



Articles

CONDITIONAL SALES AND CONSUMER PROTECTION

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INTRODUCTION

The last few years have witnessed a veritable ferment of legislative activity in Manitoba with the avowed object of protecting the man in the street against the rigours and hardships of a retail credit system based on virtually unrestricted freedom of contract. Few would dispute that the "little man"—the ordinary, average Manitoban acquiring consumer durables on "time"¹—frequently gets a raw deal at the hands of the sellers and finance organizations. Whether the law is in a position to do anything about this is perhaps more debatable.

On the one hand, the legislator should not stand idly by while the rules and institutions of the common law are being used as means of oppression and injustice, but, on the other hand, the legislator ought not, in a free economy, impose any greater restrictions on trade and business than are absolutely necessary to maintain minimum standards of justice and fair dealing. The capital which provides the credit in the retail market is private capital, and the finance houses are private business institutions. Their object, like that of any other private business institution, is to make profits. Any legislation which significantly curtails the profitability of this business may leave the consumer worse off than he is now, be reducing the supply of credit, and may thus indirectly affect the buoyancy of the whole economy.

Moreover, most of the consumer's troubles may be said to originate in his own gullibility and ignorance, and no statute can make a gullible and ignorant person knowledgeable and sensible. It is the present writer's view, however, that the law of Manitoba, prior to the recent legislation, did not do enough to maintain minimum standards of justice and fair dealing, and that the aims of the recent legislation are sound. It will be contended, nevertheless, that the statutes in question—The Time Sale Agreement Act² and the Consumers' Credit Act³—

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1. *I.e.*, by deferred payments, over a period of, normally, 2-3 years.
2. S.M., 1962, c. 76, as amended by S.M., 1963, c. 87.
3. S.M., 1965, c. 15.

show signs of undue haste in preparation, and do not provide as effective a solution to the consumers' difficulties as they might have done. Before considering the provisions of the Acts in detail, it may be useful to recall the main features of the previous law.

THE PREVIOUS LAW

In the view of the common law a conditional sale contract is simply a type of agreement to sell, and is consequently governed by the Sale of Goods Act.⁴ This Act was passed at a time when no thought was given to problems of consumer protection. A limited degree of protection is afforded by the Lien Notes Act.⁵ Under section 2 no bailment of manufactured goods "where the condition of the bailment is such that the possession of the chattels should pass without any ownership therein being acquired by the bailee⁶ . . . shall be valid unless it is evidenced in writing, signed by the person thus taking possession of the chattel".

The requirement of a writing signed by the purchaser,⁷ as a condition precedent to any obligation under the contract, may be regarded as the absolute minimum of consumer protection. Under a similar provision in the English Hire Purchase Act, 1938,⁸ the Court of Appeal held⁹ that the signature of an incomplete document was not compliance with the Act. This is an added safeguard for the purchaser, for it means that the terms of the contract are down in black and white for him to read (if he chooses to) before he is bound by the contract. The point does not appear to have arisen in Canada, however.

Section 3 of the Lien Notes Act gives some relief to the defaulting purchaser. If the conditional vendor retakes possession of the goods for breach of condition in the agreement, "he shall retain them for twenty days in the same condition as they are at the time he retakes possession; and the bailee or his successor in interest may redeem them within that period on payment of the amount then in arrear" with interest, if payable, and the costs and expenses of taking and keeping possession.¹⁰

4. R.S.M. 1954, c. 233.

5. R.S.M., 1954, c. 144.

6. This expression is wider than, but clearly includes, conditional sales contracts.

7. *Quære*, whether signature by an agent on behalf of the purchaser is sufficient. It is not under the English legislation (see case cited in Note 9) but there a clear contrast is made in the section (see next note) between signature "by the hirer and by or on behalf of" other parties. Much of the value of this provision lies in the requirement of personal signature; however, the point may be academic in view of the Time Sale Agreement, s. 3, discussed below.

8. Sec 2(2) (a): "An owner shall not be entitled to enforce a hire-purchase agreement . . . unless . . . a note or memorandum of the agreement is made and signed by the hirer and by or on behalf of all other parties to the agreement . . ."

The Hire-Purchase Act, 1964, s. 3(1), now requires hire-purchase, and conditional sale agreements (see s. 21), to be in writing, and a note or memorandum evidencing the agreement is no longer enough, but it is doubtful whether this change means much in practice. The Time Sale Agreement Act uses both formulations (sec. 3(1) and 3(2), as amended).

9. *Eastern Distributors Ltd. v. Goldring* (1957) 2 Q.B. 600.

10. Sec. 3(2) excludes lien notes and conditional sale agreements in respect of implements coming under the Farm Implement Act from the operation of this section.

This section suffers from the defect, which, as we shall see, is almost chronic in Manitoba consumer protection statutes, of not defining the consequences of non-compliance. Suppose the conditional vendor resells within the twenty days, before the buyer has been able to raise finance to redeem the goods, but it is proved that the buyer could have redeemed the goods if the seller had kept them the full twenty days. Can the buyer bring an action in conversion against the vendor? Alternatively, could the vendor resist a claim by the buyer on proving that the buyer would not have been able to raise the money in time anyway? The only point on which one can be reasonably certain is that a seller who ignored the twenty day waiting period would be held to have made a conclusive election to look to the goods for satisfaction of his debt, and would be unable to come against the buyer for any deficiency.

The only other provision in the Lien Notes Act which can be said to contain an element of consumer protection is s.5, which prohibits the registration in any Land Titles Office of "lien notes, hire receipts, orders for chattels, or documents or instruments containing as a portion thereof, or having annexed thereto or endorsed thereon, any order, contract, or agreement, for the purchase or delivery of any chattel;" and no caveat may be registered which is founded upon any of the prohibited documents. The purpose of this enactment was, in part, at least, to make it less easy for an implement dealer selling to a farmer on credit to mislead the purchaser about the fact that the payment of the price was to be a charge on the land.¹¹ The section was, however, easily evaded, for it does not prohibit charging the land with the payment of the price of chattels, provided this charge is created by a separate document, containing no reference to the transaction out of which the indebtedness arose.¹²

It can thus be seen that, although some steps had been taken to protect the consumer against the consequences of the unequal bargaining power of the contracting parties, a great deal was left undone. To take only the more obvious instances, there was no attempt to lay down positive standards of disclosure with regard to the amount or rate of financing charges; there were no mandatory implied conditions of quality;¹³ and no restrictions on the vendor's exercise of contractual rights of repossession and resale at any stage of the currency of the agreement, apart from the twenty-day holding period under the Lien Notes Act, sec. 3.¹⁴

11. See the judgment of Perdue, J.A., in *Smith v. American-Abell Engine & Thresher Co.* (1907) 17 Man. R. 5, at pp. 8-11.

12. *Smith v. American-Abell Engine & Thresher Co.*, above.

13. In recent years the doctrine of fundamental breach has done quite a lot towards remedying this defect, without statutory intervention. See the cases cited in the section of this issue devoted to "Current Law—Sale of Goods", at note 16.

14. Probably the most fundamental legal problem arising out of the Canadian retail credit structure—the attempt to divorce the seller's obligations under the contract from the buyer's liability to pay, by means of the promissory note negotiated to the finance company as holder in due course—is not, of course, within the legislative competence of the Province, and for that reason is not considered in this paper.

THE TIME SALE AGREEMENT ACT, 1962¹⁵

This Act deals solely with the first of the omissions mentioned in the last paragraph. It can at least be regarded as a move in the right direction, although there are a number of respects in which the Act could be improved. Originally passed in 1962, the Act was extensively amended in 1963,¹⁶ and it is to be regretted that the Legislature did not see its way to repealing the 1962 Act, and re-enacting what was retained from the old version in an entirely new statute based on the 1963 amendments.¹⁷

The aim of the Act was originally declared to be to ensure:

. . . that a person purchasing goods on an instalment payment plan should, at the time of entering into an agreement for the purchase thereof, be fully informed as to the amount of interest that he is required to pay on any unpaid balance of purchase price and the true rate thereof; and also as to all other amounts added to and included in the purchase price, or payable in addition to the purchase price.¹⁸

While it may be admitted that finance charges are in substance only a form of interest on the capital advanced by the finance company to the consumer, it is extremely difficult, if not impossible, to devise a workable formula for expressing such charges in terms of interest *rates*, and the 1963 Act wisely withdrew from the unnecessary complications which such a requirement would have entailed. The essence of the matter is that the purchaser should be aware *how much* he is paying for financing, and it is of considerably less importance that this should be expressed as a percentage of the amount owing from time to time.¹⁹ Accordingly, all references to interest and interest rates have been deleted in the 1963 version.

The scope of the Time Sale Agreement Act differs in three respects from that of the Lien Notes Act. In the first place, the Time Sale Agreement Act applies to contracts for all goods, defined as in the Sale of Goods Act,²⁰ and is not limited to manufactured goods. On the other hand, the effect of s. 5 of the Time Sale Agreement Act is to exclude from the provisions of the Act many conditional sales which are within the Lien Notes Act. Sec. 5(a) excludes sales for an amount less than one hundred dollars²¹—the Lien Notes Act has no minimum

15. S.M., 1962, c. 76. (Hereinafter referred to as TSAA, 1962).

16. S.M., 1963, c. 87. (Hereinafter referred to as TSAA, 1963).

17. The unrevised version was never in force: the whole Act, with amendments, only came into force on 1st September, 1963 (TSAA, 1963, ss. 7 and 8).

18. TSAA, 1962, Preamble.

19. The Act is silent on the converse problem—the charge expressed as a percentage only. This can be equally misleading, unless the period of time, with reference to which the interest is calculated, is conspicuously stated.

20. T.S.A.A., 1962, s. 2(b), (S.G.A. s. 2(1) (h)), *viz.*, "chattels personal other than things in action or money, and includes emblements, industrial growing crops, and things attached to or forming part of the land, that are agreed to be severed before sale or under the time sale agreement."

21. As amended by T.S.A.A., 1963, s. 6; the application of s. 5(a) to a "continuous deferred payment plan" is considered below.

value requirement.²² Thirdly, sec. 5(b)-(d)²³ excludes all non-consumer transactions from the scope of the Act, namely, sales by a manufacturer or distributor to a wholesaler of goods that the wholesaler intends to resell in the course of his business, sales by a manufacturer, distributor or wholesaler to a retailer of goods that the retailer intends to resell in the course of his business, sales of implements to which the Farm Implement Act applies, and sales of vending machines or bottle coolers to a retailer to be installed in his retail establishment.

The central provision of the Time Sale Agreement Act is sec. 3(1);²⁴ "A time sale agreement²⁵ shall be evidenced by a writing,²⁶ executed by the buyer or his agent prior to, or at the time of, or within twenty²⁷ days after delivery of the goods, in which the seller gives" the required information. Before considering the rest of the subsection, it should be pointed out that the opening words reveal two major weaknesses in the statute, which are likely to detract very seriously from its effectiveness.

In the first place, the Act does not insist on *personal* signature of the document by the buyer. As has been pointed out already,²⁸ providing information for the buyer becomes a meaningless chore unless everything possible is done to bring the information home to the buyer, and from this point of view nothing could be worse than a provision which enables him to be bound by a document he has never even seen. Secondly, it is incomprehensible that the seller should be given *up to 20 days after delivery* of the goods in which to present the buyer with the information which the Act says he should have.

What is the purpose of requiring the seller to give the information at all? It cannot be to enable the buyer to discover to his dismay, when it is too late to do anything about it, that the finance charges are much more exorbitant than he had imagined. If the information is to be of any real benefit to the buyer he must have it *before* he becomes contractually bound to take the goods, not nearly three weeks after the goods have been delivered. Moreover, the twenty-day period in sec. 3(1) is in flat contradiction with the words of the Preamble: "Whereas it is desirable that a person purchasing goods on an instalment payment plan, should, *at the time of entering into an agreement for the purchase thereof*, be fully informed . . ." Even if the agreement is not legally enforceable until the buyer has executed the document required

22. Neither Act has a *maximum* value limit—rightly, it is submitted. Contrast the English Hire-Purchase Act, 1964, s. 1.

23. As amended by T.S.A.A., 1963, s. 6.

24. As amended by T.S.A.A., 1963, s. 3.

25. Defined (s. 2(d)) so as to include both conditional sales and hire-purchase agreements. The latter were presumably added to forestall evasion of the Act, by using the English, rather than the Canadian, method of credit buying.

26. See sec. 3(3), as amended by T.S.A.A., 1963, s. 4, for requirements as to size of print.

27. T.S.A.A., 1963, s. 3(a). The original figure was ten.

28. See above, note 7.

by sec. 3²⁹—and this would be the case if there was no other writing to satisfy sec. 2 of the Lien Notes Act—there is still an artificial separation of the time when the “sales pressure” is on and the moment when the agreement becomes enforceable, which may have unexpected results. On the one hand, the astute buyer will be given a prolonged opportunity to resile from the transaction; on the other hand, it will be easy for a fast-talking seller to cajole a slow-thinking buyer into signing for the information after the goods have been delivered, and after the information has ceased to have any “protective” value for him. Either way, this can hardly have been the intention of the draftsmen of the Act, and it is difficult to see what object they did have in mind in inserting the twenty-day period.

The information which the seller is required to furnish is twofold. First, he must give “a description of the goods by which they may readily and easily be known and distinguished.” This is an expression borrowed from the Bills of Sale Act,³⁰ in the context of which it has a well-settled meaning.³¹ Whether this meaning is appropriate in connection with conditional sale contracts is another matter. The object of the description in a bill of sale is to enable third parties to follow up the registration and ascertain which of the grantor’s goods are included in the security or assignment. Conditional sale contracts do not have to be registered in Manitoba, and the Time Sale Agreement Act has no relevance to the position of third parties giving credit to the purchaser on the strength of his possession and apparent ownership of the goods. The English Act³² requires only a list of the goods to which the agreement relates “sufficient to identify them”, and, it is submitted, this simple formula is all that is necessary. Reference to the “readily and easily known” test of the Bills of Sale Act, with its implication of public notice, can only introduce needless complication.

Secondly, the seller must state the matters enumerated in sec. 3(1) (a).³³ In a number of respects these provisions, while being substantially on the right lines, reveal unfortunate looseness of expression and, indeed, are at times self-contradictory. By sec. 3(1) (a) (i) the seller must state:

... the regular cash selling price that would be charged for the goods to a buyer who paid cash for them in full at the time of purchase, as that regular cash selling price is shown in advertisements, labels, price lists, catalogues, or other price marks or statements of prices issued by or on behalf of the seller.

This should cause no difficulty, although it is a little odd that the Act should resort to a hypothetical “regular” cash price, instead of

29. What if the buyer refuses to sign the document when presented to him? Presumably, in the case supposed, of the agreement’s not being enforceable without the document, the seller is powerless. It is to be noted that non-compliance with the T.S.A.A. *alone* does *not* render the agreement unenforceable (S. 4(2), T.S.A.A., 1962, added by T.S.A.A. 1963, s. 5).

30. S.M., 1957, c. 5, s. 4(3).

31. See, e.g., *Re Morris* (1943), 25 C.B.R. 1.

32. Hire-Purchase Act, 1938, ss. 2(2) (b), 3(2) (b).

33. Sec. 3(1) (b) applies the requirements, *mutatis mutandis*, to hire-purchase agreements.

taking the more direct line of requiring the seller to state the *actual* cash price at which he was prepared to sell those particular goods to that particular purchaser.

The weakest part of the subsection is in paragraphs (ii) - (vi),³⁴ dealing with the manner in which the amount of the charges must be stated. At the outset para. (ii) requires the seller to state "the *full purchase price* charged to the buyer under the time sale agreement, showing *as a separate item* the amount included therein for finance charges."³⁵ Taken by itself, "full purchase price" appears to bear the natural meaning of the total amount that the buyer has to pay in order to become owner of the goods, and "finance charges" are so defined in the 1963 Act³⁶ as to be equivalent to the difference between the cash price and this total amount. Nevertheless, paragraphs (iii) and (iv) make provision for insurance, and other charges, respectively, which the seller is not required to include either in the full purchase price or in the total of finance charges.

Quite apart from the fact that this seems to ignore the definition of "finance charges" and the natural meaning of "full purchase price", there seems to be little reason for allowing the seller to soften the blow in this way. Three items of \$14.00 each always look less than a single item of \$42.00. The same can be said of "transportation, delivery or installation costs"; here the Act clearly permits the statement of such costs as a separate item,³⁷ but a total price of \$104, with a charge of \$16 for delivery, naturally seems to be a better bargain than a price of \$120, with free delivery.

The Act would have been simpler, clearer, and, it is submitted, more effective, if it had compelled the seller to state (a) the total amount payable by the buyer as a single sum inclusive of all charges of whatever nature; (b) a breakdown of this figure into the two items of "cash price" and "total charges"; and (c) a further breakdown of the total charges to show separately how much is attributable to delivery, installation, insurance and financing.³⁸ The use of such terms as "discount", "commission", "legal fees" and "bonus" should be prohibited altogether, as they simply provide a cloak for the unscrupulous deception of unthinking or inexperienced purchasers—a glance at the Report of the Tallin Commission³⁹ reveals how easily the consumer gets the idea into his head that a "bonus" is something to his advantage.

34. As amended by T.S.A.A., 1963, s. 3(b) and (c). Para. (v), dealing with "interest", is repealed.

35. Italics supplied.

36. Sec. 2(c).

37. T.S.A.A., 1962, s. 3(1) (a) (vi). There appears to be no conflict in this case with the definition of finance charges: "any charge that the buyer is required to pay . . . for the privilege of purchasing the goods on time, over and above the regular cash selling price . . ." (Italics supplied).

38. S. 3(1) (a) (vii)-(ix) require no comment; there must be a statement of any additional charge, other than costs of repossession, etc., payable by buyer on default; of the initial payment; and of the total unpaid balance, and the amounts and date of payment of subsequent instalments.

39. The Tallin Commission on Real Property Mortgage Loan Transactions, which submitted its report to the Attorney-General of Manitoba on February 9th, 1965.

A word should be said here about the application of the Act to a "continuous deferred payment plan", i.e., "a time sale agreement under the terms of which goods may be purchased from time to time by the buyer and the cash price thereof and charges in addition thereto are charged to the account of the buyer and added to the unpaid balance of his account"⁴⁰. Such accounts are commonly operated by the larger stores, primarily for the purchase of major household appliances. The difficulties of adapting the provisions of the Act to such accounts are great, and it may be doubted whether the Act has solved them.

In the first place, it may be questioned whether the agreement, setting up the account, "under the terms of which goods may be purchased from time to time", is itself a *time sale agreement*, and if it is not,⁴¹ then the Act is excluded from the beginning. The Act is also excluded⁴² unless the unpaid balance "at any time prior to default" is more than one hundred dollars. Why the application of the Act should be determined by reference to the purchaser's default is a mystery: the seller must be able to say from the beginning whether the agreement is within the Act, and, moreover, the Act requires that a continuous deferred payment plan, to which it applies, must not merely be *evidenced* by a writing, but must actually be *in writing*, containing the specified information.⁴³ The point is, however, largely academic, for such accounts are not in practice operated where a balance of less than one hundred dollars is contemplated.

The most glaring defect of the Time Sale Agreement Act is that non-compliance by the seller does not render the agreement unenforceable, either absolutely or subject to relief by the court on proof that the buyer has not been prejudiced by the omission.⁴⁴ The only consequence for the seller of not complying with the Act is that he becomes liable on summary conviction to a fine of not more than five hundred dollars.⁴⁵ Much depends, of course, on the rigour with which the Act is enforced, but there is a danger that many breaches will never be brought before the courts, and that those fines which are incurred will be regarded as little more than one item in the overheads of retail credit selling, rather like bad debts. The merits of the Act outweigh the weaknesses, which could in any event be removed if a little more care and thought were devoted to the drafting of the Act, and it would be a great pity if the Act were to wither from lack of effective enforcement in the criminal law, when a much more effective civil sanction is at hand.

40. T.S.A.A., 1963, s. 2(b).

41. This is a question of the construction of the agreement. The writer has seen one such form of agreement, as used by a leading department store, which, in the writer's opinion, could not be construed as a time sale agreement.

42. T.S.A.A., 1962, s. 5(a), as amended by T.S.A.A., 1963, s. 6.

43. T.S.A.A., 1962, s. 3(2), as amended by T.S.A.A., 1963, s. 4. The seller is still allowed up to twenty days after delivery of the goods to obtain the buyer's signature. As the contract is enforceable even without the writing (see below) the position is even more ludicrous than under s. 3(1).

44. T.S.A.A., 1962, s. 4(2), added by T.S.A.A., 1963, s. 5.

45. With up to six months' imprisonment in default of payment—but this will not concern the seller who is a corporation.

THE CONSUMERS' CREDIT ACT, 1965⁴⁶

This is a much more radical measure. The Act consists, in effect, of two parts, the first⁴⁷ purporting to restrict the seller's choice of remedy in the event of the buyer's default in making payments under the contract, and the second⁴⁸ introducing a "cooling-off period" in certain cases, that is to say, the buyer is given the right to notify the seller that he has had second thoughts, and is withdrawing from the transaction. It will be convenient to take the latter portion of the Act first.

The field of application of the Act is basically the same as that of the Time Sale Agreement Act,⁴⁹ with one important difference: The Consumers' Credit Act has no minimum value requirement. The intention behind the Act seems clear enough that it should only apply to credit transactions,⁵⁰ or in other words basically to time sale agreements;⁵¹ this appears from the title itself, and from s. 13: "Subject to section 6,⁵² this Act applies to all instalment sales, whether effected by way of a time sale agreement, lien note or by way of an agreement or arrangement made at the time of sale or subsequent thereto covering the whole or part of the purchase price of the goods sold." Although this takes the Act beyond simple time sale agreements, to include any sale where credit is in fact given, whatever the original nature of the agreement, the keynote is still the giving of credit.

With regard to the "cooling-off period", however, the position is not entirely clear. The Act defines⁵³ "purchaser" as "a person who *buys* or agrees to buy goods under a time sale agreement, contract *or other agreement*"⁵⁴ and there is a corresponding definition of "vendor".⁵⁵ The expression "time sale agreement, contract or other agreement" recurs constantly in sections 7-11, and an "other" agreement must *prima facie* mean an agreement that is not a time sale agreement.⁵⁶ The answer probably is that the expression "other agreement" has to be read subject to s. 13, and thus includes a credit sale,⁵⁷ but not a cash sale. However, if this is the intention of the Act, it could surely have been made clearer.

The "cooling-off" provisions are further restricted by sections 6 and 14(2). Under the latter, the purchaser of a motor vehicle or

46. S.M. 1965, c. 15. The Act came into force on 7th August, 1965 (See *Manitoba Gazette* of that date). The act is hereinafter referred to as C.C.A., 1965.

47. Sections 3-5.

48. Sections 6-11. The remaining sections apply equally to both parts.

49. S. 14(1) (a), (b) and (d) of CCA, 1965, are in the same terms as s. 5(b)-(d) of T.S.A.A., 1962, as amended. S. 14(1) (c) further excludes "a sale of goods to a corporation".

50. This is so in the nature of things, as far as ss. 3-5 are concerned, but the provision with regard to the "cooling-off period" could conceivably apply to cash transactions as well.

51. Defined, s. 2(e), in the same terms as in T.S.A.A., 1962, s. 2(d).

52. See below.

53. S. 2(d).

54. Italics supplied.

55. S. 2(f).

56. It is to be noted that the Act does not say "other *similar* agreement", and this does not seem to be a case for invoking the *ejusdem generis* rule.

57. A sale under which the property passes to the buyer, before payment of the price in full.

trailer within the meaning of The Highway Traffic Act is excluded from the benefit of the right of cancellation. More important is the limitation contained in section 6: "Sections 7 to 11 apply only in a case where the vendor, or a person acting on his behalf in respect of the sale, initiates or negotiates the sale by going from house to house selling or offering for sale, or soliciting orders for the future delivery of, goods or goods and services."

A certain amount of difficulty may be experienced in deciding whether the vendor or his agent has been "going from house to house." This expression clearly includes the salesman whose call is unsolicited, but there are many other variations possible—the newspaper ad inviting the customer to fill out and send in a coupon with his name and address; the telephone enquiry, "May we send our man round?" to a number chosen at random from the telephone book, to mention only two common *modi operandi*.

Undoubtedly sales concluded after such an approach are within the spirit of the Act, for the sales pressure is applied to the purchaser in his own home, with the attendant dangers that he will sign anything just to get rid of the salesman and so on, but can it be said that the vendor "initiates or negotiates" the sale by "going" from house to house. He certainly does not *initiate* the sale in this way, and is every sale concluded after a call on the purchaser at his home "negotiated by going from house to house"? If not, what is the test?⁵⁸

Another difficulty arises on section 7. The Act provides a right of cancellation in the interests of the weak-willed consumer, who is most likely to succumb to high pressure sales techniques, and it may be assumed that the people most in need of protection are unlikely to be well-informed about the existence of such rights as the Act gives them. With this in mind, section 7 provides that:

(1) Every time sale agreement and every contract or other agreement for the purchase and sale of goods that is⁵⁹ in writing shall clearly and conspicuously state (a) that the purchaser may, at any time within two days after the date of the execution of such time sale agreement, contract, or other agreement, serve⁶⁰ on the vendor⁶¹ a notice,⁶² in writing . . . , executed by the purchaser cancelling⁶³ the agreement or contract; . . .

It is submitted that this provision is defective in two respects: in the first place the seller should be required to go further than just include this statement in the agreement, for the chances are that the buyer will not read it anyway. If anything effective is to be done to

58. English law has come to grief over the same problem. The test of the Hire-Purchase Act, 1964, s. 4(1), that the relevant document should be "signed by the prospective hirer or buyer at a place other than appropriate trade premises" has proved easy to evade.

59. Except in the case of a continuous deferred payment plan, there is no provision requiring a time sale agreement, etc., to be in writing—see above.

60. By s. 8 the notice is deemed to be served at the time of mailing, if sent by registered post.

61. S. 7(1) (b) requires the agreement to state the name and address of the vendor for the purpose of receiving the notice.

62. The notice is effective "if, however expressed, it indicates the intention of the purchaser to withdraw from the transaction to which it relates". (s. 7(2)).

63. The notice operates to rescind the agreement, as if it had never existed (s. 9). Sections 10 and 11 deal with return to the purchaser of moneys paid, and of goods delivered in part exchange.

draw the buyer's attention to his right of cancellation, it ought to be the seller's duty to *explain* to him that this right exists, so that the buyer actually does know about it, and not merely would have known about it if he had taken more care. Secondly, as usual, the Act does not specify the consequences of non-compliance. It is submitted that the only effective way of securing compliance is to allow the buyer to rescind *at any time* if he is not given proper warning of his right of cancellation under the Act; but how the law actually stands is a matter of pure speculation, and it may well be that the seller is not penalized at all for failing to include the statement of the buyer's right of cancellation.

Turning to the provisions of the Act with regard to the seller's remedies on default by the buyer, the general pattern which emerges is that the seller must decide which of two courses he will follow in the event of the buyer's default in paying the instalments of the price. He may either rest on his security interest in the goods, by retaking possession and, in general, reselling them, in which case he must forego any claim against the buyer if the proceeds of sale (or the value of the goods, if not resold) are insufficient to pay off the whole outstanding debt,⁶⁴ or he may refrain from exercising his right to repossess, and, instead, bring an action against the buyer for the whole balance of the price,⁶⁵ but if the goods in question are taken in execution under a judgment for the price, the seller is in effect reduced to the same position as if he had repossessed the goods in the first place.⁶⁶

Whether this part of the Act can be regarded as a success, depends on the view which is taken of the intention behind it. If the intention was merely to discourage hasty repossession by the seller against the buyer's will, then the Act is no doubt successful. Section 3(1) provides unequivocally that:

Notwithstanding anything contained in any other Act of the Legislature or in any agreement or contract between a vendor and a purchaser, where the vendor sells goods and has a lien on the goods for all or part of the purchase price, the vendor's right to recover any unpaid purchase money, if he seizes or causes the goods or a portion thereof to be seized,⁶⁷ whether under the terms of a time sale agreement or any other agreement,⁶⁸ is limited to his lien on the goods and his right to repossession and sale thereof; and no further action is maintainable by the vendor to recover the purchase price or any part thereof from the purchaser.

Section 3(2) further provides that if the vendor "seizes or repossesses *and sells*"⁶⁹ the goods the purchaser's debt for the unpaid

64. Section 3.

65. Section 4(1).

66. Section 4(2). S. 4(3) excludes the operation of these provisions where the vendor's security is materially impaired by the destruction of or damage to, the goods by the wilful act or neglect of the purchaser after repossession.

67. Voluntary surrender by the buyer, even at the seller's request or suggestion, has been held not to be a seizure of the goods on similar legislation in Alberta: *R. Angus (Alberta) Ltd. and Traders Finance Corporation Ltd. v. Kidner* (1965) 51 W.W.R. 568. Consequently the seller still retained the right to claim the deficiency after resale.

68. The seller is presumably not affected by a seizure made independently of the terms of the agreement, as, for example, where the buyer's default amounts to a repudiation of the agreement.

69. *Quaere*, whether "repossess" adds anything to "seizes"? And is the debt *not* discharged if the vendor *retains* the goods, instead of *reselling*?

purchase price is fully discharged,⁷⁰ but any surplus after paying the debt and costs must be paid to the purchaser.

The Act thus effectively secures that the seller cannot repossess against the buyer's will, and maintain an action for the deficiency, but it may be doubted whether there was any call for such a provision. The seller is being penalized, and, it is submitted, unnecessarily. If it is felt that repossession is a hard remedy, the answer is surely to prohibit it altogether, or to require an order of the court, before the seller may lawfully repossess.⁷¹ Discharging the balance of a bad debt *ipso facto* is a drastic remedy, not, it is submitted, required by the needs of consumer protection.

On the other hand, it seems probable that the object of the Act was not merely, or even primarily, to discourage repossession, but to establish a system of compulsory election by the seller among his remedies: either repossess or sue for the balance, but not both. If the case of *Butler v. Traders Finance Corporation Ltd.*⁷² was rightly decided, the Act has largely failed in this object. There, on the terms of sec. 19(2) of the Conditional Sales Act of Alberta,⁷³ which is for present purposes in terms identical with s. 4(1) of the Consumer Credit Act,⁷⁴ it was held that the seller had not made an election by obtaining judgment for the price, and could still fall back on his security interest in the goods in the purchaser's bankruptcy. The Act only restricts the seller's rights *if he seizes the goods*, either by repossessing, or by execution under his judgment.

Even if the words "the vendor may *elect* to bring an action . . . for the unpaid purchase price" are given their natural meaning, the section still leads to the curious result, by virtue of subsection (2), that to obtain the full amount of the debt, the vendor must execute the judgment on property *other than the contract goods*, for if he takes the contract goods in execution he is back where he started from, and has to be content with the value of the security. Insofar as this is of benefit to the purchaser, it is open to the same objections as the restrictions on repossession in section 3. If the Act really was intended to provide that the seller must look to the goods alone as security for the payment of the debt, this could have been said much more simply, and it is submitted that the present provisions achieve hardly more than that.⁷⁵

70. The section thus eliminates the possibility of holding (as was done in *Industrial Acceptance Corporation Ltd. v. White* (1965) 54 W.W.R. 312(B.C.)), in reference to similar legislation in Alberta) that the Act takes away the *remedy*, but leaves the *right* untouched.

71. As is done in England, by s. 11 of the Hire-Purchase Act, 1938.

72. (1965) 47 D.L.R. 2d 260 (Alta.).

73. R.S.A., 1955, c. 54.

74. "Instead of seizing . . . the goods . . . under the provisions of the . . . agreement, the vendor may elect to bring an action against the purchaser for the purchase price or part thereof . . ."

75. S. 5 of the Act deals with the case where the vendor, on repossession, discovers that an "accessory or component part" of the security has been removed by the purchaser: the purchaser then becomes liable for the lesser of (i) the value of the accessory; or (ii) the deficiency on resale.

CONCLUSION

Many of the views expressed in this paper must inevitably be no more than tentative suggestions, and it may be that, in the course of time, the courts can smooth off some of the rough edges on the recent legislation. A fair summary of the present position would be that the legislature had some good ideas, but failed to make the most of them. The matter is still under consideration, and the final word has not been spoken yet. It is to be hoped that the opportunity will be taken to revise the Time Sale Agreement Act and The Consumers' Credit Act, and put them into the workable and effective form of which they are capable, and which they deserve.



