

## THE RECOURSE IN WARRANTY

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# THE RECOURSE IN WARRANTY

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I am very pleased to have been invited to participate as a member of this panel. Nevertheless, I am not quite sure why an ex-politician has been included. You will remember how Shakespeare described a politician "As a person who would circumvent God." On the other hand professors and their profession are also often held in low repute. You will perhaps have heard this recent definition of education "The casting of false pearls before real swine."

Be that as it may, thank you for inviting me.

My colleague Professor Louis Perret has eloquently explained the intricacies and limitations of the recourses in warranty under the Civil Code of Quebec and the Report of the Office de Révision du Code civil.

## I. — INTRODUCTION

It is my duty to explain what the new *Québec Consumer Protection Act* (Bill 72) proposes to do in respect to warranties. The Avant-Projet was in two parts — the first "volet" was deposited on December 21, 1977 in the National Assembly as a working document rather than as an avant-projet and the second "volet" was presented to the public when the House was not in session on July 4, 1978.

Bill 72 for its part was deposited in the National Assembly on October 12, 1978 and adopted December 21, 1978.

## II. — THE SOURCES

It is important to study what has already been done in Canada in order to discover possible sources of Bill 72 and thus to have a better understanding of its proposals.

Ontario began the process in 1972 by the tabling of the Ontario Law Reform Commission Report on *Consumer Warranties and Guarantees* based on American and British statutes. The Ontario government then presented The *Consumer Products Warranties Act* 1976 (Bill 110 3rd Sess.) which bill never became law. The Ontario studies and proposals were nevertheless the basis of the very

advanced *Saskatchewan Consumer Products Warranties Act*<sup>1</sup> being Bill 65 which was adopted in 1977 and is only now in force.

It would seem that the Québec project has been drawn from the Ontario propositions and the Saskatchewan law and it is important to understand this because both the Ontario and Saskatchewan legislation are statute law in style and form.

The New Brunswick Act — “*Loi sur la Responsabilité et les Garanties Relatives aux Produits de Consommation*”<sup>2</sup> adopted in June 1978 should also be mentioned. It is more modest, and was presented after the first Québec “volet” of December 21, 1977. It does not seem to have influenced the Québec project.

I have mentioned these sources because no supporting documents have yet been made available to the public as to the sources of the *new Consumer Protection Act* — Bill 72.

### III. — ANALYSIS OF THE QUÉBEC PROJECT — BILL 72.

#### 1) THE WARRANTIES APPLY TO:

- a) contracts of sale of goods or services — Sect. 34
- b) contracts of lease of goods or services — Sect. 34
- c) mixed contracts of sale & lease — Sect. 34

The Saskatchewan Act is not as broad and does not include services but besides applying to sales, applies to leases of consumer products at Sect. 2 (m) as does the New Brunswick Act at Sect. 1 (1).

The proposed Ontario Bill applied only to sale of goods and not to services or leases — Sect. 1 (1) (b) and Sect. 2.

#### 2) LEGAL WARRANTIES (IMPLIED WARRANTIES).

The legal warranties are really two in number and are the classic legal warranties of the Civil Code being warranties against eviction and legal defects. (The new Civil Code Revision proposes obligations in respect to eviction, latent defects and delivery).

##### a) *Of Title* (Against eviction)

The merchant must free the goods from every undeclared charge in the title — Sect. 36;

This warranty is provided only by the merchant.

##### b) *Against Latent Defects*

The latent defects provision of the Civil Code is expanded to mean serviceability.

a) Goods must be fit for their customary purpose — Sect. 37.

b) Goods must be durable in normal use for a reasonable time — Sect. 38.

<sup>1</sup> 1976-1977 Statutes of Saskatchewan Chapter 15.

<sup>2</sup> 1978 Statutes of New Brunswick Chapter C-18.1.

- c) Goods to be serviceable must have replacement parts and repair services must be available — Sect. 39 (One may contract out of this responsibility, nevertheless.)

### 3) CONTRACTUAL WARRANTIES.

The normal contractual warranties of the Merchant and the Manufacturer are extended by the following prescriptions:

- a) The goods or services must conform to the description in the contract. — sect. 40.
- b) The goods or services must conform to the statements and advertisements of the merchant and the manufacturer and are binding on those who make them. — sect. 41.
- c) Written or oral statements by representatives of the merchant or manufacturer are binding on their principals. — Sect. 42.
- d) Warranties in statements or advertisements are binding on those who make them. Sect. 43.

### 4) EXCLUSIONS OF WARRANTY (Exclusions of the contractual or conventional warranties).

We must remember that art. 1507 c.c. permitted complete exclusion of warranties, meaning exclusions of contractual and legal warranties except of course for fraude, faute lourde, violations of good morals, and public order and acts of the vendor.

Exclusions from a conventional warranty are now only permitted if clearly indicated in separate and successive clauses. Sect. 44. (The legal warranties of Bill 72 are of public order in virtue of sect. 261.)

### 5) DRAFTING OF CONTRACTUAL WARRANTIES.

The warranty must be drawn up in a specific form — Sect. 45 (Failure to do so is an offense under the Act. See the penalties at sect. 277 and following.)

### 6) WHO MAKES THE WARRANTY (Vertical Privity).

- a) The Merchant
  - i) for defects in title;
  - ii) for defects of fitness, durability and serviceability.
- b) The Manufacturer for defects of fitness and durability. (No expert is needed against the manufacturer or merchant. Sect. 53 para. 1)

### 7) WHO MAY CLAIM — (Horizontal Privity)

The Purchaser and any “Subsequent Purchaser” may claim against the Manufacturer — Sect. 53 para. 4 and Sect. 54 para. 2. (Note “acquéreur” in the french text). However a member of the family is not mentioned. The Saskatchewan Act at Sect. 4(1) is much broader in this respect as was the proposed Ontario Bill at Sect. 1(a) and as is the New Brunswick Act at Sect. 23.

## 8) THE RECOURSES.

*Civil* — The Recourses available to the consumer are set out in Sect. s. 271 and 272 and are all the possible classical recourses, taken together.

- (a) the specific performance of the obligation;
- (b) the authorization to execute it at the merchant's or manufacturer's expense
- (c) that his obligations be reduced;
- (d) that the contract be rescinded;
- (e) that the contract be set aside; or
- (f) that the contract be annulled,

Without prejudice to his claim in damages, in all cases. He may also claim exemplary damages.

Also available are sections 53, 54 and 270.

The Saskatchewan Act only permits exemplary damages where there is a "wilful" and knowing violation of this Act." Sect. 28-1. This latter proposition seems preferable.

*Penal* — Penal Recourses also lie for failure to comply with the Act — Sect. 277.

## 9) DIVISION IV OF TITLE I OF BILL 72 — refers specifically to a) the sale of used cars, and b) to the repair of automobiles.

Division V refers to the repair of household appliances being a kitchen range, a refrigerator, a freezer, a dishwasher, a clothes washer, a clothes dryer and a television set. This is an extension to specific and pressing problems of the general principles of warranty already enunciated. Used automobiles are provided with a legal warranty of from one to six months or 1,700 to 10,000 kilometres by sect. 159. Repairs of automobiles are subject to a legal repair warranty of three months or 5,000 kilometres by Sect. 176 while the repair of household appliances is guaranteed for three months — sect. 186.

It is suggested that these particular details might be better left to regulation rather than a code as they seem to be neither timeless nor eloquent. On the other hand they provide considerable justified protection to the consumer.

## 10) OTHER METHODS TO OBTAIN RECOURSE.

Besides the ordinary Courts, the consumer has the benefit of the Small Claims Court (for claims of under \$500.00) — Civil Code of Procedure Art. 953 ssq.; Legal Aid to assist him (for about 1/3 of the population of Québec); and the new Class Action Law proclaimed on Jan. 18, 1979 which promises to be of great value — Civil Code of Procedure Art. 999 ssq. As there is no right without an equally effective legal proceeding, the foregoing recourses are an integral part of the recourse in warranty for consumers and are a great step forward.

## IV. — CODE OR STATUTE.

The general Warranty provisions of Bill 72 are written for the most part in the style of a Civil Code “le style français” as opposed to “le style anglais” as L.-P. Pigeon put it in his masterful document entitled “Rédaction et Interprétation des Lois” of 1965.

This is in contrast to the particular warranty provisions and the business practices sections of Bill 72 which are written like a statute. When one remembers that Stendahl and Balzac read the Napoleonic Code to improve their literary style because of that Codes “concision” as opposed to the “precision” of the common law one can only regret many passages of Bill 72.

Generally the drafting of the Bill 72 is such that the Project will never be a Consumer Protection Code as has been suggested, but at best a Consumer Protection *Statute* written in the “style anglais”.

On the other hand, the language of Bill 72, despite its often contorted style, is still far superior, far clearer and far more intelligible than the language of most common law consumer protection statutes.

## V. — CONSUMER PROTECTION CODE.

Should the provisions on warranty be in a separate statute or code? It is a question which we must ask ourselves, and has been asked of us by the organizers of this Colloque.

My view is that for the present, the new law should be apart from the Civil Code for a period of trial and adjustment. Eventually, however, it must be included in the Civil Code because two systems of law cause difficulties for citizens, for the courts, for attorneys, for administrators of our laws and even for our legislators. I note that the two systems have even caused difficulties for the experts attending this Colloque.

Just as the present Civil Code makes distinctions, favouring non-merchants so an eventual Civil Code could contain nuances favouring the consumer. Two parallel codes on a permanent basis, however, seems burdensome to me. It should also be noted that many of the principles of the Revised Civil Code are more advanced than Bill 72. For example in respect to garanties the Revision seems more realistic containing not merely the two classic warranties of title and latent defects but also the principle of delivery (see art. 359 of Book V of the Report of the Civil Code Revision Office.) The new Revised Civil Code is also written in a relatively elegant and graceful style.

Many parts of the *Consumer Protection Act* are administrative law and must in any case remain in that Act.

## VI. — COMPARISON WITH BILL 45.

An earlier speaker had referred quite deprecatingly and at length to the actual *Consumer Protection Act* (Bill 45) adopted in July 1971 and as there was no

objection to the matter being raised at that time by the Chairman, may I briefly set the record straight?

Bill 45 although adopted in only 14 months without much previous background and work having been done by the previous government solved the following most pressing problems of the time:

- i) lesion for adults,
- ii) fraud from itinerant vendors,
- iii) falsity in lending by the adoption of new truth in lending rules,
- iv) rights to debtors — seize or sue provisions, cut-off clauses and rights of purchasers who had paid in part in conditional sales, etc.,
- v) abolition of pyramid sales,
- vi) control of credit reports,
- vii) control of children's advertising (the first in North America)
- viii) contracts in french or the language of the consumer — this was the first legislation giving french priority in the history of Québec,
- ix) control of trust funds by regulation,
- x) general rules of fairer contracts,
- xi) creation of a consumer protection council,
- xii) creation of a consumer protection department.

All this was done in fourteen months after *unlimited* public hearings at a Parliamentary Commission.

Bill — 72 copies almost all of the above but has new legislation on warranties and business practices etc. Bill 72, it must therefore, be said is still a great step forward.

### WARRANTIES — Concordance.

#### 1. *Transactions covered*

- (a) Civil Code Art. 1486 c.c.
- (b) Sask. s. 11; s. 2 (m); s. 2 (e)
- (c) Bill 72 s. 34; s. 1 (d).
- (d) N.B. s. 4 (1); s. 1 (1).

#### 2. *Form of Warranty*

- (a) Bill 72 s. 45
- (b) Sask. s. 17
- (c) N.B. s. 25

#### 3. *Extent of the Warranty*

- (a) Bill 72 s. 35-43
- (b) Sask. s. 8; s. 11
- (c) N.B. s. 8 to s. 12

#### 4. *Term of Warranty*

- (a) Bill 72 s. 46; s. 50; s. 38
- (b) Sask. s. 11 (7)
- (c) N.B. s. 12

5. *Exclusions from Legal Warranty*

- (a) Civil Code Arts. 1507; 1509
- (b) C.C. Rev. Book V Art. 360 & 361
- (c) Bill 72 s. 261 s. 262
- (d) Sask. s. 7 (2); s. 8 (2); s. 6 (2)
- (e) N.B. s. 7, s. 24, s. 25, s. 26

6. *Extra-Contractual Statements*

- (a) Bill 72 s. 41; s. 42; s. 43
- (b) Sask. s. 8 (1); s. 9; s. 10.
- (c) N.B. s. 4

7. *Warranties Covered*

A. *Warranty Against Eviction (Title)*

- (a) Civil Code Art. 1508 to Art. 1521
- (b) C.C. Rev. Book V Art. 363-366 (See also delivery 367 to 372)
- (c) Bill 72 s. 36
- (d) Sask. s. 11 (1); s. 11 (2)
- (e) N.B. s. 8

B. *Warranty Against Defects*

- (a) Civil Code, Art. 1522-1531
- (b) C.C. Rev., Book V 373 to 378
- (c) Bill 72 s. 37 to s. 43
- (d) Sask. 11 (3) to 11 (8) including sale by sample and purpose.
- (e) N.B. s. 9, 10, 11, 12

C. *Maintenance, Repairs, Parts*

- (a) Bill 72 s. 39
- (b) Sask. s. 11 (8)

8. *Who has an Action on the Warranty?*

A. *Who qualifies as a consumer?*

- (a) Code Civil Art. 1506
- (b) C.C. Rev. Book V. s. 350
- (c) Bill 72 s. 1 (e)
- (d) Sask. s. 2. (d)
- (e) N.B. s. 1 (1)

B. *Subsequent owners and others — Horizontal privity*

- (a) C.C. Rev. Book V Art. 103
- (b) Bill 72 s. 53 para. 4; s. 152; s. 54
- (c) Sask. s. 4 (1) s. 5; s. 27; s. 28; s. 29
- (d) N.B. s. 23

9. *Who is Liable in Warranty?*

A. *Who is a Merchant?*

- (a) C.C. Rev. Book V, art. 102
- (b) Bill 72 s. 167 (a), s. 182 (b)
- (c) Sask. s. 2 (1)
- (d) N.B. s. 1 (1)

B. *Direct Liability of Manufacturer — vertical privity*

- (a) C.C. Rev. Book V. art. 102, 103
- (b) Bill 72, s. 53, para. 1; s. 54; s. 1 (g); s. 271; s. 272
- (c) Sask. s. 13 (2); s. 13 (3); s. 14; s. 1 (h)
- (d) N.B. s. 27 and possibly s. 23



10. *Recourses*

- (a) Civil Code 1053 cc & 1065 cc. & 1066 cc.
- (b) Rev. Contract & delict and Book V Art, 102 & 103
- (c) Bill 72 s. 53; s. 54, s. 270; s. 271; s. 272
- (d) Sask. s. 19 to s. 28
- (e) N.B. s. 13 to s. 23