, s. 20C (3) (i).

14. See CPA, s. 20C (3) (h), (i) & (4). A close reading of paragraph (i) in the context of paragraph (h) as interpreted by subsection(4) many even compound the issue.

Now the seller in a consumer sale must ensure that the goods are durable. There is implied into his contract a condition "that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale".¹⁵ This clause is the first anywhere in Canada to impose responsibility for the durability of all consumer goods upon sellers. It goes some way to protecting consumer purchasers where their goods break down or wear out in too short a space of time. However, the test of durability is not particularly precise; in fact the clause invites litigation. Perhaps that is inevitable until the courts establish reasonable expectations for the durability of different classes of goods. Nevertheless, the control of "surrounding circumstances" are almost entirely in the hands of sellers and manufacturers. Doubtless the practices of an industry and the opinion of its experts will be called upon to establish in court what is reasonable in a particular set of surrounding circumstances. The problem of design control without inhibiting industrial creativity or consumer choice is very difficult. The instant standard will do no more than compare like goods from the same industry. Even with this limited function, it would be valuable if the durability clause made clear that it applies not only to products as a whole but also to component parts of each item where appropriate. Moreover the amendments do not tackle the even larger problems of after-sales services, namely the maintenance of stocks of parts and the provision of repairs, whether goods break down through fair wear and tear or in breach of the seller's responsibility for durability.

The last addition of the amendments to the Consumer Protection Act is an obligation on the part of the seller with respect to the standard of services he provides. Henceforth there is an implied condition in a sale of services, with or without goods, that they "shall be performed in a skillfull and workmanlike manner".¹⁶ The addition of this clause, or some similarly phrased standard of performance, was necessary as a corollary to the inclusion of service agreements within the definition of a consumer sale. Where properly trained service personnel are involved the new condition is unlikely to vary present standards of contractual work. It is, however, a most valuable addition for the protection of consumer

15. CPA, s. 20C(3)(j).

16. CPA, s. 20C(5).

purchasers where incompetent work is performed. Now there is a ground for an action in contract besides the traditional suit in tort. Consequently an injured purchaser will have a greater choice of remedies from which to select. When his contract is for goods and services, he will no longer be limited to suing for damages in tort but may follow the contractual remedy of rejecting the goods and recovering any money he has paid.

There is nothing to suggest that the new standard for contractual services will not be strictly applied against sellers along with the other implied obligations in the Consumer Protection Act, just as the comparable obligations under the Sale of Goods Act have been exercised. As a result, professional persons are likely to be concerned that they will become strictly liable for the provision of services, and will no longer be measured by the standard of fault applicable in the law of negligence. However, the change in legal responsibility will be most unlikely to affect their ultimate culpability. The standard that is to be strictly enforced has its own inbuilt reasonableness. Even the law of contract respects that the question "what is a skillfull and workmanlike provision of services" involves an objective standard of normal practices of the average competent professional person in the particular circumstances.

All the implied obligations of the seller are now supported by a provision that any attempts to disclaim such responsibility are void. Unlike the Sale of Goods Act, which gives pre-eminence to the principle of contract law that the intention of the parties shall be respected and thus permits the exclusion of provisions of that Act, the implied conditions under the Consumer Protection Act are mandatory.¹⁷ Quite apart from the familiar social arguments respecting the consumer's lack of freedom to contract that are usually rehearsed in support of the prohibition of disclaimer clauses, the statutory terms are themselves only minimum standards of quality and for that reason alone their mandatory imposition in consumer transactions is eminently reasonable. Henceforward, consumer purchasers will not have to worry about the difficulties of recovery when they are victims of the supply of shoddy goods under written terms. On the other hand, retailers will have to sell second quality goods as seconds at reduced prices, as all responsible dealers have customarily done, and may no longer pass them off as top

17. CPA, s. 20E.

quality goods with an elaborate "warranty" that is, in fact, an obscure disclaimer of responsibility.

Yet the scope of the provision avoiding disclaimers of statutory liability seems to be severely limited. It appears to cure only written exemption clauses. The opening words, "any written term or acknowledgement", arguably exclude oral statements by the seller or his salesclerk in the negotiating stage of a transaction. Written disclaimers of liability are surely the most common form at present. However, it would not be difficult for retailers to change their practices to suit their ends. It would be a pity if the Act merely led sellers to train their salesclerks to give effective oral disclaimers. Surely exemption from statutory responsibility for quality is objectionable in principle, regardless of form.

Upon the occasions of its operation, the disclaimer provision is, happily, enlarged to prevent its own evasion. It additionally avoids any abrogations of responsibility to pay compensation for breach of a statutory obligation. The full extent of the consumer purchaser's remedies in contract for breach is thereby protected. Regretably, while a cure for disclaimer clauses has been provided, prevention has not. It remains permissible to insert exemption clauses in a consumer sale. While their continued inclusion is ineffective at law, their use may remain highly persuasive to a consumer who happens to read his contract and is not precisely knowledgeable of his rights under the Consumer Protection Act. There is no social justification for such application of disclaimer clauses *in terrorem*. Prevention of void disclaimer clauses might easily have been achieved by the addition of a simple penal prohibition.

Outlawry of disclaimer clauses would also have another incidental advantage to consumer purchasers. The amendments to the Consumer Protection Act were not intended to prevent express warranties or guarantees by retailers or manufacturers. The provision is only intended to abolish disclaimers of the minimum implied liability at law. If prohibition of such disclaimers had been effected, then henceforth guarantee and warranty cards would only be allowed to include additional liability, expressly assumed by the seller or manufacturer, beyond the statutory minimum standards. To that extent, warranty and guarantee cards would then become more nearly what they imply and what the consuming public assumes them to be, rather than the present traps for the unwary.

By the addition of section 20D, the Consumer Protection Act will now also partially regulate referral sales. These transactions involve

a technique of selling whereby the vendor gives a gift or other benefit to the prospective purchaser, generally by way of inducement to him to buy, upon receipt of a list of names and addresses of friends and neighbours to whom he is referred to continue his selling efforts. Receipt of the gift or benefit is usually, but not necessarily, contingent upon a successful sale to one of the referred parties. This selling technique is, arguably, socially objectionable because it preys upon the gullibility of individuals, who expect to receive something for nothing. In fact, the seller cannot afford to give a supposed gift for nothing, but must by some means increase his price in such a way as to cover the costs of any benefit he may eventually pass on. Some commentators suspect that the extent of price inflation more than adequately covers the costs of the gifts and benefits that the seller actually grants, especially where they are only available upon the contingency that subsequent sales are actually made to the referred parties. Generally the first buyer has no way of knowing whether or not any referrals are in fact successful, and therefore cannot claim his contingent gift or benefit.

Prevention of some such social evil must, presumably, be behind the provisions of the Consumer Protection Act since it now proclaims that a consumer sale with a contingent gift or benefit is “not binding on the purchaser”. This result, however, appears to be only a partial solution to the problem. Since a referral sale is no longer to be binding upon a consumer purchaser, the seller will not be able to sue him for any unpaid price. To this extent, the gullible consumer may in fact be relieved of his obligations. Yet he cannot get out of the contract entirely and recover any money that he has already paid. There is no statutory provision that the contract is void or that he may avoid it. It is probably also unfair to the seller to let the consumer keep the goods without any payment for them. The whole provision seems too capricious a solution to the problem of referral sales. It permits the losses on the agreement to lie where they happen to fall, depending upon the extent of performance of the sale before the consumer wakes up to the bad bargain he has struck and cares to stop it.

The regulation of referral sales is further compounded by another section in the new Direct Sellers’ Licensing and Regulation Act.¹⁸ Since most referral sales are made on the doorstep they will be caught by this Act as well as the Consumer Protection Act. The

18. DSLRA, s. 24(2).

results may be very confusing. The Direct Sellers' Licensing and Regulation Act prohibits altogether the offer of a contingent gift in the negotiation of a direct sale, but it does not otherwise allow the consumer to avoid his responsibilities under the contract of purchase he may subsequently make. In other words, the Direct Sellers' Licensing and Regulation Act prevents incentives without affecting the accompanying contract of sale, whereas the Consumer Protection Act permits the offer of incentives but grants to the consumer the protection that the sale itself is not binding upon him. If a particular consuming purchaser is in the happy position by which both Acts apply to his transaction, he may in fact be satisfactorily protected, — always provided he has not already paid the purchase price for the goods. But surely this confusion of controls in two separate enactments is not an adequate state for the law and does not reflect a carefully thought out social policy towards referral sales. In light of the proposed amendments to the federal Combines Investigation Act,¹⁹ which will totally prohibit referral selling, reconsideration of consumer protection for the victims of this trading technique will be imperative.

Since the new Direct Sellers' Licensing and Regulation Act has already been raised in regard to referral sales it is appropriate to discuss its main implications next. It replaces the old Direct Sellers Act.²⁰ Its chief function is to update and develop the Act it repeals. The purpose of the old Direct Sellers Act appears to have been continued in the new Direct Sellers' Licensing and Regulation Act, although in some respects the expansion has been so great as to leave the legislative intention unclear. The main functions of these Acts are to regulate the business of direct sellers and to provide exceptional remedies for consumer purchasers under direct sales contracts. The new Act elaborates all of these purposes. It is upon its developments that this note will comment.

The Act is only applicable to direct sales. The limited definition of direct selling in the old Act was a major obstacle to its intended consumer protection. It was aimed at the majority of direct sales transactions, namely those made on the doorstep from house to house, but included no others. Subsequently, difficulties have occurred with enticements to purchase conducted in hotels or motels upon invitation there, by written solicitation and by telephone

19. *Bill C-2*, 1st Session, 30th Parliament, 23 Elizabeth II, 1974 (first reading, October 2, 1974) s.36.4.

20. S.N.S. 1969, c.5 as amended.

orders. The intention of the phrase “direct selling” seems to include all transactions negotiated in circumstances that encourage or permit pressurized salesmanship. They may occur when the buyer does not have alternative goods to choose or to compare, or when his opportunity to shop around for alternative prices is absent, or simply when he is unable to avoid the blandishments of the seller because they are closeted in a private place. In an effort to cover all such situations, the definition of direct selling in the new Act specifically refers to the kinds of difficulties already mentioned and extends generally to “selling or offering for sale or soliciting orders for the future delivery of goods or services . . . by any means other than by a merchant from a recognized retail store . . .”.²¹ It also explicitly includes any sale or offering for sale of a hearing aid, regardless of the circumstances.

The definition is enormously broad. It refers the reader to two other definitions to assist understanding. First, the Act defines a recognized retail store negatively by excluding a host of premises where business is regularly conducted. Examples include display rooms, offices, repair shops, warehouses, studios, as well as hotels and motels.²² Thus it is apparent that a garage man in repairing a car is conducting a direct sale within the Act because he deals from premises that are not a recognized retail store. Likewise, it would seem that any transaction with an agent of a distributor or chain retailer who merely has a local display room or office is also a direct sale because the outlet is not regarded as a recognised retail store. In fact, all businesses that regularly provide services, whether with or without goods, are likely to be classed as direct sellers either because their work is done *in situ* or because it is completed in a repair shop or office. Even sales of goods from a regular store may be treated as direct sales, because the scope of the Act is further broadened by its definition of a merchant. The term does not include a person who operates a recognised retail store if more than 50% of his goods or services are transacted outside of that store by means of direct selling²³. The effect is to extend the Act to every transaction of storekeepers who conduct the major part of their business off their premises.

Little imagination is necessary to dream up a multitude of circumstances in which business is regularly conducted and which

21. DSLRA, s.2(d) (see note 7).

22. DSLRA, s. 2(j).

23. DSLRA, s. 2(g). See also s. 6(h).

now will be caught within the Direct Sellers' Licensing and Regulation Act. Of consumer transactions, the only statutory exclusions are a small number of reasonably petty considerations, or jurisdictional necessities.²⁴ They involve such items as the sale of newspapers, campaigns for charitable organizations, sales by Crown corporations and any transactions regulated by federal or other provincial statutes. The regulations exclude transactions under \$25, save for magazines, photographs, records, kitchen utensils and, of course, hearing aids. The Act is clearly intended as protection for consumers and to regulate only commercial traders. A number of subsections prevent its operation higher up the chain of production between manufacturers, distributors, wholesalers and retailers themselves.²⁵ An individual seller who places a classified advertisement is not affected by the legislation since it is directed to sales "in the course of business" as a direct seller.²⁶

The breadth of scope of the Act is probably far greater than is necessary to control the kind of pressurized sales techniques at the core of the notion of direct selling. In an effort to catch in its ambit all examples of unacceptable direct sales methods, the Act appears to have enveloped far too many acceptable and customary sales practices and salesmen. The net is so widely cast as to shed doubt on the intention of the Act as a whole. It is possible to argue that the legislation is no longer aimed at the traditionally conceived direct seller, but is intended to permit the regulation of virtually all sales and selling practices other than in regular stores and shops. Certainly the minister responsible has plenty of power to make regulations under the Act to control a broad range of commercial activity.²⁷

Whether such wide sweeping control is socially necessary may be doubtful. While the minister also has ample power to exempt specific classes of persons,²⁸ it is against the principle of our law to exclude commercial freedoms unnecessarily or to place an excessive range of personal action under bureaucratic discretion. Probably the scope of the new Direct Sellers' Licensing and Regulation Act, in its efforts to overcome the recognised social limitations of the old Direct Sellers Act, has exceeded reasonable

24. See DSLRA, ss. 6(a)-(d), (i), 7 and its Regulations, s.21.

25. DSLRA, s. 6(e)-(g).

26. DSLRA, s. 2(a).

27. See DSLRA, s. 35, especially para (i).

28. DSLRA, s. 35 (g), (h). And see the Regulations, s.20.

bounds. Ultimately it is the operation of the Act that matters. Its effectiveness will depend upon the ability of the government to enforce its regulatory requirements. Its actual capacity to control its intended variety of hot footed salesmen travelling the province, without restriction on other tradesmen, has yet to be tested.

To the extent that the new Act provides for the licensing and bonding of all varieties of direct sellers,²⁹ its broad scope is potentially most protective of consumers. Since the old statute fatally lacked any registration system the means of administratively regulating direct sellers was absent. For this objective, the new Act grants suitable powers to those in control but does not provide any guidance as to suitable standards of conduct.

The powers of control are mainly by the discretionary issue, suspension and cancellation of licences and the requirement of bonding.³⁰ The direct seller himself is fully protected to the extent that he has a right of appeal against an unsatisfactory decision.³¹ However, the registrar responsible for the administration of the licensing system arguably receives insufficient direction from the Act in the exercise of his discretion. He must issue a licence if the applicant meets all the fees, bonds and conditions set by the Act, and its regulations.³² However he may suspend or cancel a licence for violation of the Act, the regulations, or any restrictions imposed thereunder, or for misrepresentation, fraud or dishonesty, or for what he considers incompetency or untrustworthiness in the conduct of the direct seller's business.³³

Objection may chiefly be directed against the last ground of decision. While it is commendable that there should be some means of expeditiously removing unreliable and unscrupulous direct sellers, there needs to be clear legislative or regulatory guidance about competency in the host of trades controlled by the Act. The liberality of the statutory phrases do not assist the registrar himself in establishing acceptable standards of conduct amongst direct sellers. Neither does such phraseology show the direct sellers themselves what standards they are expected to maintain or against

29. DSLRA, ss. 5, 10 and its Regulations, ss. 8-10. The Act requires a licence be held by every firm of direct sellers and all their salesmen.

30. See DSLRA, ss. 8(1), 9(1), 18, 26, 28.

31. DSLRA, s. 39.

32. The Regulations do grant discretion to the registrar in applying the conditions, such as the size of a bond to be posted or the need for an audited financial statement, for the issuance of a licence to each applicant individually.

33. DSLRA, s. 18(2).

which they may appeal unfavourable decisions.³⁴ Nor does such openness of legislative language give any indication to consumer purchasers as to what standard of sales and service assistance they may reasonably expect and to what conduct they may reasonably object.

So far as consumers' personal remedies are concerned, the broad scope of the Act has a distinct advantage. It affords the extraordinary protections established by the Act to a very wide range of consumers. Any purchaser under a direct sales agreement has additional contractual rights and remedies against his seller beyond the protections provided by the Sale of Goods Act and the Consumer Protection Act. The Direct Sellers' Licensing and Regulation Act requires contracts to be in writing and to contain certain specified information.³⁵ Necessary details about the direct seller and his place of business must be included together with a statement of the warranties or guarantees he is providing or "where there is no warranty or guarantee a statement to that effect."³⁶ This phrasing is unfortunate and may be confusing. To the extent that it is intended to refer to the seller's express warranties, if any, it is accurate but misleading. A consumer, not knowing the difference between express and implied warranties might reasonably assume that a statement of no warranty has precisely that effect. Whereas, the recent amendments to the Consumer Protection Act, already discussed in this note, actually impose minimum warranties in a direct sale as in any other consumer transaction. It is unfortunate that a document, commendably required in order to inform the consumer of his rights, can be permitted to contain such a misleading half truth.

The Act also provides, as did the old Direct Sellers Act, an additional contractual right to the consumer to cancel the direct sales agreement. The time period for cancellation under the new legislation is now extended from five to ten days. The written contract must also contain a notice of the right to cancel in words prescribed by the Act and required to be at the top of the first page:

34. Indeed he may never learn why his licence was suspended or cancelled since the registrar appears under no duty to provide written reasons for his action.

35. DSLRA, s. 20. The Regulations, s. 15, now prescribe that the sections of the Act themselves (ss. 20-23) that specify the required information and establish the consequent rights of consumers shall also be reproduced *verbatim* in the written contract.

36. DSLRA, s. 20(e).

You can cancel this agreement by notice in writing within ten days after you have signed it. If you do not cancel this agreement within the ten days, you may not be able to cancel it afterwards. You can send your notice by registered mail to (name and address of direct seller shall be inserted here) or you may deliver it there yourself. You must mail it or deliver it before the end of the ten days. If you cancel it, any money you paid and any goods you traded in will be returned to you.³⁷

These words are also implied as a term of the agreement and cannot be disclaimed.³⁸ A copy of the written contract containing all required information must be delivered to the consumer immediately upon its execution.³⁹ For failure to do so, the direct seller pays a civil penalty as well as facing summary prosecution.⁴⁰ Lack of the prescribed notice about cancellation gives the purchaser the right to cancel his contract up to thirty days after first receipt of the goods or services.⁴¹ The direct seller may recover from his omission by personal delivery of a separate written notice of the right to cancel. Then the ten day period only is available to the buyer, but counted from the date of receipt of that notice.⁴²

These legislative changes to the right of cancellation reflect the realization that the old five day rule was ineffective protection for consumers both because it was too short a period in which to act and because its existence was generally unknown. However, the not too scrupulous direct seller may still evade the full force of the consumer's right to cancel his contract merely by the expediency of delaying the delivery of the goods. The purchaser may subsequently regret the contract that he has just made and may even learn of his cancellation right by reading his written agreement, yet he still may be lulled into thinking that it is of no effect if he does not hear again from the direct seller. Then what may have seemed only a bad dream will turn into cold reality when the goods are delivered after the ten day period has run out. Were the Act to make the cancellation period run, not from the date of the agreement, but from the date of delivery of the goods or services under the contract, this loophole for the unscrupulous direct seller would be defeated.

37. DSLRA, s. 20(g).

38. DSLRA, s. 21(1). And see s. 34 which avoids all attempts to disclaim any provision of the Act.

39. DSLRA, s. 24(1).

40. A direct seller is liable to summary conviction for failing to comply with any provision of the Act. See DSLRA s. 36.

41. DSLRA, s. 21(2).

42. DSLRA, s. 21(3), (4).

In addition to an automatic cancellation right within ten days, the buyer may also cancel the contract any time up to six months after signature even, it seems, if the goods or services meet the contract. The extra right to cancel is granted by the Act where the direct seller is not licensed, or is in breach of his licence, or where the goods are not delivered for 90 days.⁴³ This indeed is a stringent remedy for consumers, especially if exercised collectively. The prospect of up to six months business falling in must be a powerful stimulant to a direct seller to ensure he is properly licensed.

Upon cancellation, the buyer may expect the return of his purchase monies, if paid, and any trade in, or its value, and may retain possession of the goods until such repayment.⁴⁴ Such restitution after cancellation is sensible enough, but the actual method of accounting may be unfair. While the consumer recovers everything he has paid, he is not required to credit the direct seller for the use he may have made of the goods in the meantime. The purchaser is especially likely to gain a considerable and unfair advantage where his cancellation is not made for the better part of six months. Loss of the sale, without loading him with loss through depreciation of his property, is probably quite serious enough a civil penalty for a direct seller to have to pay.

In a laudable effort to stamp out genuinely abusive practices associated with direct selling, provision of the prescribed information and exercise of the right of cancellation is imposed on any merchant who tries to sell anything through public fairs and accommodations. The prescription will incidentally affect regular shopkeepers, who are not otherwise required to be registered under the Act, when they engage in some direct selling on the side. The contractual requirements of the Act are made to apply "to all sales that are solicited, negotiated or entered into in any dwelling, motel or hotel or at any exhibition, trade or fair . . .".⁴⁵ The wording of the Act does not limit the transactions to consumer purchases or even direct sales, but expressly covers all sales. This language presumably will include trade sales between different elements in the commercial hierarchy of production even though such businesses are not regarded by the Act as registerable as direct

43. DSLRA, s. 22.

44. DSLRA, s. 23. Presumably in order to facilitate repayment, the Regulations, s. 16, require a direct seller to retain all purchase monies in trust until cancellation or until the cancellation period has expired.

45. DSLRA, s. 25.

sellers.⁴⁶ The reason for such interstitial inclusion of commercial transactions is uncertain. The provision appears illogical. Its effect on businessmen will probably be more tiresome than tyrannous. As a result, a regular merchant, whether he normally retails to the public or distributes to the industry, when he sets up a trade stall at a local exhibition or convention, must comply with all the contractual requirements of the Act in dealing with all his customers, consumer and commercial alike.

The consuming buyer's rights in a direct sale under the new Direct Sellers' Licensing and Regulation Act are thereby conspicuously developed. He has lost but one that was available under the old Direct Sellers Act. The purchaser may no longer prevent a direct seller upon secured credit from repossessing the goods after his breach in payments, regardless of however many instalments he has made. Under the old Act, when the consumer had paid two thirds or more of the purchase price, the direct seller was prevented from enforcing his real remedies against the goods themselves.⁴⁷ This right of the buyer was a real benefit to him even though it was inappropriately provided in the Direct Sellers Act. It was a rule of potentially general application to instalment payment contracts and should be reconsidered for re-enactment in the credit legislation of the Consumer Protection Act.

Otherwise, the consumer has gained much power over his contractual relations through his personal remedies of cancellation. Mostly, they are socially appropriate to cope with the genuine abuses of direct selling. Yet, just as the broad umbrella of the new Direct Sellers' Licensing and Regulation Act forces the licensing of many tradesmen unnecessarily so it will grant protections to many consumers undeservingly. To that extent, reputable classes of sellers⁴⁸ will now bear extra burdens both of maintaining a licence and of contracting always in the prescribed written form, the costs of which will no doubt be reflected in higher prices to consumers. They, on the other hand, may be encouraged to engage in unwarranted and abusive cancellations, also at a cost transferable in higher prices to other consumers.

The other face of price is debt. When a consumer fails to make payments as they fall due and goes into default, he faces the

46. See the text to note 25, *supra*.

47. S.N.S. 1969, c. 5, s. 7. Except with leave of the court.

48. Subject to exemption. See DSLRA, s. 35(g) & (h) and the Regulations, ss. 20, 21.

harrowing experience of collection. Like the direct sellers' legislation, the new Collection Agencies Act is intended as an updated and socially reformed replacement for the old Collecting Agencies Act.⁴⁹ It continues the functions of regulating professional debt collectors by a scheme of licensing and bonding. Much of the Act is concerned with a more elaborate system of registration, and greater protection of the interests of collectors and collection agencies by way of hearings and appeals upon licensing decisions. The Act continues to excuse lawyers from its controls.⁵⁰

An important omission from the governance of the Act is the class of professional debt collectors on their own behalf. The business of purchasing or taking assignments of debts due to creditors in order to recover them personally at a profit is a regular, if speculative, practice. The old Act recognized that such business needs controlling just as much as the collecting activity of an agency on behalf of a principal. Consequently, the trade was statutorily deemed analogous to debt collecting and thus included within the reach of the regulatory system.⁵¹ The new Collection Agencies Act merely defines a collection agency as: "a person other than a collector who deals with a debtor *for the purpose of obtaining or arranging for money owing to another person*, or who holds out to the public that he provides such a service or any person who sells or offers to sell forms or letters represented to be a collection system or scheme."⁵²(emphasis added) This phraseology clearly refers only to collection agencies as agents, and not as principals in their own interests. The omission is unfortunate and may be serious. Most of the trade in bad debts is taken by collection agencies, who will need to be registered for their agency business in any event. But nothing in the Act requires them to abide by its controls, especially its standards of professional conduct, in prosecution of their business as assignees and principals. Worse, there is every encouragement to the unscrupulous amongst them hereafter to take all their business by sale or assignment so as to avoid the requirements of the Act altogether.

The major innovation of the Act is the inclusion of a form of code of professional conduct for debt collectors. It is advanced chiefly by a designated list of abusive practices. In part, the acceptability of

49. R.S.N.S. 1967, c. 38.

50. CAA, s. 4 (see note 4).

51. R.S.N.S. 1967, c. 38, s. 1(5).

52. CAA, s. 2(a).

some practices depends upon the particular procedures of an individual collection agency. For instance, no form or form letter may be used to collect a debt unless it has previously been filed with the registrar,⁵³ responsible for the administration of the licensing system. In originally applying for a licence, a collection agency is required, as under the old Act, to provide copies of its intended agreements with principals and all its forms to be used in collecting.⁵⁴ Regretably, the Act does not mention what the registrar shall do with these documents. It is to be hoped he will scrutinize them for reasonableness and fairness. Even so, the Act does not say that he may prohibit their use, although he does have a discretion not to issue a licence.⁵⁵ How much better it would be if objective standards for scrutiny had been publicly proclaimed by statute.

The procedures of an individual collection agency's accounting are also subject to scrutiny. The Act requires the agency in the conduct of its business to keep satisfactory records and ledgers and to maintain a trust account for the receipt of clients' monies.⁵⁶ In part to support this control, the Act gives the registrar wide powers of entry and inspection.⁵⁷

Most importantly, the code of conduct in the Act further specifies actions that collection agencies or their collectors may not take in their efforts to recover debts.⁵⁸ For instance, they may not place a telephone call collect to a debtor and may not communicate with him at all once he has referred them in writing to his lawyer. They may not harass a debtor by frequent contacts and shall make none at all after nine o'clock at night or on Sunday. Collectors are forbidden to harry a debtor through his friends, relations, neighbours, or employer either by spreading false information about him or by inquiring about his livelihood or way of life, except to obtain his address. They may not charge the debtor with the costs of their

53. CAA, s. 19(g).

54. CAA, s. 6(3).

55. See CAA, s. 13(1)(a). The apparent discretion of the registrar to withhold the grant of a licence on any grounds, as well as the supply of unsatisfactory collection forms, opens the CAA to the kind of criticism leveled at the registrar's powers under the DSLRA to suspend or cancel licences. See the text to notes 30-34, *supra*. The CAA sets a good example for the DSLRA on suspension and cancellation, as opposed to issuance powers, in that the statutory code of conduct provides the registrar with just the kind of objective criteria needed to guide his decisions.

56. CAA, s. 19(a) & (b).

57. CAA, s. 21.

58. CAA, s. 20.

collection efforts on behalf of their principals. All of these proscriptions, and more listed in the Act, are reinforced by a general prohibition against collectors threatening, abusing or intimidating a debtor.

This kind of professional code of practice in the Act is to be applauded. No doubt the administrators of the licensing system under the old Act operated on some such very similar scheme. However, it applied by way of administrative policy; that is to say, informally and not openly. Now it is plain to collection agencies and their collectors what the bounds are beyond which they may not step in their business activities.⁵⁹ Likewise, it is clear to consumers, who find themselves as debtors the subject of collection, what kind of treatment they may expect from collectors and what practices they may reasonably object to.

Unfortunately for the debtor, he has no personal remedy for a breach by the collector of the statutory code of behaviour.⁶⁰ Possibly he has suffered nervous shock from harassment or lost his employment through misleading insinuations. The Act only envisions a response to such breaches by the Crown. Thus the debtor may complain about the miscreant to the registrar, who may take preventive action against future abuse by suspension or cancellation of the collector's licence.⁶¹ Alternatively the collector may be summarily prosecuted.⁶² But neither course of action compensates the debtor for any harm already done to him.

Nevertheless, the development of a proclaimed code of conduct is a considerable protection for consumer debtors. More is the pity it does not apply to all debt collecting, whether by collection agencies or creditors themselves. The system of licensing professional debt collectors has proved to be an effective social control by itself. The code of professional conduct declared in the new Collection Agencies Act can only add to its success. But what are fair and reasonable procedures for debt collecting by professionals, ought surely to be minimum standards of acceptable conduct for anyone who tries to collect his own debts. The code should apply to all debt

59. And they should be precisely knowledgeable of them since the Regulations, s. 11, call for the successful completion of a written examination on the Act before a licence may be issued.

60. Unless the courts will in future imply a statutory duty of care.

61. CAA, s. 15(1). But the consumer has no power to compel the registrar to act.

62. CAA, s. 23 makes it an offence to contravene or to omit to fulfil any provision of the Act or its Regulations.

collections, whether the collector is required to be registered as a professional agent or not.

Much more may be written about the three Acts, subject of this note. In particular, the management of their licensing systems could usefully be scrutinized. Here, only the statutory reforms and developments have been picked out for comment. Moreover, the Acts have been reviewed from the perspective of the public rather than the bureaucracy, in an effort to expose the new ground rules operating between the parties to a consumer transaction. These approaches have been taken in the hope and belief that they will satisfy the enquiries of practising lawyers, whether as counsel for corporate or consumer interests.