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CHAPTER 1

INTRODUCTION

A. OVERVIEW

This Report examines and evaluates the law relating to the remedies available to a contracting party who has been induced to enter a contract on the basis of a false pre-contractual statement.

The question can be illustrated by a simple example. Imagine that A wishes to buy a painting from B. Prior to the sale, B states that the painting is the work of a celebrated artist. On the faith of this statement, A purchases the painting for $50,000. In fact, the painting is the work of a lesser artist and its market value is only $20,000. It is also a fact that if the painting had been authentic A would have made a very good deal because such a painting has a market value of $60,000. The issue is disarmingly simple. What is the appropriate remedy for A?

The issue is often portrayed as one of unjust enrichment. By representing the painting falsely, A has received $30,000 more than the painting was worth. This $30,000 has been secured at the expense of A who has been misled by B's words. One remedy is to force B to reimburse the $30,000. This can be achieved in two ways. The contract may be cancelled and the parties returned to their pre-contract positions. The painting will be returned to B and B will refund the purchase price. Alternatively, the contract may be maintained. A will retain the painting but B will return $30,000 of the purchase price, i.e. the difference between the contract price ($50,000) and the value of the painting ($20,000). In this way B is forced to surrender the unjust enrichment gained under the contract.

An alternative way of approaching this question is based on A's expectations. A's reasonable expectation was to receive the painting as represented, i.e. a painting worth $60,000. B failed to confer that benefit. Indeed, he only provided a painting worth $20,000. On this analysis, B should pay the difference between what A received (a painting worth $20,000) and what he expected to receive (a painting worth $60,000), i.e. $40,000 in damages. Such a remedy would go beyond undoing an unjust enrichment. It would fulfil the innocent party's reasonable expectations.

Unfortunately, the simplicity of the issue is not mirrored in the law relating to pre-contractual statements. Indeed, the current law is quite extraordinarily complex and confusing and is productive of inconsistent results. Much of the confusion results from a lack of judicial consensus about which of the three potential remedies outlined above is the most appropriate. Consequently, there are legal rules and principles which are called on selectively to justify the desired remedy. Recently, a judge of the Manitoba Court of Appeal, in a case to be discussed at length in the body of this Report, drew attention to the unsatisfactory state of the law. Mr. Justice Twaddle stated:

> . . . the entire subject of innocent misrepresentation as a cause of action should be reviewed in depth by the Law Reform Commission.[1]

[1] *Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 at 339 (Man. C.A.).

B. THIS REPORT

This Report surveys the law relating to pre-contractual statements and makes recommendations for reform of the law in Manitoba.

In Chapters 2 to 6 we canvass the law as it exists in Manitoba. Chapter 2 presents an overview of the legal principles which govern pre-contractual statements. We review at greater length the pertinent principles of contract law. This is followed in Chapters 3, 4 and 5 by a discussion of the complementary role played by tort law and legislation. Chapter 6 contains an examination of the case of *Ennis* v. *Klassen*, the Manitoba decision which sparked our consideration of this area of the law.

In Chapter 7, we review both the legislative reform and law reform recommendations which have taken place in Canada in the past two decades. Much of this activity has focussed on sales of goods and services. Chapter 8 reviews the reforms which have been implemented in three common law jurisdictions: England, New Zealand and the United States of America. This part identifies different approaches to reform.

Chapter 9 reviews the various options for reform and contains our recommendations for reform of the law in Manitoba. This is followed, in Chapter 10, by a draft Misrepresentation Act and commentary. The Act is reproduced (without commentary) as Appendix A to this Report.

C. ACKNOWLEDGEMENTS

The Commission wishes to thank Prof. Philip H. Osborne of the Faculty of Law, University of Manitoba, who was retained as our consultant and to prepare this Report. We also wish to thank his research assistant, Mr. Rod Crook, and the Legal Research Institute of the Faculty of Law, University of Manitoba.

Professors Arthur Braid and Gerald Nemiroff also provided assistance by preparing short memoranda on two related side issues for which we are very thankful.

CHAPTER 2

THE LAW RELATING TO PRE-CONTRACTUAL STATEMENTS; AN OVERVIEW

In this area of law it is important to identify the main contours of legal liability before embarking on a detailed analysis of particular causes of action and rules. There are three broad areas of law which impact on pre-contractual statements in Manitoba: contract law, tort law and legislative provisions. It is, however, fair to say that tort rules and legislative provisions play a complementary and supplemental role in the law. It is, therefore, desirable to begin with contract.

A. CONTRACT LAW

Contract remedies depend upon the nature and classification of the pre-contractual statement. If the pre-contractual statement is an erroneous statement of fact, it is classified as a misrepresentation. The remedy for a misrepresentation which induces another to enter a contract is rescission. The contract is, at the option of the innocent party, rendered void. The parties are restored to their pre-contract situation - the *status quo ante*. This remedy is a harsh one and may cause considerable commercial disruption where the contract forms one link in a commercial chain. To guard against this risk, there are a series of bars to rescission which terminate the innocent party's right to rescind. Bars to rescission include unreasonable delay, affirmation of the contract and interference with the contractual rights of third parties. In contract law, no action for damages is available for a misrepresentation inducing a contract.[1]

If the pre-contractual statement is intended to be a promise, it may be viewed as a term of the subsequent contract or as a collateral contract. Breach of such a contractual promise is simply a breach of contract. The remedy is an action for damages. The damages are calculated on an expectation basis and are designed to confer the promised benefit in money's worth. Technically speaking, damages are designed to place the innocent party in the position he or she would have been in if the promise had been performed. In some circumstances, the breach of contract may be so severe as to amount to a breach of a condition which permits the innocent party to terminate the contract and thereby free himself or herself from future performance. This right of repudiation does not derogate from a claim for damages.

If the statement amounts to neither a misrepresentation nor a promise, no remedy is provided under contract law.

B. TORT LAW

Independently of contract law, tort law developed a remedy for certain kinds of misrepresentation. These tort principles provide a particularly useful complement to contract

[1] *Kooiman* v. *Nichols* (1991), 75 Man. R. (2d) 298 (C.A.).

law because they create the possibility of an action for damages based on a misrepresentation. Two actions are possible. Deceit lies where a fraudulent misrepresentation has been acted on to the detriment of the representee. Fraud demands proof of dishonesty and is found where the representor knows that the statement is untrue or is reckless as to its veracity. The second is an action for negligent misrepresentation. The metes and boundaries of this action for pre-contractual misrepresentations are unclear but it may lie where insufficient care has been taken to ensure the veracity of an honest representation. Damages in deceit and negligence are calculated on a tort measure of loss. They are designed to place the plaintiff in the position he or she would have been in if the tort had not been committed. Tort damages are an attractive option where rescission is either not available (because of the bars to rescission) or undesirable (where the innocent party wishes to maintain the contractual link). However, it should be noted that there is no tortious remedy for an honest, non-negligent misrepresentation, i.e. the truly innocent misrepresentation.

C. LEGISLATION

Most legislative initiatives have focussed on the most common form of commercial transaction, the sale. The first contribution was *The Sale of Goods Act*[2] which defines the rights and obligations of sellers and buyers. Section 15 is particularly relevant to the issue of pre-contractual statements. It states that words which are descriptive of the goods are conditions of the contract of sale, breach of which gives rise to both an action for damages and a right to reject the goods.

Much later, the province focussed on broader protection of the consumer. A significant contribution of the provincial Legislature in this area of the law was passage of section 58(8) of *The Consumer Protection Act*.[3] It provides that statements made by a seller in the course of a retail sale of goods or services shall be deemed to be express warranties. The thrust of this provision is to construe pre-contractual statements as contractual promises. The remedy is, therefore, damages calculated on an expectation measure. This provision of *The Consumer Protection Act* has now, however, been largely superseded by the passage of *The Business Practices Act*.[4] The Act provides a civil remedy for a whole range of misleading and deceptive statements relating to consumer transactions for services and goods. A wide range of remedies, including damages, rescission and price abatement, are available.

A remedy may also be available under the federal *Competition Act*.[5] Section 26 provides a civil remedy for a variety of proscribed conduct in the market place including misleading advertising and representations. Damages are assessed on a tort measure.

These legislative provisions are not integrated into the common law but provide supplemental and discrete remedies in described situations.

Having set out the broad parameters and contours of the law relating to pre-contractual statements one is now in a position to discuss the individual strands of principle in greater detail.

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[2] *The Sale of Goods Act*, C.C.S.M. c. S10.

[3] *The Consumer Protection Act*, C.C.S.M. c. C200.

[4] *The Business Practices Act*, S.M. 1990, c. 6, C.C.S.M. c. B120. This Act, except s. 9(2), was proclaimed in force on January 1, 1992.

[5] *Competition Act*, R.S.C. 1985, c. C-34, am. R.S.C. 1985 (2nd Supp.) c. 19.

CHAPTER 3

PRE-CONTRACTUAL STATEMENTS IN CONTRACT LAW

A. MISREPRESENTATION

A contract induced by a misrepresentation of fact is voidable and may be rescinded at the option of the misrepresentee. Once that option is exercised, there is no contract between the parties and the parties must be restored to their pre-contractual circumstances. This is sometimes referred to as "a giving back and taking back" of all that has passed between the parties since the contract was formed. This is a severe remedy which may result in grave consequences and inconvenience for the contracting parties and third parties. Positions may have been changed in reliance on the contract, performance may have begun, negotiations and contractual links entered into subsequent to contract formation may be interfered with in a number of ways and the subject matter of the contract may have increased or decreased in value. It is particularly important to appreciate this at the outset because, as in so many areas of the law of contract, the nature of the remedy has been influential in shaping the rules which govern the availability of the remedy. In the area of misrepresentation, the severity of the remedy has led to rules restricting its availability. In particular, the definition of the term "misrepresentation" is remarkably restrictive and the bars to rescission constrain the remedy within narrow boundaries. This area of the law is imbued with judicial caution and sensitivity to commercial expedience.

1. Definition of Misrepresentation

A misrepresentation is a false statement of fact. It is traditional to define a statement of fact by excluding other kinds of statements such as statements of law, promises, opinions and puffs. As we will find, this is a good deal easier to achieve in theory than in practice. Some of the difficulties will be discussed.

(a) Statement of law

Misrepresentation in contract law does not include a statement of law. This is normally explained on the basis that a statement of law is essentially one of opinion and, as such, is unlikely to induce reliance by the representee. Waddams has pointed out, however, that this rule has not been adhered to universally and cases can be found going both ways.[1] Furthermore, some courts have drawn a distinction between abstract statements of law and representations of private rights - with the latter being regarded as misrepresentations.[2] The uncertainty is increased when statements involve both law and fact.[3] Waddams has suggested that the greater willingness to classify representations of law as giving rise to rescission is to be encouraged

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[1] S.M. Waddams, *The Law of Contracts* (2d ed., 1984) 310.

[2] *Solle* v. *Butcher*, [1950] 1 K.B. 671 (C.A.); *Magee* v. *Pennine Insurance Co. Ltd.*, [1969] 2 Q.B. 507 (C.A.).

[3] *Anson's Law of Contract* (26th ed., 1984) 213.

because ". . . the state of the law, or its supposed effect on a set of facts, is frequently a cogent inducement to enter *into* a contract."[4]

(b) Promise

A promise is not a statement of fact. There is a clear conceptual difference. To oblige oneself to a course of future conduct is distinct from a statement of existing fact. The courts will construe the former as a contractual term and will provide the appropriate remedies for breach. This distinction, however, is much easier to draw in theory, than it is to apply in practice, to statements made in pre-contractual negotiations. It should also be pointed out that a promise may also be seen as containing a statement of fact that the speaker does have a current intent to perform the promise. If that intention is not held, rescission could be available.

(c) Opinion

Opinion has also been excluded from the realm of factual representations. A good deal of latitude has been given to the seller of land, goods or services to commend his or her product. To state that land or crops are of a certain nature,[5] or that a residence is very desirable,[6] or that an anchorage is safe,[7] or that farm land has the capacity to carry a number of stock[8] or is fertile and improvable[9] have all been construed as statements of opinion. However, the line between a statement of opinion and fact is a difficult one to draw at the margins. It has been pointed out that a vital feature of many cases holding the statement to be one of opinion is that both parties had equal knowledge or equal access to knowledge and the representee knew that the statement was necessarily an opinion on a shared informational base.[10] This is, however, an uncertain guide. In *Hayward* v. *Mellick*,[11] a statement by the vendor that a farm included 65 workable acres (meaning under cultivation) was held to be an operative misrepresentation. Weatherston J.A. stated:

> . . . it was a representation. That representation was only his own information and belief, but it was, nevertheless, a representation because it was stated as a matter of fact. . . .
>
> . . . .
>
> . . . [The vendor] professed to have special knowledge of the number of workable acres. He knew that there was no easy way for . . . [the purchaser] to satisfy himself.[12]

But in *Andronyk* v. *Williams*,[13] the Manitoba Court of Appeal adopted a much stricter approach. In that case, the vendor farmer represented that the land sold included 425 acres of 'improved

[4]Waddams, *supra* n. 1, at 310 [emphasis added].

[5]*Rasch* v. *Horne*, [1930] 3 D.L.R. 647 (Man. C.A.).

[6]Waddams, supra n. 1, at 310.

[7]*Anderson* v. *Pacific Fire and Marine Insurance Co.* (1872), L.R. 7 C.P. 65.

[8]*Bissett* v. *Wilkinson*, [1927] A.C. 177 (P.C.).

[9]*Dimmock* v. *Hallett* (1866), L.R. 2 Ch. App. 21 (C.A. in Chancery).

[10]This was particularly so in the two landmark cases on this point. In *Bissett* v. *Wilkinson*, *supra* n. 8, the statement that land would carry 2000 sheep was made in circumstances where, to the knowledge of the buyer, the land had never been used for sheep farming; and, in *Dimmock* v. *Hallett*, *supra* n. 9, the description of the land was made by an auctioneer. Lord Denning M.R. made this point strongly in *Esso Petroleum Co. Ltd.* v. *Mardon*, [1976] 2 All E.R. 5 at 14. He stated that in *Bissett* ". . . the land had never been used as a sheep farm and both parties were equally able to form an opinion as to its carrying capacity."

[11]*Hayward* v. *Mellick* (1984), 5 D.L.R. (4th) 740 (Ont. C.A.).

[12]*Id.*, at 746-747.

[13]*Andronyk* v. *Williams* (1985), 21 D.L.R. (4th) 557 (Man. C.A.).

land' which was understood to mean 'suitable for cultivation'. O'Sullivan J.A. made the following observations:

> This case illustrates the difficulty in construing descriptions of the quality of that which is sold as if they were statements of fact. . . . [N]ormally, the court will interpret statements about quality as representations of opinion rather than fact.
>
> It is only representations of fact that can give rise . . . to a right of rescission. . . .
>
> In my opinion, having regard to all the evidence, I think the learned trial judge was wrong in concluding that the statements about the quality of the land in this case were the kind of representations giving rise to an action.[14]

The Court found no operative representation even though the vendor farmer had much greater knowledge than the purchaser who flew in from Great Britain and made a cursory examination of farm land which was under snow.

Even a statement of opinion may implicitly contain representations of fact. There is a representation that the seller knows no facts which would contradict his or her opinion and he or she also represents the existence of an honest belief in the opinion.

(d) Puff

The distinction between opinion and puff is not a sharp one. A puff is usually defined as an exaggerated commendation of a product or service. The characteristics of a puff are that the exaggeration is patent and the statement is so uncertain as to be unverifiable. Consequently, no reasonable person would take it seriously and act in reliance on it. Claims that a detergent makes clothes 'whiter than white' or that automobiles provide 'luxurious comfort' or that a cereal makes you 'feel alive again' are all puffs and legally inoperative. Much latitude is given in the market place for the robust 'sales pitch'.

Clearly there continues to be much uncertainty surrounding the definition of misrepresentation. However, two broad themes seem to underlie judicial decisions relating to statements of law, opinion and puff. First, there is a desire to define misrepresentation restrictively in order to narrow the scope of rescission as a remedy. Secondly, the courts appear to be guided by the notion that only statements that invite reasonable and justifiable reliance should be defined as misrepresentations. Most cases can be accommodated under this broad principle.

2. General Requirements for Rescission

There are a number of general requirements which must be met before the remedy of rescission arises.

(a) The representation must be false

By way of background, it is important to note that the law has generally imposed no obligation on negotiating parties to disclose all facts relevant to the transaction at hand. A contracting party may acquiesce in the other's mistake and self-deception.[15] A significant burden is placed on contracting parties to make their own investigations and to assure themselves

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[14] *Id.*, at 567-568.

[15] The main exception to this rule is contracts which require *uberrima fides*. Full disclosure of all relevant facts is required in respect of certain classes of contract where one party alone possesses relevant facts and they are not easily discoverable by the other. Contracts of insurance provide the best example.

of the wisdom of entering into the proposed contract. This reflects the notion of 'buyer beware' and supports the rule that mere silence does not amount to a representation. Consequently, there must be a false assertion by words or conduct to support rescission. The corollary of the right to silence is the strict approach to any words or conduct. It has been pointed out that

> . . . a single word, or . . . a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact . . . would be sufficient.[16]

Furthermore, the selective omission of facts which give an overall misleading impression will amount to a misrepresentation as will conduct designed to conceal defects and the failure to correct representations that were true at the time they were made but which subsequent events have shown to be false.

(b) The representation must induce the contract

Proof of a misrepresentation and the entry into a subsequent contract are not sufficient to give a right of rescission. There must be proof that the misrepresentation is 'material' and that it has 'induced' the contract. A statement is material when it has the capacity to induce a person to enter a contract.

In *Alexander* v. *Enderton*, Mathers C.J. described this requirement in the following words:

> . . . the false representation complained of must be something material . . . .
>
> A representation is material when its tendency or its natural and probable result is to induce the representee to act on the faith of it. . . .[17]

Inducement is established when it is shown that the misrepresentation actually persuaded the misrepresentee to enter the contract. However, if a misrepresentation has the capacity to induce a contract, an inference will arise that it has that effect. The inference may be rebutted by proof that the representee was unaware of it, did not rely upon it or knew that it was untrue.[18] In such circumstances, the misrepresentation is not a factor in the decision to enter the contract.

While the misrepresentation must be *one* of the inducements to contract, it does not have to be the *sole* inducement to contract.[19] Other incentives do not detract from the availability of rescission. A corollary to this point is that the misrepresentation has traditionally not needed to relate to the substance of the transaction. A representation relating to a minor matter gives rise to a right of rescission so long as it induced the contract. However, doubt has recently been thrown on this principle by the Manitoba Court of Appeal in *Ennis* v. *Klassen*.[20] In that case, Huband J.A., writing for the majority, declared:

> The misrepresentation, however, must be *fundamental*, or *substantial* in nature. . . .
>
> . . . [I]t is my opinion that the misrepresentation does go to the root of the contract. The plaintiff was led to believe that he was buying a BMW model 733 at a fair retail price for a second-

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[16]*Walters* v. *Morgan* (1861), 3 De G.F. & J. 718 at 724; 45 E.R. 1056 at 1059.

[17]*Alexander* v. *Enderton* (1914), 15 D.L.R. 588 at 591 (Man. K.B.), aff'd (1914) 19 D.L.R. 897 (Man. C.A.). See also, *Dart* v. *Rogers* (1911), 19 W.L.R. 326 (Man. K.B.).

[18]*Cheshire, Fifoot and Furmston's Law of Contract* (11th ed., 1986) 262-265.

[19]P.S. Atiyah, *Introduction to the Law of Contract* (4th ed., 1989) 279; G.H. Treitel, *The Law of Contract* (7th ed., 1987) 262-263.

[20]*Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.).

hand vehicle of the advertised model, type and vintage. He received nothing of the kind, and so he may rescind.[21]

This may represent a significant restriction on the power to rescind for misrepresentation in Manitoba. The point does not appear to have been argued at length in *Ennis* but his Lordship may have recognized that allowing termination of a contract for a minor misrepresentation is anomalous. Termination for mistake and breach of contract is not permitted unless the mistake or breach is fundamental. There is much to be said for contractual policy which favours the maintenance of contractual relationships unless there are fundamental reasons for ending them.

(c) Innocence no defence

Equitable rescission is available in respect of a morally innocent misrepresentation. There is no need to prove fraud or negligence on the part of the representor. Nevertheless, it is improper to seek the enforcement of an agreement which the misrepresentor knows has been secured by a false representation. A court is not able, in good conscience, to enforce such a contract and legitimize the unjust enrichment of the representor.

(d) No necessity to check the veracity of the representation

The representee is entitled to accept, at face value, the information given. It may be in the power of the representee to check the truth of the information easily and inexpensively. There is no obligation to do so.[22]

3. Rescission: The Nature of the Remedy

As was pointed out earlier, a contract induced by a misrepresentation is voidable at the option of the innocent party. The exercise of this option is referred to as rescission of the contract. Once rescission has taken place, there is no contract between the parties. The parties are consequently discharged of all obligations and each party may recover benefits that have been conferred before rescission. The innocent party may also recover money or the value of benefits paid or conferred on third parties so long as the expense was one that they were obliged to incur under the terms of the voidable contract prior to rescission. This supplemental remedy is known as an indemnity and is much narrower in scope than common law damages. It assists the overall aim and purpose of the rescission remedy which is to place the parties back in the position they were in before the contract was entered into, i.e. the *status quo ante*.

It is important to note that rescission is essentially a remedy which is exercised by the representee. It is not a remedy which obliges one to apply to the courts. Rescission operates from the moment the innocent party by words or conduct shows a resolve to rescind the contract. This decision must normally be communicated to the representor and the representee must return money or benefits conferred under the contract. The representor may accept the rescission and return money or benefits conferred. In this scenario, the rescission occurs without judicial assistance or intervention. For this reason, it may be described as a self-executing remedy. However, sometimes the right to rescind is contentious and not accepted by the representor. The representor may demand further performance or refuse to return benefits or money. The innocent party may be forced to sue to confirm rescission and to enforce restitution. Alternatively, the representor may sue for breach of contract. The innocent party will then raise the act of rescission as a defence to the claim. When actions are brought, the role of the court is

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[21] *Id.* at 326-327 [emphasis added].

[22] *Sager* v. *Manitoba Windmill & Pump Co.* (1914), 23 D.L.R. 556 (S.C.C.); *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 (C.A.).

to confirm the representee's act of rescission. Rescission dates from that time *not* from the time of the judicial decision.[23]

4. Rescission: The Bars

It has been noted earlier that rescission can be a very disruptive act in the market place. Performance of contracts may have begun; goods may have been sold to third, fourth and fifth parties; future business planning may rest on the assumption of contractual validity; and obligations to provide services may have been fully performed. It is not surprising, therefore, that the right of rescission is severely curtailed when such circumstances exist. This function is performed by the bars to rescission. These rules spell out the circumstances in which the innocent party is prevented from exercising his or her right of rescission. The contract is then deemed to be valid and obligations must be performed. Generally, rescission is barred when there has been such reliance on the contract as to make rescission an unacceptably disruptive remedy. The courts have, however, not articulated reliance as the unifying principle of the bars to rescission and the law continues to approach the problem in terms of individual rules preventing rescission. The bars to rescission include affirmation of the contract, unreasonable delay, disruption of third party rights, inability to restore the parties to their pre-contractual position, acceptance of goods and execution of the contract. Before each of these bars is considered in turn, it is important to address an issue relating to them all. Not surprisingly, the courts have applied the bars to rescission much less restrictively when the representor has been guilty of fraud. The courts are loathe to maintain any contract induced by dishonesty. Fraud will be established when the representor knew that the representation made was false or made the statement without knowing whether it was true or not and without honest belief in its veracity.

(a) Affirmation

Rescission for misrepresentation is a right of the innocent party. Nevertheless, there are circumstances in which the representee chooses not to exercise this right. Where the misrepresentation is not serious in comparison to the benefits received under the contract, the representee may choose to affirm the contract. Once the contract is affirmed, the right to rescission is lost.[24] Any words or conduct which indicate a willingness to maintain the contractual relationship are sufficient to amount to affirmation so long as the representee was aware that the representation was untrue.

(b) Undue delay

Undue delay is allied to affirmation and a failure to rescind promptly may be some evidence of affirmation. It is important to remember, however, that affirmation cannot take place without knowledge that the representation is false. As sensible as that notion appears to be, the courts have not been willing to apply it in respect of unreasonable delay. The reason is that courts are unwilling to countenance prolonged vulnerability of contracts to rescission. There is an expectation that the representee will check the veracity of representations within a reasonable period of time. It should be noted that undue delay will not bar rescission for a fraudulent misrepresentation.

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[23] A useful discussion of the nature of the rescission remedy is found in *Abram S.S. Co.* v. *Westville Shipping Co.*, [1923] A.C. 773 at 781 (H.L.), per Lord Atkinson and in *Bevan* v. *Anderson and Peace River Sand and Gravel Co. Ltd.* (1957), 12 D.L.R. (2d) 69 (Alta. S.C.).

[24] *Andronyk* v. *Williams*, *supra* n. 13.

(c) Impossibility of restitution of benefits

It has already been noted that the purpose of rescission is to defeat the unjust enrichment of the representor by returning the contracting parties to the position they were in before the contract was entered into. This requires each of the contracting parties to return the benefits that each has received under the contract - often referred to as "a giving back and a taking back" on each side. Sometimes this restitution of benefits (*restitutio in integrum* is the Latin phrase) cannot be fully achieved. Goods may have perished, goods may have become components of larger products, goods may have deteriorated, substantial changes may have been made in the state of the property or services may have been performed. The general proposition is that, if a full restitution of benefits is not possible, rescission is barred. There has, however, been a great deal of unevenness in the application of this rule. Sometimes rescission is allowed although complete restitution is impossible on the grounds that "some justice is better than no justice" and sometimes a monetary adjustment has been made even though such a step offends the 'no damages for misrepresentation' rule. Fraud is also a factor. A court will be more likely to sanction an incomplete restoration of the status quo if the unfairness of such a step is at the expense of a fraudulent misrepresentor. Furthermore, incomplete restitution to the representee can be adjusted by damages in deceit.

(d) Rights of third parties

A contract induced by misrepresentation is voidable, not void. Thus until rescission occurs, it is a valid contract capable of transferring rights of ownership to the other contracting party. Prior to rescission, ownership may be transferred to third parties. It is in this situation that rescission can be highly disruptive of commercial relationships. Goods may have been sold and resold many times. Rescission would allow the innocent representee to defeat the reasonable expectations of third parties who have, in good faith, acquired rights which depend ultimately on a vulnerable contract. In these circumstances, rescission is barred. The rights of innocent third parties rank ahead of the rights of the representee.

(e) Execution of the contract

Execution as a bar to rescission was developed in relatión to contracts for the sale of land.[25] The rule is that, once title to the land has been conveyed to the purchaser, any right to rescind for misrepresentation is lost. This rule is based on two grounds.[26] The first is that the time lapse between the contract of sale and purchase and the conveyance of title affords the purchaser an opportunity to check the veracity of representations. Some unfairness may be encountered in respect of representations which cannot be checked while out of possession but, on the whole, purchasers, who are usually legally represented, will be able to check the veracity of the representations. Secondly, that highly prized attribute of certainty in contract law is enhanced. It will be very disruptive both for the purchaser to give up possession of a house when a previous home has been sold to finance the purchase and mortgage financing has been arranged, and for the vendor who has moved out of possession and may have purchased other premises. There are two exceptions to this rule. The first is fraud. Dishonesty unravels all. The second is of doubtful origin and uneven scope. An executed contract can be rescinded for "error *in substantialibus*" (error as to substantial matters). It is a concept borrowed from mistake law and permits rescission where the land is fundamentally different from what was represented. It provides the court with some discretion if rescission is dictated by the demands of justice.[27]

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[25] *Wilde* v. *Gibson* (1848), 1 H.L. Cas. 605, 9 E.R. 894; *Redican* v. *Nesbitt*, [1924] S.C.R. 135.

[26] M.G. Bridge, *Sale of Goods* (1988) 303.

[27] Waddams, *supra* n. 1, at 311-312.

Of much greater difficulty is whether this bar to rescission extends to other kinds of contracts and, in particular, to contracts for the sale of goods. The majority view in Canada is that it does.[28] Both execution as a bar and the two exceptions of fraud and 'error in substantialibus' have been applied to sales of goods. However, in the context of the sale of goods, execution has come to mean delivery rather than transfer of title and error in substantialibus has been construed very liberally. A good example of this approach is the 1965 decision of the Manitoba Court of Appeal in *F. & B. Transport Ltd.* v. *White Truck Sales Manitoba Ltd.*[29] In that case, a 1956 model transport truck had been represented to be a 1958 model. The court permitted rescission after execution on the doubtful premise that there was an 'error in substantialibus'. The majority view has, however, been contested by a line of authority spearheaded by Denning L.J.[30] which advanced the proposition that execution should not be a bar to rescission in respect of the sale of goods. Support for this view is found in the fact that, whether a contract for the sale of goods is executed on transfer of title or delivery, the right to rescind may be lost before the truth of the representation can be tested. The whole question of execution as a bar to rescission of the sale of goods has been recently discussed by the Manitoba Court of Appeal in *Ennis* v. *Klassen*.[31] The case dealt with an executed contract of sale of a BMW 728 automobile. A predecessor in title had changed the model number on the back of the vehicle. It was consequently represented to the purchaser as a 733i model rather than the significantly inferior European 728. The automobile was delivered the day after purchase. Three days after delivery the truth was discovered. The purchaser stopped using the vehicle and left the vehicle in his driveway. The seller refused to take the car back and refund the purchase price. Huband J.A. accepted the Denning doctrine and ordered rescission of the contract. His Lordship stated:

> I would adopt the Denning position not because there is an obvious trend in that direction, but because, as Riley J. points out, the trend is consonant with sound legal principles. The Denning position is a reasoned application of equity. Where a misrepresentation induces a person to purchase a chattel, an equitable remedy should be available in spite of execution of the contract where the purchaser's conduct has been reasonable, and where the absence of an equitable remedy will produce an unfair result. Rescission ceases to be available where the contract has been accepted, which in most instances will mean after the passage of a reasonable period of time for the purchaser to determine whether representations are true.[32]

The impact of the decision is to allow delay and affirmation to determine whether rescission of an executed contract of sale is barred. In the view of Twaddle J.A., the plaintiff's claim for rescission for misrepresentation was misconceived. The proper course of action was to sue for damages for breach of an implied condition that the automobile would comply with the description. His Lordship was willing to allow an amendment to the statement of claim to facilitate this remedy. As his Lordship pointed out, to claim rescission on the grounds of misrepresentation forces the court into difficulty. Damages cannot be awarded on this ground. The only option is rescission. The consequences of rescission are often distasteful as is illustrated by the facts of the case. The act of rescission was poorly communicated (the car was not returned) and there was a large degree of confusion and uncertainty about the rights and obligations of the parties. Ownership was in doubt, the responsibility for the care of the car was in doubt, as was the responsibility for insuring it. Consequently the automobile was left out in the open for two years to deteriorate in a harsh climate. The conclusion his Lordship reached was that, in the absence of law reform permitting an action for damages based on

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[28]Bridge, *supra* n. 26, at 301.

[29]*F. & B. Transport Ltd.* v. *White Truck Sales Manitoba Ltd.* (1965), 49 D.L.R. (2d) 670 (Man. C.A.). See also *Andries* v. *Wright*, [1924] 2 D.L.R. 556 (Man. C.A.).

[30]*Leaf* v. *International Galleries*, [1950] 2 K.B. 86 (C.A.); *Long* v. *Lloyd* [1958] 1 W.L.R. 753 (C.A.).

[31]*Ennis* v. *Klassen*, *supra* n. 20.

[32]*Ennis* v. *Klassen*, *supra* n. 20, at 331.

misrepresentation, the view of the Court of Chancery that rescission be barred by execution of the contract of sale was correct. In essence, solution to the problem was an expanded right to damages not an expanded right of rescission.

(f) Loss of right of rejection for breach of condition

The decision of the Manitoba Court of Appeal in *Ennis* v. *Klassen*[33] raises the applicability of another bar to rescission. Twaddle J.A. in his judgment drew attention to the view Denning L.J. expressed in *Leaf* v. *International Galleries*[34] that the right to rescission is lost when a right of rejection for breach of condition would have been lost. Denning L.J. stated:

> Although rescission may in some cases be a proper remedy, it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition. . . . A condition is a term of the contract of a most material character, and if a claim to reject on that account is barred, it seems to me a fortiori that a claim to rescission on the ground of innocent misrepresentation is also barred.[35]

This is the so-called 'potency test'. Strictly speaking, in sale of goods law, the right of rejection is lost in respect of specific goods when title is passed (i.e. when the contract is made) and, in respect of unascertained goods, when the goods are accepted by the buyer. Thus, in *Ennis* v. *Klassen*,[36] a case of specific goods, it was arguable that rescission was clearly barred on the 'potency test'. However, it is apparent that the strict position in respect of specific goods is not always followed and that, in fact, most courts are extending the time for rejection to permit examination of the goods.[37] The *Ennis* decision therefore probably increases the consistency and compatibility of legal rules. The right to rescind for misrepresentation and to reject for breach of a condition will be lost only after a reasonable opportunity to inspect the goods has occurred and the goods are accepted by the buyer.

(g) Bars to rescission - Conclusion

While the bars to rescission can be listed precisely and described with reasonable clarity, there is considerable uncertainty and unevenness in their application. There is much disparity in the cases in respect of what amounts to unreasonable delay, affirmation and the degree to which restitution must be achieved. This is not surprising because in reality the courts are exercising a discretion to bar rescission where that remedy is unduly harsh, disruptive or unfair. As noted earlier, it is not too bold a generalization to say that rescission is barred when there has been significant reliance on the contract by the parties to it or by third parties. The bars to rescission are vital tools in balancing the interests of the plaintiff, the defendant and society. The interest in providing a remedy to an innocent party for misrepresentation must be balanced against the societal interest in certainty and predictability of commercial relationships. As in many areas of contract law, the bars to rescission reflect judicial policy which identifies certainty and predictability as paramount considerations.

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[33]*Ennis* v. *Klassen*, *supra* n. 20.

[34]*Leaf* v. *International Galleries*, *supra* n. 30.

[35]*Leaf* v. *International Galleries*, *supra* n. 30, at 90-91.

[36]*Ennis* v. *Klassen*, *supra* n. 20.

[37]Bridge, *supra* n. 26, at 280-281; M.G. Bridge, "Misrepresentation and Merger: Sale of Land Principles and Sale of Goods Contracts" (1986), 20 U.B.C.L.R. 53 at 111.

5. Misrepresentation and Merger and Acknowledgement

On occasion contracting parties seek to avoid the consequences of their misrepresentations by inserting 'acknowledgement', 'merger' or 'integration' clauses in the subsequent contract. These are often boilerplate clauses inserted in standard form contracts which claim either that 'no misrepresentations have been made' or that there has been 'no reliance on the misrepresentation' or that the purchaser 'relies solely on his or her own judgment'. Such clauses, if upheld, sanction two misdemeanours. The first is the making of a misrepresentation and the second is in attempting to avoid the consequences of that wrongdoing by use of words of exemption. Bridge has pointed out that the easy solution is to conclude that rescission for misrepresentation operates to nullify the whole contract including the integration clause. However, he correctly points out that this is not the approach of most modern Canadian courts. He notes that the current trend is:

> . . . to treat the integration clause as though it were a conventional exception clause subject to control through a variety of interpretation and fundamental breach techniques that have grown up over the years. *What is conspicuously absent* in Canadian cases is any statement that a prior misrepresentation vitiates the integration clause itself as much as the contract.[38]

There is, however, one important exception worthy of note. The remedy of rescission and damages for fraud cannot be defeated by integration or exemption clauses.[39] The degree of turpitude dictates a different solution.

B. WARRANTY

Sometimes rescission is a remedy which is neither attractive to the innocent party nor appropriate in the circumstances. The preferred and preferable remedy may be damages. This remedy is available when the pre-contractual statement is a promise or can reasonably be construed as a promise. In such circumstances, the statement may be interpreted as a contractual term or warranty. The remedy for breach of warranty is an action for damages. These damages, since they flow from a breach of contract, are assessed on an expectation measure. They are designed to place the innocent party in the position he or she would have been in if the promise had been kept. Of course, in many cases, it is not immediately apparent whether a pre-contractual statement is a representation or a warranty. Much judicial ink has been spilled on this question. It is generally agreed, however, that the starting point is *Heilbut Symons & Co.* v. *Buckleton*,[40] the landmark authority on this point. In that case, Lord Moulton sought to confine the scope of warranty within a very narrow compass. On earlier occasions, a remedy in damages for misrepresentation had been achieved by a liberal definition of fraud and by judicial willingness to construe representations as warranties. His Lordship disparaged those trends. In his view, 'no damages for misrepresentation' was a cardinal principle in the law which should be jealously protected. In particular, his Lordship held that a warranty could not be found unless there was a clear intention that the statement was to have contractual force. This intent must be strictly proved. His Lordship also rejected the following statement from *De Lasalle* v. *Guildford*.[41]

> A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment.

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[38] Bridge, *supra* n. 26, at 226 [emphasis added].

[39] *Ballard* v. *Gaskill*, [1955] 2 D.L.R. 219 (B.C.C.A.).

[40] *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30 (H.L.).

[41] *De Lasalle* v. *Guildford*, [1901] 2 K.B. 215 at 221 (C.A.), per Smith M.R.

This was held not to be a decisive test. Clear and strong proof of an intention to guarantee the truth of the statement, judged on an objective basis, was the touchstone of a warranty.

Although *Heilbut Symons & Co.* v. *Buckleton*[42] has been approved by the Supreme Court, it has not been applied by modern Canadian courts with the degree of stringency expressed by the House of Lords. The concept of intention permits a good deal of judicial discretion and, if a remedy in damages appears to be the only just solution, the requisite intention is often discovered in the particular circumstances of the case. It is clear from *Ennis* v. *Klassen*[43] that the Court would have construed the representation of the car model as a warranty if that had been argued. Indeed, Twaddle J.A., in dissent, took the view that damages were the only available remedy. *Ennis* v. *Klassen* is a case which exhibits key criteria for recognition of a warranty. There was an assumption of responsibility by the seller, there was reasonable and justifiable reliance by the buyer and there was some disparity of knowledge and experience between the seller and the buyer. This last factor is often an important one. Indeed, Bridge[44] has pointed out that the test in *De Lasalle* v. *Guildford*,[45] which was summarily dismissed in *Heilbut Symons*,[46] closely reflects modern practice so long as "decisive" is replaced with "highly persuasive". Such a test would read:

> A highly persuasive test is whether the vendor assumes to assert a fact of which the buyer is ignorant or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment.

Nevertheless, the principles relating to the finding of a warranty have not always been applied evenly. This is illustrated by Manitoba cases involving contracts for the sale of land. In *Gilmour* v. *Trustee Co. of Winnipeg*,[47] the Manitoba Court of Appeal found statements about the quantity of land to be a warranty. Similarly, in *Attorney-General of Canada* v. *Corrie*,[48] the statement that water from a well on the land was "suitable for human consumption" was held to be a warranty. However, in *Andronyk* v. *Williams*,[49] the Court of Appeal took a less generous approach in respect of a statement by a vendor of land that a farm contained 425 acres of improved land. The Court of Appeal reversed the trial judge's decision that this statement was "clearly a verbal warranty". The Court reversed the decision because collateral warranty had not been pleaded and that the written agreement disclaimed all reliance by the purchaser on any representations made by the seller. Moreover, the Court displayed a distinct lack of enthusiasm to find a remedy in damages for such a statement prior to a contract for the sale of land.

All that can be said is that much depends upon the particular circumstances of the case. Much truth is found in the extra-judicial comments of Lord Denning. He stated:

> In English law an innocent misrepresentation may give rise to a right of rescission where that is possible, but not to a right to damages. That has never given us any difficulty in practice. Whenever a judge thinks that damages ought to be given, he finds that there was a collateral contract [i.e. warranty] rather than an innocent misrepresentation. In practice when I get a

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[42]*Heilbut Symons & Co.* v. *Buckleton, supra* n. 40.

[43]*Ennis* v. *Klassen, supra* n. 20.

[44]Bridge, *supra* n. 26, at 218.

[45]*De Lasalle* v. *Guildford, supra* n. 41.

[46]*Heilbut Symons & Co.* v. *Buckleton, supra* n. 40.

[47]*Gilmour* v. *Trustee Co. of Winnipeg*, [1923] 4 D.L.R. 344.

[48]*Attorney-General of Canada.* v. *Corrie*, [1951] 3 W.W.R. (N.S.) 207 (Man. K.B.).

[49]*Andronyk* v. *Williams, supra* n. 13.

representation prior to a contract which is broken and the man ought to pay damages, I treat it as a collateral contract. I have never known any of my colleagues to do otherwise.[50]

If the court decides that a pre-contractual statement is a warranty, it may be viewed as one of the terms or obligations of the subsequent contract. There is no difficulty in construing the offer and acceptance as containing the earlier promise. However, there is a serious impediment to the use of this technique when the earlier statement is oral and the subsequent contract is written. The difficulty is created by the parol evidence rule. In its strictest form, the rule states that no evidence may be adduced of oral or verbal arrangements or promises if those promises would add to, vary or contradict a written agreement. The rule dictates the primacy of a written contract on the assumption that, if earlier oral assurances were perceived as being of real significance, they would have been written down. In an age of standard form contracts where minor changes are needed to tailor the agreement to individual circumstances, this is a dangerous assumption. Nevertheless, the Supreme Court has evinced a strong commitment to the rule, particularly if oral statements contradict written documents.[51] However, many lower courts have not shared the Supreme Court's enthusiasm for the rule. There is often a preference for the view that the rule is no more than a rebuttable presumption that the writing reflects the parties' intentions and that oral promises can be enforced where the result is more compatible with the reasonable expectations of the parties.[52] Courts have achieved this goal by exploiting a plethora of exceptions to the rule. The primary ways to avoid the rule are: to declare that the contract was intended to be partly oral and partly written and, consequently, the written agreement is not the sole repository of contractual obligations; and, to construe the oral promise as a collateral contract or a collateral warranty. This approach is based on the idea of two distinct contracts, an oral collateral contract and a later written contract. Consequently, there is a great deal of uncertainty as to whether the courts will enforce an oral warranty in such circumstances. Again, the Manitoba cases on the sale of land are illustrative. In *Gilmour* v. *Trustee Co. of Winnipeg*[53] and *Attorney-General of Canada* v. *Corrie*,[54] the Court found a warranty in a collateral contract. In *Andronyk* v. *Williams*,[55] the Court rejected the notion of collateral contract because it contradicted the words of the written "no reliance clause" in the agreement. Thus, in arguing for a warranty, the plaintiff must satisfy the 'intention' test and also, in many cases, must persuade a court to circumvent the parol evidence rule.

C. 'THREE PARTY' COLLATERAL CONTRACTS

Traditional contractual principles have proved to be particularly ineffective in the field of consumer merchandising. Modern marketing techniques place increasing importance on the manufacturer as the source of information and promotional statements rather than the retailer. However, the rules of privity of contract tend to insulate the manufacturer from legal accountability for misstatements. Standard principle stipulates that a purchaser may only sue the seller in contract and third parties are subject to no contractual liabilities to the purchaser. One technique to impose a responsibility on the manufacturer is to construe promotional statements as a separate or collateral contract between the manufacturer and the purchaser, thereby circumventing privity principles. The technique has been warmly received by some courts in

[50] D.E. Allan, "The Scope of the Contract" (1967), 41 Aus. L.J. 274 at 293 (response by Lord Denning).

[51] *Hawrish* v. *Bank of Montreal*, [1969] S.C.R. 515; *Bauer* v. *Bank of Montreal* (1980), 110 D.L.R. (3d) 424 (S.C.C.); *Carman Construction Ltd.* v. *Canadian Pacific Railway Co.* (1982), 136 D.L.R. (3d) 193 (S.C.C.).

[52] *Gallen* v. *Allstate Grain Co. Ltd.* (1984), 9 D.L.R. (4th) 496 (B.C.C.A).

[53] *Gilmour* v. *Trustee Co. of Winnipeg*, *supra* n. 47.

[54] *Attorney-General of Canada* v. *Corrie*, *supra* n. 48.

[55] *Andronyk* v. *Williams*, *supra* n. 13.

respect of consumer transactions where there is a great deal of reliance on information and statements of third parties such as manufacturers, distributors and wholesalers. Not all statements can be construed as collateral contracts. The requirement of promissory intent must be satisfied and it is usually essential to show certainty of language and reasonable and justifiable reliance on the statement. Nevertheless, it has proved to be a useful, if limited, technique to impose legal responsibility on third parties. A useful example is *Hallmark Pool Corp.* v. *Storey*[56] where the plaintiff chose a swimming pool on the faith of a generous guarantee from the manufacturer contained in both an advertisement and a brochure. The pool was purchased and installed by an authorized dealer. The pool was improperly installed and deteriorated to the point that it was a write-off. The New Brunswick Court of Appeal held that the guarantee was enforceable against the manufacturer on the basis of a collateral contract.

[56]*Hallmark Pool Corp.* v. *Storey* (1983), 144 D.L.R. (3d) 56 (N.B.C.A.).

CHAPTER 4

PRE-CONTRACTUAL STATEMENTS IN TORT LAW

It is a phenomenon of the common law that some of the harsh and inflexible positions taken in contract law have been ameliorated through the use of tort principles. Such is the case in respect of pre-contractual statements. As has been noted, much difficulty has been created by the rule that a pre-contractual misrepresentation does not give rise to a claim for damages. This deficiency has been overcome to some extent by judicial interpretation of the representation as a promise. Of equal significance is the possibility of a tort claim in the tort of deceit and negligent misrepresentation.

A. FRAUDULENT MISREPRESENTATION

Loss suffered by reliance on a fraudulent misrepresentation is recoverable in the tort of deceit. Courts normally view fraud as a very serious charge of moral turpitude. Consequently, fraud is defined narrowly and strict proof is necessary.[1] The authoritative definition of fraud is found in *Derry* v. *Peek*[2] where Lord Herschell stated:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.

The gravamen of this definition is that fraud demands proof of dishonesty and it must be kept distinct from a careless or negligent misrepresentation. It must be proved that the representor was lying or that he or she was making a statement without honest belief in its truth. Negligence is perfectly compatible with an honest belief in the statement's truth.

Of course, sometimes, in order to find a remedy, courts may find fraud on a less rigorous test. A recent decision of the Manitoba Court of Appeal is illustrative. In *DeLeeuw* v. *Lehner*,[3] the plaintiff purchased a motor boat which was represented as "like new" and "in running condition". When the purchaser took delivery of the boat, he discovered that it would not start. The engine was badly corroded and had seized up. The plaintiff did not rescind the contract but sued to recover the cost of repair. The trial judge stated: "Whether either Mr. or Mrs. Lehner [the sellers] knew the representation was false is unclear, because neither of them testified at the trial."[4]

At most, the learned trial judge was willing to find negligence which was supported by the fact that the boat had not been used for over a year. He imposed liability on the basis of the

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[1] *Dart* v. *Rogers* (1911), 19 W.L.R. 326 (Man. K.B.); *Alexander* v. *Enderton* (1914), 19 D.L.R. 897 (C.A.).

[2] *Derry* v. *Peek*, (1889) 14 App. Cas. 337 at 374 (H.L.); *Attorney-General of Canada* v. *Corrie*, [1951] 3 W.W.R. (N.S.) 207 (Man. K.B.).

[3] *DeLeeuw* v. *Lehner* (1989), 57 Man. R. (2d) 97 (C.A.).

[4] *Id*., at 98 (quoting the unreported trial decision: Man. Q.B., Suit #226/88, May 6, 1988, Hanssen, J., at 5).

negligent misrepresentation. In the Court of Appeal, Hall J.A. upheld the decision of the trial judge on different grounds. He stated:

> . . . the appellants are left with a clear case of deceit which supports the claim in damages, the measure of which is the cost of repairing the faulty engine.[5]

His Lordship did not discuss the point and one is left to speculate on why fraud was found when it was not supported by clear evidence and was not argued on appeal. The Court probably felt constrained from finding liability in negligence because of its own authority in *Andronyk* v. *Williams*[6] (to be discussed shortly). Furthermore, a finding of fraud would prevent reliance by the seller on the exemption clause in the contract. In essence, the notion of fraud was strained to produce a just result and avoid difficult legal questions.

Damages for deceit are assessed on a tortious basis and are calculated to place the innocent party in the position he or she would have been in if the tort had not been committed. This, of course, is to be contrasted with the measure of damages for breach of warranty which is designed to place the innocent party in the position he or she would have been in if the contract had been performed. In tort law, direct consequential losses are also recoverable including such losses as expenses incurred and personal injury flowing from fraudulent misrepresentations of the safety of products.

It should be noted that an action in damages for deceit does not foreclose the remedy of rescission. Furthermore, the remedy is more extensive where the representation is fraudulent. Bars to rescission are less restrictive.

B. NEGLIGENT MISSTATEMENT

Since the 1963 decision in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*,[7] negligent misstatements causing financial loss have been actionable when the speaker and the person relying on the information are in a special relationship. There continues to be some doubt about the precise definition of special relationship. For some, the essential characteristics are a voluntary assumption of responsibility and reasonable reliance. Other courts require a relationship where the speaker is exercising special skill and knowledge and is in the business of giving such advice. Whatever the precise parameters of liability for negligent misrepresentation, there is no longer any doubt that a pre-contractual relationship may breed a duty of care. In such circumstances, the injured person will have available a remedy in damages and the 'no damages for misrepresentation' rule in contract law may be avoided. Damages will, of course, be assessed on a tortious measure, which attempts to place the injured party in the position he or she would have been in if the tort had not been committed. However, the capacity for the principle in *Hedley Byrne*[8] to provide a general remedy in damages for pre-contractual misrepresentations is severely limited by an inherent limitation and by the decision of the Manitoba Court of Appeal in *Andronyk* v. *Williams*.[9]

The inherent limitation is, of course, that the remedy in damages depends upon the proof of fault. Non-negligent representations will only be remedied in damages if they amount to a warranty.[10] Tort responsibility is based on fault not inaccuracy. Of much greater significance in

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[5] *DeLeeuw* v. *Lehner*, *supra* n. 3, at 99.

[6] *Andronyk* v. *Williams* (1985), 21 D.L.R. (4th) 557 (Man. C.A.).

[7] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

[8] *Id.*

[9] *Andronyk* v. *Williams*, *supra* n. 6.

[10] *Kooiman* v. *Nichols* (1991), 75 Man. R. (2d) 298 (C.A.).

Manitoba, however, is the decision in *Andronyk* v. *Williams*.[11] That case involved a representation by the vendor of a farm that 425 acres were improved land. In fact, only 300 acres could be properly described as such. Rescission was barred and the Court found no warranty. This left the plaintiff's claim for damages under *Hedley Byrne*. In some respects the case was a strong one. The vendor, who had farmed the land, had knowledge and experience in respect of the land. The plaintiff, who was on a brief visit to Manitoba from the United Kingdom, had little opportunity to inspect the snow-covered property. His reliance seems reasonable and justifiable. However, in a very conservative decision, the Manitoba Court of Appeal found no liability.

First, the Court stressed that the liability in *Hedley Byrne* was one for negligent misrepresentation and that misrepresentation in tort was to be interpreted as it is in contract law, i.e., there can only be liability for statements of fact. In the Court's view the statement about improved land was certainly no more than opinion and may have been no more than a puff.[12]

Secondly, the relationship between the vendor and purchaser was not a special relationship and there was, therefore, no duty of care. O'Sullivan J.A., speaking for the Court, stated:

> In my opinion, the state of the law in Manitoba is this: representations made in the course of negotiations, but not incorporated into a contract as a term thereof, are not actionable in damages for economic loss, unless they are made in breach of an actionable duty to take care. The fact that a representation made by a person with such duty was made in the course of pre-contract negotiations does not preclude tortious liability. Whether a duty of care exists depends on circumstances pointing to a relationship between the plaintiff and defendant, according to which it is reasonable for the plaintiff to expect there is an actionable duty to care in making statements which are foreseen to cause economic loss. The fact that parties are in pre-contract negotiations is not in itself sufficient to create such an actionable duty of care.
>
> ....
>
> In the case now before us, the only relationship between Andronyk and Williams was that of pre-contract negotiators. In my opinion, such a relationship did not give rise to an actionable duty of care in making statements which were not incorporated into the contract.[13]

The Court gives little guidance as to what factors will indicate a duty of care. The statement that a duty arises in circumstances where it is reasonable for the plaintiff to expect there is an actionable duty of care is unhelpful. One suspects, however, that the Court was influenced by *Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt*[14] which sought to restrict the duty of care to those who, by being in the business of giving advice, claim special skill and expertise in providing information.

O'Sullivan J.A. reiterated that view in the course of giving leave to appeal in *De Leeuw* v. *Lehner*,[15] a case discussed earlier. The case dealt with a misrepresentation made by the vendor of a boat as to the condition of its motor. After remarking that nice questions arise as to when a special relationship arises, he stated:

> But in Manitoba it has been held that the relationship between a vendor and purchaser is not without more a relationship as to give rise to the duty of care as to representations made in precontract negotiations.

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[11]*Andronyk* v. *Williams, supra* n. 6.

[12]*Andronyk* v. *Williams, supra* n. 6. The Court's approach to tort liability for negligent misrepresentation was reaffirmed in *Foster Advertising Ltd.* v. *Keenberg* (1987), 38 C.C.L.T. 309 (Man. C.A.).

[13]*Andronyk* v. *Williams, supra* n. 6, at 574.

[14]*Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt*, [1971] A.C. 793 (P.C.).

[15]*DeLeeuw* v. *Lehner* (1988), 55 Man. R. (2d) 58 (C.A.).

This court dealt with this matter at some length in the case of *Andronyk v. Williams*, [1986] 1 W.W.R. 225. . . .[16]

Professor Rafferty has drawn the inescapable conclusion.

> The overall impression left by *Andronyk* v. *Williams* is one of a severe narrowing of the *Hedley Byrne* principle. In particular, one is left with the sense that there is little room for *Hedley Byrne* to operate in the context of pre-contractual negotiations. The court does recognize that a representation made in the course of such negotiations can attract tortious liability. However, there is no guidance as to when a duty of care will exist in such a context. . . .
>
> The court seems to assume that in the great majority of, if not all, cases the statement in question will either be a term of the resulting contract or of no legal significance.[17]

However, it should be noted that outside of the Province of Manitoba a less restrictive application of the *Hedley Byrne* doctrine is favoured.

First, there is support for the view that the definition of misrepresentation in tort is broader than its contractual meaning of a statement of fact. Some courts have applied the *Hedley Byrne* principle to advice and opinion.[18] Others have extended responsibility to forecasts[19] and even statements of intention.[20] However, the point remains to be settled authoritatively. Indeed, a recent pronouncement of the Supreme Court of Canada lends some weight to the view of the Manitoba Court of Appeal. In Queen v. *Cognos Inc.*,[21] it was argued that certain of the representations in question related to matters *in futuro* and could not support an action for negligent misrepresentation. Iocabucci J. cited *Andronyk* v. *Williams*[22] and assumed without deciding that it represented the correct view of the law. On that basis, his Lordship concluded that the representation under consideration was primarily factual and consequently liability could be imposed.

It is also clear that other courts are more willing to impose a duty of care between pre-contractual negotiators. The Court of Appeal of Ontario in *Hayward* v. *Mellick*[23] imposed a duty of care in respect of a representation made by the vendor of land that there were 65 'workable acres'. The British Columbia Court of Appeal has also recognized a duty of care between contractual negotiators in *Rainbow Industrial Caterers Ltd.* v. *C.N.R.*[24] Most recently, the Supreme Court has indicated a willingness to recognize a duty of care between contractual

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[16] *Id.*, at 60.

[17] N.S. Rafferty, "The Recovery of Purely Economic Loss in Negligence: The Province of the Law of Tort?", *Isaac Pitblado Lectures on Recent Developments in the Law of Contract and Tort 1988-89*, 48 at 53.

[18] *Hedley Byrne* itself dealt with an opinion on the creditworthiness of a potential client of the plaintiff: *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, *supra* n. 7. See also *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*, [1990] 3 W.W.R. 690 at 736 (B.C.C.A.), where Southin J.A. expressed no doubt that plaintiffs have succeeded in cases of opinion, advice and information.

[19] *Esso Petroleum* v. *Mardon*, [1976] Q.B. 801 (C.A.).

[20] *V.K. Mason Construction Ltd.* v. *Bank of Nova Scotia* (1985), 16 D.L.R. (4th) 598 (S.C.C.); *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*, [1990] 3 W.W.R. 690 (B.C.C.A.), aff'd (1993), 99 D.L.R. (4th) 577 (S.C.C.); *Meates* v. *Attorney-General*, [1983] N.Z.L.R. 308 (C.A.).

[21] *Queen* v. *Cognos Inc.* (1993), 99 D.L.R. (4th) 626 (S.C.C.).

[22] *Andronyk* v. *Williams*, *supra* n. 6.

[23] *Hayward* v. *Mellick* (1984), 5 D.L.R. (4th) 740 (Ont. C.A.).

[24] *Rainbow Industrial Caterers Ltd.* v. *C.N.R.* (1990), 43 B.C.L.R. (2d) 1 (B.C.C.A.). This decision was affirmed by the Supreme Court without discussion of the duty of care issue, see *Rainbow Industrial Caterers Ltd.* v. *C.N.R. Railway Co.* (1991), 8 C.C.L.T. (2d) 225.

negotiators. In *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*,[25] the defendant represented that a right of way on which Hydro transmission towers and lines were to be erected was cleared. The plaintiff relied on the negligent misrepresentation and successfully tendered for the work. The Court recognized a duty of care without hesitation and imposed liability. Of even greater significance is *Queen* v. *Cognos Inc.*[26] which dealt with a negligent misrepresentation made by the employer in the course of negotiations which led to a contract of employment. Again, the Court recognized that the employer was under a duty of care not to negligently misrepresent the nature of the employment opportunity to the prospective employee. The Court declined to state definitely the characteristics of the 'special relationship' which gives rise to a duty of care but noted that the case displayed a number of relevant criteria. Iocabucci J. noted:

> It was foreseeable that the appellant would be relying on the information given during the hiring interview in order to make his career decision. It was reasonable for the appellant to rely on said representations. There is nothing before this court that suggests that the respondent was not, at the time of the interview or shortly thereafter, assuming responsibility for what was being represented. . . .[27]

The Court also made it clear that it rejected the restrictive approach of *Mutual Life and Citizen Assurance Co. Ltd.* v. *Evatt*[28] which confines the duty of care to professionals who are in the business of giving advice. There can be little doubt that the authority of *Andronyk* v. *Williams*[29] insofar as it denied a duty of care between the contracting parties is threatened by those two decisions. The Supreme Court clearly favours a more robust role for the *Hedley Byrne* doctrine in respect of pre-contractual obligations than favoured by the Manitoba Court of Appeal.

Such an approach is evident in some trial decisions in Manitoba. In *Botink* v. *Hovmand*,[30] the defendant auctioneer advised the plaintiff of the minimum prices that he could expect for a variety of items to be sold at auction. The items fetched substantially less than his expectations and he sued for the balance. The trial judge found a negligent pre-contractual representation and, without reference to *Andronyk* v. *Williams*, imposed liability on the basis of *Hedley Byrne*. Not only was the representation made between contracting parties but it is also a statement of opinion if not a forecast.

Clearly, the precise role for the *Hedley Byrne* doctrine in the field of pre-contractual representations has yet to be resolved. It does appear, however, that *Andronyk* v. *Williams*[31] is increasingly out of step with policies which favour a more generous scope for tort liability.

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[25] *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*, *supra* n. 20.

[26] *Queen* v. *Cognos Inc.*, *supra* n. 21.

[27] *Queen* v. *Cognos Inc.*, *supra* n. 21, at 648.

[28] *Mutual Life and Citizen Assurance Co. Ltd.* v. *Evatt*, *supra* n. 14.

[29] *Andronyk* v. *Williams*, *supra* n. 6.

[30] *Botink* v. *Hovmand* (1987), 50 Man. R. (2d) 180 (Q.B.).

[31] *Andronyk* v. *Williams*, *supra* n. 6.

CHAPTER 5

STATUTORY PROTECTIONS

Many of the legislative reforms to contract law have been in the area of sales of goods and in consumer transactions involving both sales of goods and services. This is not surprising since the sale is the most common form of commercial transaction. *The Sale of Goods Act*[1] was designed to bring greater certainty, clarity and efficiency to the determination of the rights and liabilities of sellers and buyers. More recently, *The Consumer Protection Act*[2] and *The Business Practices Act*[3] focus on the unfairness which can result from an inequality of bargaining power and seek to provide broader protection of the consumer. The federal Government has also entered the field with the *Competition Act*[4] which provides certain remedies for deceptive practices. The legislation currently applicable in Manitoba will be discussed only insofar as it relates to pre-contractual statements.

A. *THE SALE OF GOODS ACT*

The section of *The Sale of Goods Act* which most closely relates to pre-contractual statements is section 15. It reads:

> Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.[5]

This condition of correspondence with contractual description has given rise to a number of problems of interpretation. The key problem is to distinguish this implied obligation from express terms and representations. It has been correctly recognized that a wide definition of description would render the whole discussion of express terms and representations redundant. All such express statements could be construed as words of description and, therefore, a term of the contract. There is indeed some incentive for judges to define such statements as words of description because not only do they elevate such statements to "conditions" of the contract but they also permit the imposition of an obligation on the seller that goods are of "merchantable quality". The obligation of merchantable quality is an important protection for the buyer and this has led many courts to construe even the sale of specific goods which have been actually seen by the buyer as a 'sale by description'. Nevertheless, most Canadian courts have tried to draw a distinction between express statements, whether terms or representations, and words of description. The concept utilized to perform the task has been one of identification. Words

[1] *The Sale of Goods Act*, C.C.S.M. c. S10.

[2] *The Consumer Protection Act*, C.C.S.M. c. C200.

[3] *The Business Practices Act*, C.C.S.M. c. B120.

[4] *Competition Act*, R.S.C. 1985, c. C-34, am. R.S.C. (2nd Supp.) c. 19.

[5] *The Sale of Goods Act*, C.C.S.M. c. S10, s. 15.

which identify the goods are words of description. Words which relate to the quality of the goods or collateral matters are express terms or misrepresentations.[6] However, it must be admitted that such a distinction is frequently very difficult to draw and the way in which a case is analyzed depends more on judicial preference than on careful examination and construction of the particular statement. A useful illustration is found in *Ennis* v. *Klassen*.[7] In that case, the seller stated that the automobile in question was a BMW 733i. It was a 728. Huband J.A., speaking for the majority of the Manitoba Court of Appeal, construed this as a misrepresentation which rendered the contract voidable. The dissenting judge, Twaddle J.A., construed the statement as "words of description" giving rise to damages for breach of contract. Typically little consideration was given to the classification of the statement by either judge. The judgments merely proceed on different assumptions about the legal nature of the statement.

Thus, in the sale of goods, the legal analysis of pre-contractual statements is further complicated by the notion of "description".

B. *THE CONSUMER PROTECTION ACT*

The Consumer Protection Act[8] of 1971 was the province's first significant step towards ensuring greater fairness in consumer transactions. Two provisions are pertinent to the issue of pre-contractual statements: section 58(1)(f) and section 58(8). However, before we examine those provisions, it is important to be aware of definitions which affect the scope of the legislative provisions. The Act draws a distinction among a "retail sale" of goods and services, a "sale of goods" and a "sale of services". Only "retail sale" is defined restrictively. The definition in the Act states:

> "retail sale" of goods or of services or of both means any contract of sale of goods or services or both made by a seller in the course of his business except
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> (a) any contract of sale of goods which are intended for resale by the buyer in the course of his business unless the buyer intends to resell or re-let the goods or services, or both, in a manner to which Part VII applies;
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> (b) any contract of sale to a retailer of a vending machine or a bottle cooler to be installed in his retail establishment;
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> (c) any contract of sale of farm machinery and equipment to which The Farm Machinery and Equipment Act applies;
>
> (d) any contract of sale to a corporation; and
>
> (e) any contract of sale of goods or services intended to be used or used by the purchaser for the primary purpose of carrying on a business, unless the goods or services are intended for resale or re-let in a manner to which Part VII applies; . . . .[9]

Broadly speaking, the scope and intent of the definition is to describe the typical consumer transaction between a business and an individual. Contract of sale and contract of services are defined in the broadest possible terms.

Section 58(1)(f) applies to retail sales and states that retail sales of goods and every purchase of goods shall contain an implied condition that the goods correspond with the

[6] M.G. Bridge, *Sale of Goods* (1987) 431 ff.

[7] *Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.).

[8] *The Consumer Protection Act*, S.M. 1971, c. 36, C.C.S.M. c. C200.

[9] *The Consumer Protection Act*, C.C.S.M. c. C200, s. 1(1).

description under which they are sold. This provision mirrors section 15 of *The Sale of Goods Act* and carries with it the same problems of interpretation in respect of words of description. However, there is one very important point of difference from section 15. Under *The Consumer Protection Act*, the obligation that goods comply with description cannot be excluded by an appropriately worded exemption clause. This is not the case under section 15.

Of much greater significance is section 58(8) of *The Consumer Protection Act*. It reads:

> Every oral or written statement made by a seller, or by a person on behalf of a seller regarding the quality, condition, quantity, performance or efficacy of goods or services that is
>
> (a) contained in an advertisement; or
>
> (b) made to a buyer;
>
> shall be deemed to be an express warranty respecting those goods or services.[10]

This section is clearly designed to provide a much broader warranty protection in respect of pre-contractual statements. However, the section, which was included by subsequent amendment to the Act, raises a number of difficult problems in respect of scope and interpretation. Perhaps the issue of greatest importance is the question of the scope of the section. It is clear from the language of section 58(8) that it is not restricted to *retail* sales of goods and services. On its face, therefore, it applies to *all* sales of goods and services including sales between businesses and sales between individuals. If effect is given to the plain language of the section, it has a significant effect on the common law. It defines a wide range of pre-contractual statements (traditionally terms and representations) relating to all sales of goods and services as warranties.[11] However, it can be argued that, in spite of the language used, the section must be read in the light of the overall purpose of the Act which is to protect consumers. The issue has not as yet been resolved by the courts. This is explained in large part by a collective and not unreasonable assumption in the legal profession that section 58(8) only applies to consumer transactions. This is probably the reason why section 58(8) was not even brought to the attention of the Court in *Ennis* v. *Klassen*[12] and *DeLeeuw* v. *Lehner*.[13] Both cases involved private sales between individuals. The scope of section 58(8) will remain uncertain until an authoritative interpretation is given. For the moment, it is perhaps most reasonable to construe the section as applicable solely to consumer transactions.

There are a number of other difficulties which arise from section 58(8). A few will be canvassed. First, it is not clear whether section 58(8) is designed to displace other remedies available to an innocent purchaser. A warranty gives rise to an action for damages based on an expectation measure. A purchaser may prefer to pursue a claim for equitable rescission or in tort for deceit or negligent misrepresentation. The language of section 58(8) is quite strong; express statements are deemed to be warranties. There is no guidance as to whether breach of warranty is the sole remedy or whether section 58(8) provides an additional and supplementary remedy available at the option of the injured party without sacrificing traditional rights. Secondly, it is not clear if this remedy is available against non-sellers. A significant problem in respect of consumer transactions is that many statements upon which a consumer relies come from manufacturers and distributors. Traditional rules of contractual privity restrict the capacity of a

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[10] *The Consumer Protection Act*, C.C.S.M. c. C200, s. 58(8).

[11] Such an interpretation would be compatible with Lord Denning's view expressed in *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.*, [1965] 1 W.L.R. 623 at 627 (C.A.) that "if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty".

[12] *Ennis* v. *Klassen*, *supra* n. 7.

[13] *DeLeeuw* v. *Lehner* (1989), 57 Man. R. (2d) 97 (C.A.).

buyer to sue in respect of deceptive statements made by non-sellers. Tort remedies and the three-party collateral contract device must be used to provide a remedy. It is sensible to change the privity rule in respect of such statements in consumer transactions but it is not clear if that was intended by the Legislature. The wording is broad enough to achieve this. Section 58(8) speaks of statements made by a seller without specifically excluding sellers further up the chain of distribution and also speaks of statements made on behalf of sellers which could include manufacturers and distributors. A narrow interpretation would restrict the section to immediate sellers. Thirdly, the section is devoid of a definition for "statement". The traditional classification of warranty (statement of promissory intent) and representation (statement of fact) have been criticized as overly narrow in the light of modern marketing practices. Section 58(8) cannot be criticized on that ground. Statements of "quality, condition, quantity, performance, and efficacy" would seem to cover the ground from fact to puff and include statements of opinion, forecast and intention. One technique that is sometimes used to control the meaning of statement is to demand that it be of a kind to induce reasonable and justifiable reliance. However, in section 58(8) there is no requirement that the statement is intended as a warranty, is capable of inducing reliance, is relied on or is even known to the buyer. A statement made in an advertisement could be deemed to be a warranty even though, at the time of sale, the purchaser is unaware of it. It is also not clear that a seller could avoid liability by requesting that the buyer check the veracity of the statement or by suggesting that the buyer does not rely on the statement. Clearly judicial interpretation will be needed to define the nature of a statement. Fourthly, while there is some uncertainty on the point, it does seem that the parol evidence rule is abrogated in situations covered by the Act. Since the statements are deemed to be express warranties, there is little room for the parol evidence rule. Finally, it is not clear if an appropriately worded exemption clause could exclude liability for a breach of a section 58(8) warranty. Section 58(1), which provides for certain implied warranties in a retail sale of goods and services, states specifically that the warranties are non-excludable. Section 58(8) does not contain similar provisions. This leads to the conclusion that they may be excludable. Overall, section 58(8) is not a very satisfactory provision.

C. *THE BUSINESS PRACTICES ACT* (1990)

The Business Practices Act 1990 is the most important consumer protection legislation passed in Manitoba since *The Consumer Protection Act* 1970. The Act sets out a comprehensive approach to the control and remedy of unfair business practices. It has incorporated most of the strengths and avoided many of the weaknesses of earlier business practices legislation in Ontario, Saskatchewan, Alberta and British Columbia.[14] The Act seeks to protect the consumer from unfair business practices with an appropriate mix of penal sanctions, administrative enforcement measures and consumer initiated redress for loss suffered. To the extent to which the legislation provides for individual redress for deceptive trade practices, it is particularly pertinent to a discussion of pre-contractual statements.

The focus of the legislation is the consumer transaction which is defined as a sale or lease of goods and services between a supplier acting in the ordinary course of business and an individual consumer. The goods and services must be primarily for personal, family or household use.[15] The term supplier is defined broadly and includes not only those in the business of retail selling or leasing but also manufacturers, assemblers and distributors of goods and services.[16] The Act seeks to control the unfair business practices of all those in the chain of

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[14]An excellent comparative analysis of the legislation in these provinces has been made by E.P. Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 Osgoode Hall L.J. 327.

[15]*The Business Practices Act*, C.C.S.M. c. B120, s. 1.

[16]*The Business Practices Act*, C.C.S.M. c. B120, s. 1.

distribution of consumer goods and services. This reflects the reality of the market place where often the most influential information does not come from the immediate seller.

The Act declares that both suppliers and employees of suppliers are prohibited from committing unfair business practices.[17] In most Canadian business practice legislation, two broad categories of unfair business practices are recognized: deceptive practices and unconscionable practices. The Manitoba Act deals more fully with deceptive practices than with unconscionable actions but section 3 does deal with the latter in a general way. It declares that taking advantage of a consumer, who the supplier knows or ought to know is not in a position to protect his or her own interests, is an unfair business practice. Much more concrete guidance is given in the area of deceptive practices. Section 2 states that it is an unfair business practice to do or say anything or omit to do or say anything which may reasonably deceive or mislead a consumer or to make a false claim. It may be noted that the section includes non-disclosure which may be deceptive. This reverses the old common law rule which states that unless the contract is classified as *uberrima fides*, no legal consequences arise from mere silence. The section also clearly covers conduct as well as words. Furthermore, actual reliance or promissory intent is unnecessary to establish an unfair business practice. The requirement that a consumer might reasonably be deceived introduces the notion of a capacity to induce reliance. The general provision is supplemented by subsection 2(3) which contains a shopping list of deceptive statements and conduct which amounts to an unfair business practice.

Section 23(1) allows a consumer to commence a court action against a supplier for relief against an unfair business practice. It will be remembered that "supplier" includes all those involved in the chain of manufacture and distribution. All doubt that strict privity rules are abrogated is removed by section 4 which states that prohibited conduct is an unfair business practice notwithstanding:

> (a) that the unfair business practice is not directed at a specific consumer and does not occur in the course of or for the purposes of a specific consumer transaction but is directed to the public at large; *and*
>
> (b) that there is no privity of contract between the supplier and any specific consumer affected by the unfair business practice.[18]

This abolition of vertical privity is a very important protection to the consumer. Section 23(2) lists the remedies that a court may award. Flexibility is achieved by giving to the court the power to choose among damages, rescission of the consumer transaction, an injunction preventing the defendant from continuing an unfair business practice, an order to refund all or part of payment or to reduce the price, an order of specific performance or such other relief as is deemed appropriate. Two other sections are worthy of mention. Section 28 prohibits a supplier from exempting himself or herself from obligations under the Act and section 29 declares that the Act does not derogate from any other remedies that may be available to the consumer. Within its scope, the Act provides complete and generous protection against erroneous pre-contractual statements. It also avoids many of the uncertainties and difficulties arising from section 58(8) of *The Consumer Protection Act*.

D. *COMPETITION ACT*

Brief mention should also be made of the legislative contribution of the federal Government in the area of unfair business practice. The *Competition Act*[19] is designed to

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[17] *The Business Practices Act*, C.C.S.M. c. B120, s. 6.

[18] *The Business Practices Act*, C.C.S.M. c. B120, s. 4 [emphasis added].

[19] *Competition Act*, R.S.C. 1985, c. C-34, am. R.S.C. 1985 (2nd Supp.) c. 19.

prohibit a variety of abusive, manipulative and unfair business practices. It is primarily penal in nature. Section 52 makes illegal a wide range of misleading and false representations made to the public for the purposes of promoting the supply and use of products. These sections clearly include situations where, in traditional terminology, representations or warranties are made to buyers by sellers and others in the chain of distribution. Section 53 deals with misrepresentations in respect of the testing of products for performance, efficacy and life of a product and unauthorized testimonials. As in *The Business Practices Act*, penal sanctions are supplemented by civil action. Section 36(1) permits any person who has suffered loss as a result of conduct breaking Part VI of the Act (in which sections 52 and 53 are found) to commence a civil action to recover damages in an amount equal to the loss caused. This loss will likely be assessed on reliance or restitutionary principles. It has recently been held in another context that this remedy is supplementary to other common law remedies which may be available.

While the scope of *The Consumer Protection Act*, *The Business Practices Act* and the *Competition Act* varies, the general thrust of legislative reform in the area of pre-contractual statements is clearly in the direction of a greater role for the remedy of damages.

CHAPTER 6

AN ANALYSIS OF *ENNIS* V. *KLASSEN*

A. INTRODUCTION

The Manitoba Court of Appeal decision in *Ennis* v. *Klassen*[1] has been referred to on a number of occasions in this Report. It is a recent and important decision in the area of pre-contractual statements and it was instrumental in prompting the Manitoba Law Reform Commission to initiate this project. It provides a useful illustration of the tangled skein of legal rules relating to pre-contractual statements and it contains divergent judicial views about the scope and propriety of alternative remedies. For all of these reasons, the case demands separate and careful examination.

B. THE FACTS

The case involved the sale of a BMW automobile from Klassen to Ennis. Both were to some extent the victims of the fraud of Klassen's predecessor in title. That person had illegally imported into Canada a BMW 728, a car that is normally unavailable in Canada. In order to facilitate a sale and to maximize his profit, he attempted to pass the vehicle off as a BMW 733i, a clearly superior car. In outward appearance, the 733i and 728 are very similar but a BMW 733i has a more powerful engine, featured Canada approved safety standards and was more luxurious. Furthermore, parts were more readily available. Klassen's predecessor in title was able to perpetrate this fraud by changing the number 728 on the rear of the automobile to 733. He did not, however, add an "i" indicating a fuel injection model. Klassen purchased the vehicle in November 1986. Klassen was dissatisfied with the vehicle and decided to sell it. He advertised the car as a BMW 733i. Ennis purchased the car on August 18, 1987. He believed that it was a BMW 733i and paid $9,000. He took delivery the following day. On August 22 (four days after the sale), Ennis discovered the truth and realized that the vehicle was worth substantially less than he had paid for it. He demanded his money back and was willing to return the automobile. Klassen refused to repay him the money and declined to accept return of the car. Ennis parked the car in his (Ennis's) driveway and never drove it again. An action was commenced on January 8, 1988.

C. THE ISSUES

The diversity of legal analysis that may be applied to this relatively simple scenario is evidence of the complexity of the law. It is useful to review the legal arguments which could be made by the plaintiff. The order in which the law has been discussed earlier will be followed.

[1] *Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.).

1. Contract

(a) Rescission

Clearly, the statement that the automobile was a 733i can be seen as a misrepresentation of fact inducing the contract of sale. The actions of the purchaser may be construed as a rescission of the contract requiring Klassen to return the purchase price in return for re-acquiring possession of the vehicle. However, this analysis is not without potential problems. First, the act of rescission was poorly executed and poorly communicated. The intention to rescind would have been made clearer if the plaintiff not only demanded his money back but also returned the automobile to the seller. Klassen knew that Ennis was unhappy and wanted his money back but it may not have been clear that the automobile was rejected and that it was at his risk. To retain possession of the vehicle makes the act of rescission equivocal at best. Secondly, one could anticipate the argument that the contract was executed and rescission was barred. Thirdly, one could anticipate the 'potency' argument. This was a sale for specific goods. Title passed when the contract was made. If the representation was a condition of the contract, the right to reject had been lost. *A fortiori* the right to rescind had been lost.

(b) Warranty

An alternative analysis can be made on the basis that the statement that the BMW was a 733i was promissory in nature. The plaintiff could claim that the defendant warranted or guaranteed that the car was a BMW 733i. If it could be shown that the defendant intended to warrant the model type, damages would be an available remedy. The promise could be analyzed as either a collateral contract, separate and apart from the contract of sale or it could be analyzed as a term of the contract of sale. Damages would be assessed on the difference between the value of that which was received and the value of that which was promised.

2. Tort

(a) Fraud

The case can be analyzed from the standpoint of tort law. Fraud would support an action in damages. The key difficulty here is the evaluation of Klassen's conduct. There is no doubt that Klassen's predecessor in title was guilty of a fraudulent act but Klassen's conduct was more equivocal. Clearly Klassen knew before resale that the automobile was a 728 but he may have been under the impression that a 728 was an equivalent vehicle to a 733i. There would clearly be some difficulty in presenting strong and clear evidence of dishonesty on the part of Klassen.

(b) Negligent misrepresentation

This course of action would also create problems for the plaintiff. It can be argued that Klassen ought to have made more enquiries in respect of the 728/733i dichotomy and that, if he had taken those steps, he would have understood the significant disparity between models. Consequently, his representation could be viewed as an honest but negligent statement. Nevertheless, as has been noted, there are difficulties in Manitoba in establishing that Klassen owed Ennis a duty of care. We have discussed *Andronyk* v. *Williams*[2] where the Court of Appeal stated that the relationship of seller and buyer is not sufficient in itself to breed a duty of care. In a case between two private persons, the establishment of a duty of care is very difficult as indicated by *DeLeeuw* v. *Lehner*.[3]

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[2] *Andronyk* v. *Williams* (1985), 21 D.L.R. (4th) 557 (Man. C.A.).

[3] *DeLeeuw* v. *Lehner* (1989), 57 Man. R. (2d) 97 (C.A.).

3. Legislation

(a) *The Sale of Goods Act*

The statement that the automobile was a BMW 733i can be seen as words of description giving rise to an implied condition that the goods correspond with the description. This would give rise to a difficult issue as to whether the buyer had a right to reject the goods but there would be no question about the buyer's claim for damages based on a contract measure.

(b) *The Consumer Protection Act*

The case could be argued under section 58(8) of *The Consumer Protection Act*. The broad and plain language of that Act is sufficient to provide a remedy for breach of a statutory warranty. However, as noted earlier, the scope of that Act is extremely uncertain and many lawyers assume that it will be restricted to retail sales between a business and a consumer and will not cover the private sale between individuals. Similarly, neither *The Business Practices Act* nor the *Competition Act* apply to a private sale between individuals.

4. The Lacuna Exposed

The preceding examination of the issue and possible routes of legal analysis indicate the difficulty in giving legal advice and consequently in judicial decision making. A remedy can be made available to the plaintiff but not without some legal difficulty. What is clearly lacking in this armory of legal remedies is a simple cause of action for damages for any misrepresentation which induces one party to enter a contract. If rescission is inappropriate, unavailable or undesirable, as it was, arguably, in the case of *Ennis* v. *Klassen*, the judge has no power to simply award damages as an alternative remedy. The judge is forced to interpret the statement as a promise, as tortious, or as a statutory warranty to achieve the desired result.

5. The Plaintiff's Case

The plaintiff chose to bring an action for rescission of the contract on the basis of a fraudulent misrepresentation. This course of action was perhaps surprising in view of the weak evidence of dishonesty and the imperfect rescission of an executed contract.

6. The Trial Judgment

At trial before Lockwood J., the plaintiff did not succeed. The learned trial judge found no fraud and took the view that the plaintiff's actions were insufficient to establish rescission of the contract. No remedy was available in respect of the case as pleaded. Costs were awarded against the plaintiff on a solicitor-client basis because of an unsupported claim of fraud.

7. The Equities of the Case

The 'right' decision in this case is not self-evident. To some degree, it is a contest between two innocent parties who were the victims of the fraud of a third party. The evidence of what Klassen knew about the car, when he knew it and whether he had grounds for suspicion was not strong. There were also some facts which may have led a prudent purchaser to have concerns. The lack of an 'i' after the 733 and his knowledge that the car was not a fuel injection model may

be seen as grounds for dictating a closer check of the vehicle. Overall, the seller was the first to be put on notice that there were some deficiencies in the automobile and he may have closed his mind to the conclusions to be drawn from the fact that parts were unavailable, that it was a 728 model, that it was illegally imported into Canada and the dealer refused to take it on consignment for the foregoing reasons and because it may not have been insurable as a 728 model. On balance, the equities favour the plaintiff.

8. The Manitoba Court of Appeal

The whole Court found for the plaintiff. The approach and assessment of the current law was, however, quite different.

Huband J.A. (Monnin C.J.M. concurring) favoured permitting rescission of the contract and, in so doing, countenanced a liberal approach to the rescission remedy. His Lordship did not dwell on the question of the sufficiency of the acts of rescission. He largely assumed that rescission had taken place. The only significant question was whether execution of the contract was a bar to rescission. His Lordship showed no great reluctance in deciding that execution is not a bar to rescission of a contract for the sale of goods.

Twaddle J.A. took a very different view. He viewed the action in rescission as misconceived and preferred to allow the plaintiff to amend his pleadings to make a claim for damages on the basis of a breach of contract. In his Lordship's view, rescission was not available for the following reasons. First, the plaintiff did not appear to have rescinded the contract. Secondly, executed contracts of sale are not susceptible to rescission. Thirdly, the potency test ruled out rescission because title had passed in a sale of specific goods. The appropriate course of action was to sue for breach of the implied condition that the goods must correspond with the description. He was willing to grant an amendment to put the litigation back on the correct track. It is clearly his Lordship's view that the appropriate course of law reform is not to extend the rescission remedy but to provide the courts with power to award damages for misrepresentation as an alternative remedy to rescission. His Lordship found support for his reservations about the remedy of rescission in the facts of the case. When rescission is achieved promptly between co-operating parties and the status quo *ante* is restored with minimal disruption, it is an effective and just remedy. However, when rescission is not clearly and fully executed or is resisted by the other party, there is inevitably a period of uncertainty and confusion as illustrated in *Ennis* v. *Klassen*. The automobile was left out in the harsh Winnipeg climate to deteriorate for two years. If rescission had occurred, the seller owned the car and it was at his risk for the purposes of insurance. If rescission had not taken place, the innocent party must mitigate his losses by not allowing the automobile to deteriorate and depreciate. Of course, any self-executing remedy such as rescission, indeed any legal remedy, may be productive of some uncertainty until final adjudication. However, in his Lordship's view, a broader scope for rescission would exacerbate these problems. His Lordship seems to conclude that the alternative remedy in damages for misrepresentation would relieve the courts from the temptation to extend rescission to ensure justice between the parties.

CHAPTER 7

OTHER CANADIAN LEGISLATION AND REFORM INITIATIVES

As we noted earlier, much of the law reform in the area of pre-contractual statements focuses on the consumer transaction and the sale of goods. The general thrust is to broaden the remedy in damages and to avoid the strictness of privity rules which protect non-sellers from accountability for their statements about products and services. For purposes of clarity, it is useful to consider these legislative and reform initiatives separately and also to consider several recommendations relating to the reform of general contractual principles relating to pre-contractual statements. The seminal works in each of these areas are those of the Ontario Law Reform Commission. In 1972, the Commission issued its Report on *Consumer Warranties and Guarantees in the Sale of Goods*[1] which focussed on consumer transactions. In 1979, the Report on *Sale of Goods*[2] was issued. In 1987, the Commission addressed the reform of general principles of contract in its Report on *Amendment of the Law of Contract*.[3] The Reports and their subsequent influence will be considered in turn.

A. CONSUMER WARRANTY REFORM

1. Ontario Law Reform Commission Report on *Consumer Warranties and Guarantees in the Sale of Goods* (1972)

As its name suggests, the Ontario Law Reform Commission Report on *Consumer Warranties and Guarantees in the Sale of Goods* was primarily concerned with consumer transactions. The Report considered, in part, the situation of a consumer who buys goods on the faith of erroneous pre-contractual statements. The Report identified the difficulties in establishing a warranty (proof of intention and the parol evidence rule) and tort liability (proof of negligence or fraud when the seller does little more than pass on information received from the manufacturer). The solution proposed was to enlarge the common law concept of express warranties by adopting, in consumer transactions, the test laid down in the *American Uniform Sales Act*. Section 12 reads:

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.[4]

It is interesting to note that this recommendation was made one year after Manitoba had achieved an extended warranty protection by passage of section 58(8) of *The Consumer Protection Act*. Two provinces, New Brunswick and Saskatchewan, acted on this Report and introduced a broader warranty protection for consumers.

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[1]Ontario Law Reform Commission, *Consumer Warranties and Guarantees in the Sale of Goods* (Report, 1972).

[2]Ontario Law Reform Commission, *Sale of Goods* (Report, 1979).

[3]Ontario Law Reform Commission, *Amendment of the Law of Contract* (Report, 1987).

[4]*Uniform Laws Annotated*, vol. 1, Sales, (1950) 173.

2. New Brunswick

The New Brunswick extension of warranty protection is found in section 4 of the *Consumer Product Warranty and Liability Act*.[5] It reads:

> EXPRESS WARRANTIES
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> 4(1) In every contract for the sale or supply of a consumer product the following statements are express warranties given by the seller to the buyer:
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> (a) any oral statement in relation to the product that the seller makes to the buyer, unless the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's statement;
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> (b) any written statement in relation to the product that the seller makes to the buyer, whether or not the buyer relies on the statement, unless the circumstances show that it would be unreasonable for him to rely on the statement; and
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> (c) any statement in relation to the product, however made, that the seller makes to the public or a portion thereof, whether or not the buyer relies on the statement, unless the circumstances show that it would be unreasonable for the buyer to rely on the statement.

Clearly, the central notion of this legislation is the elevation of statements to the status of warranties. "Statement" is defined in section 4(4)(b) as a promise, representation or statement of opinion which has the capacity to induce reasonable reliance. This is much broader than the common law warranty requiring promissory intent. However, statements are categorized for the purpose of identifying the degree of reliance necessary. Oral statements made by the buyer are warranties unless there is no reliance or reliance is unreasonable. The burden to prove no reliance or unreasonable reliance is on the seller. Written statements made by the seller to the buyer, such as statements made to the public, are warranties unless it is shown that it would be unreasonable to rely on the statements. No requirement of actual reliance is made. Thirdly, statements made by non-sellers, such as on product labels and accompanying information, are warranties of the seller if it is reasonable for the buyer to rely on them. In essence, the seller is deemed to have adopted such statements. There is an exception from responsibility for statements not made by a distributor of a product if the seller does not know nor ought to have known of the statement. Section 5 explicitly ousts the parol evidence rule.

This legislation expands the range of statements for which there is responsibility and replaces the concept of contractual intent with reasonable reliance. It further seeks to relieve the burden on consumers by not requiring them to prove actual reliance. The Act does not come to grips with the problem of the responsibility of the manufacturer (vertical privity). The burden of responsibility for all related information is placed on the seller.

3. Saskatchewan

Warranty protection was broadened in respect of consumer transactions in Saskatchewan by the *Consumer Product Warranties Act*.[6] The centerpiece of that legislation is section 8(1) which reads as follows:

> **Express warranties**
> 8.-(1) Any promise, representation, affirmation of fact or expression of opinion or any action that reasonably can be interpreted by a consumer as a promise or affirmation relating to the sale or to the

[5] *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1.

[6] *Consumer Product Warranties Act*, R.S.S. 1978, c. C-30, s. 8(1).

quality, quantity, condition, performance or efficacy of a consumer product or relating to its use or maintenance, made verbally or in writing directly to a consumer or through advertising by a retail seller or manufacturer, or his agent or employee who has actual, ostensible or usual authority to act on his behalf, shall be deemed to be an express warranty if it would usually induce a reasonable consumer to buy the product, whether or not the consumer actually relies on the warranty.

This section mirrors the New Brunswick approach closely. It broadens the scope of statements amounting to a warranty and utilizes the notion of capacity to induce reliance rather than proof of actual reliance. Statements made by a manufacturer may amount to a warranty. Section 9 abolishes the parol evidence rule and section 10 deals with the seller's liability for statements which are on or accompanying products and statements made in a manufacturer's advertising. The seller is liable for the former unless he or she expressly disavows responsibility for them. In respect of the latter, no liability is imposed unless the statements are adopted expressly or impliedly.

The legislative initiatives in New Brunswick and Saskatchewan represent one approach to pre-contractual statements. It may be useful to identify the chief characteristics of that approach. First, the legislation isolates a particular class of contractual relationship, the consumer transaction for the sale of goods, for special treatment. This may be warranted because of the disparity of economic power between suppliers and consumers and the power of modern advertising and marketing techniques. Nevertheless, a limitation of this sort is always difficult to justify. Secondly, either reasonable and justifiable reliance, long suspected as being the covert test for warranty or the capacity to induce reliance, is the primary test of responsibility. Thirdly, the vehicle for extending protection is the warranty which carries the consequence of an award in damages based on an expectation measure. Such a measure is particularly appropriate in contracts between businesses and consumers. A business often has some special skill and knowledge and is in a position to spread loss through insurance or by price adjustment.

B. GENERAL SALES LAW

The Ontario Law Reform Commission followed its Report on *Consumer Warranties and Guarantees in the Sale of Goods* with a broader study relating to sale of goods law generally. Its 1979 Report on *Sale of Goods* caused a great deal of interest in the reform of sales law and led to the adoption of a draft Sale of Goods Bill by the Uniform Law Conference. Of course, the question of pre-contractual statements was raised and discussed.

1. Ontario Law Reform Commission Report on *Sale of Goods* (1972)

It is perhaps not surprising that, in its assessment of the law relating to pre-contractual statements, the Commission was, as it was seven years earlier, influenced by section 12 of the *American Uniform Sales Act*. It recommended an increased warranty protection for all buyers and recommended the adoption of the following draft section:

(1) A representation or promise in any form relating to goods that are the subject of a contract of sale made by the seller, manufacturer or distributor of the goods is an express warranty and binding upon the person making it

(a) if the natural tendency of such representation or promise is to induce the buyer, or buyers generally if the representation or promise is made to the public, to rely thereon; and

(b) if, in the case of a representation or promise not made to the public, the buyer acts in reliance upon the representation or promise.

(2) Subsection 1 applies to a representation or promise made before or at the time the contract was made and whether or not

(a) it was made fraudulently or negligently;

(b) there is privity of contract between the person making the representation or promise and the buyer;

(c) it was made with a contractual intention; or

(d) any consideration was given in respect of it.

(3) This section applies *mutatis mutandis* to a representation or promise made by the buyer.[7]

Again, the important aspect of this provision is that pre-contractual statements, whether representations or promises, are deemed to be express warranties. This applies to all sales of goods and is not confined to the consumer transaction. Consequently, extended warranty protection is available in sales between businesses and sales between private individuals. The Commission expressed some reservations about this increased warranty protection. Damages for breach of a warranty are assessed on an expectation basis and there was some reservations about assessing damages on such a basis against a non-merchant seller. The Commission overcame these reservations because of the definitional difficulties in differentiating between merchant and non-merchant sellers and because American courts have encountered few difficulties in dealing with non-merchant representors.

The proposal does not define "promise" or "representation". Difficulties with exaggerated or uncertain statements and puffs are dealt with by use of the notion of reliance and the capacity to induce reliance. In respect of representations not made to the public, it must be shown that the statement has a natural tendency to induce the buyer *and* that the statement was relied on. In respect of public statements, actual reliance is not required. This is to ensure responsibility for statements in advertising, in package inserts and on the face of packaging which are often not in fact read and relied on. Nevertheless, these are parts of the general sales propaganda and a business representor can reasonably be held to be responsible.

The proposal directly addresses the problem created by the privity rules. The proposal indicates that manufacturers and distributors will be held liable for statements made by them. It is preferable to place responsibility on the person who makes the statement rather than imposing responsibility on the seller for third party statements. The proposal also makes it clear that fraud, negligence and promissory intent are not relevant in imposing a warranty.

The Commission decided that the remedy of rescission should not be abolished. The Commission suspected, probably correctly, that an extended warranty protection would reduce reliance on the rescission remedy. It was also proposed that rescission should not preclude an award of damages. Moreover, rights in tort law would survive the proposed legislation. A buyer would not be put to an election. Consequently, expectation damages would be available for a pre-contractual fraudulent misrepresentation. This prevents a potential inequity because damages in tort for fraud may fall below that available for an innocent warranty. Under the proposal, the victim of a fraudulent misrepresentation is assured of the more beneficial assessment rule.

The proposed legislation was not passed by the Government of Ontario. It was, however, submitted to the Uniform Law Conference. It is desirable, given the amount of inter-provincial trade, that sales law be uniform across the country. Consequently, the Uniform Law Conference struck an inter-provincial committee to consider the Ontario Law Reform Commission Report and to recommend on the reform of sales law.

[7]Ontario Law Reform Commission, *supra* n. 2, vol. 1, at 141-142.

2. Draft Sale of Goods Act of the Uniform Law Conference

The inter-provincial committee reported back in 1981 and the Uniform Law Conference accepted its recommendation of a draft Bill known as the *Uniform Sale of Goods Act.*[8]

Section 5.10 of the *Uniform Sale of Goods Act* follows the general policy of the Ontario Law Reform Commission of extending the range of warranty protection. The Act recognizes that a statement intended to be promissory in nature is an express warranty of the contract and then identifies four further situations in which a statutory warranty will be established. These situations are set out below.

- Statements made directly by the seller relating to the subject matter of the contract where the buyer relies on those statements and that reliance is reasonable.

- Statements made by the buyer and relied on by the seller where such reliance is reasonable.

- Statements made by manufacturers and other non-contracting parties to a remote buyer which are relied on by the buyer or, if the statements were made to the public, which have a natural tendency to induce reliance.

- Statements made by a manufacturer or other non-seller which are adopted by the seller by words or conduct. There is a presumption that a merchant seller has adopted statements in written form accompanying the goods. The seller is entitled to an indemnity from the maker of the statement.

This provision reflects the thrust of the Ontario Law Reform Commission recommendations. The primary characteristics of these proposals are a broadened warranty protection, the use of reliance, and the capacity to induce reliance, as the touchstones of warranty and the imposition of warranty liability on representors who are not privy to the contract or sale. In so doing, consumers receive the kind of protection that is essential in light of the modern market place and marketing strategies.

A further interesting and noteworthy aspect of the Draft Sale of Goods Act is the introduction of much flexibility in remedies. On this point, the Act has much in common with the civil remedies provisions of *The Business Practices Act*. The flexibility allows the court to avoid an award of damages for breach of warranty on an expectation measure where it would be inequitable to do so. The discretion is found in section 9.19(1)(b). It states that, in respect of the statutory warranties outlined in section 5.10, the court may grant rescission of the contract, a reduction or return of the price or damages to protect reliance losses. Section 9.19(2) directs that, in exercising this discretion, the court should take into account which of the parties, if either, is a merchant, whether the warrantor had particular knowledge or expertise or whether he or she was merely passing on information received from another and whether the person providing the information was negligent. Clearly the desire is to restrict expectation damages to merchants, those with superior information and knowledge and those at fault.

The momentum that had built in the late seventies and early eighties for the reform of sales law now appears to have dissipated. No province has passed the *Uniform Sale of Goods Act*. The Ontario Law Reform Commission moved on to reform of the general principles of contract law.

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[8]Uniform Law Conference of Canada, *Uniform Sale of Goods Act* (1981).

C. GENERAL CONTRACTUAL PRINCIPLES

The reform of the general law of contract has received remarkably little attention from law reform commissions in Canada. It was not until 1987 that the Ontario Law Reform Commission issued a report which canvassed the broad spectrum of contractual principles including the law relating to misrepresentations. Because it examined the issue of misrepresentations in the broad context of all contracts, its recommendations deserve special attention.

1. Ontario Law Reform Commission Report on *Amendment of the Law of Contract* (1987)

In order to properly appreciate the recommendations of the Commission, it is important to note that the Commission largely excluded the law relating to fraudulent misrepresentation from its discussion and recommendations. The Commission focussed on the law of innocent (non-fraudulent) misrepresentations.

The Commission approached the law relating to innocent misrepresentations from the perspective that the function of the law must be to prevent the unjust enrichment of the representor at the expense of the representee. This function could be performed more efficiently if two changes were made in the law. First, rescission must be retained and strengthened. Secondly, the law must develop an alternative remedy in damages for circumstances where rescission is unavailable or undesirable. Since this remedy would be an alternative to rescission, it must create the same economic result as rescission. Consequently, damages must be assessed on a restitutionary or reliance measure. The Commission therefore decided to maintain the distinction between warranties and misrepresentations and rejected the approach favoured in the reform of sales law, that is, to elevate all pre-contractual statements to the status of warranties. Breach of warranty requires damages to be assessed on an expectation measure which goes further than the prevention of unjust enrichment. Concern was also expressed that a broader warranty protection would create an indefensible dichotomy in the law between an 'innocent' warranty and a fraudulent misrepresentation with damages for breach of the former being more generous than for fraud.

Thus, the proposals of the Commission attempt to introduce greater flexibility of remedies in the prevention of unjust enrichment. This requires a more liberal approach to rescission and a supplemental damages remedy based on the reliance or restitutionary measure. The proposals will be considered in turn.

> Recommendation 65:
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> Subject to Recommendation 66, a representee should be able to rescind a contract that has been induced by misrepresentation even though the contract has been wholly or partly performed and even though, in the case of a contract for the sale of an interest in land, the interest has been conveyed to the representee.

This proposal seeks to expand the rescission remedy by removing execution as a bar to rescission. It has already been noted that there has been much dissatisfaction and uncertainty with this bar to rescission. Recently, in *Ennis* v. *Klassen*,[9] the majority of the Manitoba Court of Appeal rejected it as a bar to rescission in the sale of goods. This proposal extends that policy to all contracts including contracts for the sale of land. Other bars to rescission are maintained. It should be noted that this is the one proposal that applies to fraudulent misrepresentations. The

[9] *Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.).

Commission wished to avoid any possibility of the right to rescind for innocent misrepresentation being broader than that available for fraud.

Recommendation 66:

(1) The courts should have power to deny rescission for misrepresentation or to declare it ineffective, awarding damages in lieu thereof.

(2) In exercising the power referred to in Recommendation 2(1), the courts should take into consideration, *inter alia*

(a) undue hardship to the representor or to third parties,

(b) difficulty in reversing performance or long lapse of time after performance,

(c) whether a money award would give adequate compensation to the representee,

(d) the nature and scope of the representation,

(e) the conduct of the representor, and

(f) whether or not the representor was negligent in making the representation.

This proposal qualifies the broader power of rescission outlined in the first proposal. The bars to rescission are replaced with judicial discretion to deny rescission for non-fraudulent misrepresentation if it would be just and fair to do so. This proposal recognizes the disruptive and commercially inconvenient results which may flow from rescission. Damages on a restitutionary basis will be awarded where rescission is denied. A few comments on this approach may be in order.

First, the introduction of judicial discretion introduces, at least in the short term, greater uncertainty in the law. It is interesting to speculate, for example, on whether rescission would have been rendered ineffective in *Ennis* v. *Klassen*. Given the wide range of factors to be considered, it is not at all clear what the answer would be. It will be remembered that uncertainty between the contracting parties as to their respective rights and liabilities was a key concern expressed by Twaddle J.A. in *Ennis* v. *Klassen* where, for a two year period, an automobile sat in the open while issues of ownership, rescission and damages remained unresolved.[10] The Ontario Commission takes the view that such periods of uncertainty are unavoidable in respect of the rescission remedy and that, if necessary, interim orders for the preservation of property are available. Nevertheless, uncertainty would seem to be increased rather than diminished by this proposal.

Secondly, not surprisingly, the factors to be taken into account in deciding whether to deny rescission include some which are, at common law, bars to rescission, for example, difficulty of reversing performance (*restitutio in integrum*), long lapse of time after performance (delay), undue hardship to third parties (third party rights).

Recommendation 67:

(1) Whether or not a contract is rescinded, the court should have the power to allow just compensation by way of restitution, or for losses incurred in reliance on the representation.

(2) In deciding whether to award compensation, the court should take into account such factors as whether the representation was made in the course of a business, whether the representor had personal knowledge of the matters represented by him or her, and whether he or she used reasonable care in making the representation.

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[10] *Id.*

A number of aspects of this proposal warrant mention. First, damages may be awarded whether or not rescission has taken place. Secondly, damages may be awarded on a restitutionary or reliance measure but apparently not on both. The former measure is consistent with the general aim of preventing an unjust enrichment and both measures indicate concern that an expectation measure would place too great a burden on the innocent non-business representor who is not in a position to absorb or spread loss. This concern is underscored by the fact that there is no right to damages. Indeed, the list of factors on which the discretion is to be exercised indicates that business representors, those with personal knowledge and those who have been at fault, are primary targets. Again it is interesting to speculate on whether damages would be available in a case like *Ennis* v. *Klassen*.[11] It dealt with a sale by a private individual who had sketchy knowledge and whose fault is doubtful. The proposals are open to criticism if damages are not available in a case like this. At the least, it indicates how discretion increases the degree of uncertainty in the law.

It is clear from the foregoing that the Ontario Commission did not desire to make significant structural changes to contractual principles. The world of warranties, misrepresentations, fraud, negligence and collateral contracts is left intact. The Commission sought to isolate the non-fraudulent misrepresentation and to amplify and introduce some flexibility in the remedies which prevent unjust enrichment.

D. CONCLUSION

The discussion of Canadian reform initiatives assists in focusing on three broad approaches to the reform of the law relating to pre-contractual misstatements. The approaches will be formulated in general terms and reference will be made back to the earlier discussion.

1. The first approach maintains the distinction between warranties and misrepresentations. If the statement is promissory, remedies should be available to secure to the innocent party the benefits of performance. Where there is a misrepresentation, the problem is perceived as one of unjust enrichment. The appropriate role of the law is to create better remedies to force the maker of the statement to surrender the unjust gain and secure it for the innocent party. This can be achieved by a more generous remedy of rescission, supplemented by an alternative remedy in damages assessed on a reliance on restitutionary measure. The primary exponent of such a view is the Ontario Law Reform Commission Report on *Amendment of the Law of Contract*.

2. The second approach is to abolish the distinction between misrepresentations and warranties and categorize all pre-contractual statements on which there has been some reliance or which have the capacity to induce reliance as warranties. The remedy lies in an action for breach of contract and damages are assessed on an expectation measure. The premise of this approach is that all assurances, statements and information should be interpreted as part of the promised contractual performance and the benefit of that contractual performance must be secured for the innocent party. This approach has been adopted by the Ontario Law Reform Commission in its Report on *Consumer Warranties and Guarantees in the Sale of Goods* and its Report on *Sale of Goods*. The primary reservation expressed about such an approach is in its application to non-merchant representors who may not be in a position to absorb or spread damages based on the more generous expectation measure.

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[11] *Ennis* v. *Klassen*, *supra* n. 7.

3. This approach seeks to find a via media between the other two. It seeks to elevate many pre-contractual statements to warranties but to allow a great deal of judicial discretion to choose among a range of remedies including damages on an expectation, restitutionary or reliance measure, price reduction, refund, rescission and specific performance. This creates a great deal of judicial freedom to allow the court to protect expectation, reliance or restitutionary interests depending on a variety of factors including whether the representor was in business, the amount of personal knowledge the representor had and the degree of fault. This approach is favoured by the *Draft Sale of Goods Act* of the Uniform Law Conference.

Isolation of these three different approaches may prove useful in assessing the legislative reforms in other common law jurisdictions.

CHAPTER 8

REFORM IN OTHER COMMON LAW JURISDICTIONS

The three jurisdictions which deserve particular note in respect of reform of the law of pre-contractual statements are England, New Zealand and the United States of America. In England and New Zealand, legislation has altered the general law. It was not restricted to consumer transactions, sales or any other class of transactions. In the United States, reform has been largely restricted to sales and allied transactions. In England, the *Misrepresentation Act 1967*[1] was prompted by the *Tenth Report (Innocent Misrepresentation)* of the English Law Reform Committee.[2] In New Zealand, reform of the law relating to pre-contractual statements was incorporated in the *Contractual Remedies Act 1979*[3] which, as its name suggests, addresses the wider question of contractual remedies for breach. In the United States, reform of sales law was brought about first by the *Uniform Sales Act*[4] and then by the *Uniform Commercial Code*.[5] Judicial development of tort law, as evidenced in the American Law Institute *Restatement of the Law of Torts*,[6] was also important.

A. ENGLAND: *MISREPRESENTATION ACT 1967*

Two initial observations about the *Misrepresentation Act 1967* should be made. The first is that the Law Reform Committee reported before the House of Lords decision in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[7] and the Act was passed before the full potential of the new duty of care was recognized. Secondly, the Act has been severely criticized for its deficiencies in drafting, its complexity and its failure to address completely many issues which have subsequently arisen.[8] Nevertheless, the overall approach to the issue of innocent misrepresentations is clear.

The general thrust of the reform involved two strategies. The first was to liberalize the rescission remedy while guarding against unfair results by introducing judicial discretion to award damages in lieu of rescission. To this extent, it foreshadowed the recommendations of the Ontario Law Reform Commission Report on *Amendment to the Law of Contract*.[9] The second

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[1]*Misrepresentation Act 1967* (U.K.), 1967, c. 7.

[2]*Tenth Report (Innocent Misrepresentation)*, English Law Reform Committee, Comnd 1782 (1962). For an interesting comment on the Report, see J.S. Ziegel, "Report on Innocent Misrepresentation" (1962) 106 Sol. Jo. 791.

[3]*Contractual Remedies Act 1979*, New Zealand Statutes, 1979, No. 11.

[4]*American Uniform Sales Act* (National Conference of Commissioners on Uniform State Laws) 1906.

[5]American Law Institute, *Uniform Commercial Code*, Official Text (9th ed., 1978).

[6]American Law Institute, *Restatement of the Law of Torts* (2d), 1965.

[7]*Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

[8]For a detailed criticism of the Act, see P.S. Atiyah and G.H. Treitel, "Misrepresentation Act 1967" (1967), 30 M.L.R. 369. For other useful analyses of the Act and subsequent jurisprudence, see *Cheshire, Fifoot and Furmston's Law of Contract* (11th ed., 1982); *Anson's Law of Contract* (26th ed., 1984); G.H. Treitel, *Law of Contract* (7th ed., 1987).

[9]Ontario Law Reform Commission, *Amendment to the Law of Contract* (Report, 1987).

was to introduce a statutory remedy in damages for negligent misrepresentations which induce the creation of a contract. Each branch of this reform will be examined in turn.

1. Reform of the Rescission Remedy

The scope of rescission was increased in two ways. There had been some judicial authority which suggested that the equitable remedy of rescission was lost when a misrepresentation was subsequently incorporated as a term of the contract. In such circumstances, the representee was restricted to the remedies of repudiation and/or damages available for breach of a term of the contract. Section 1(a) of the Act changes this rule and makes it clear that, in such circumstances, the rescission remedy survives as an option available to the representee.

Of much greater significance is section 1(b) of the Act which declares that execution is no longer a bar to the rescission of any contract. This position is consistent with that of the Ontario Law Reform Commission Report on *Amendment of the Law of Contract*. However, on this point, the Legislature departed from the recommendation of the English Law Reform Committee. Its view was that execution should be retained in respect of contracts for the disposition of land (other than leases under three years). Such a position is similar to the current position in Manitoba after *Ennis* v. *Klassen*.[10] There are solid arguments for this kind of half-way house. Some were noted earlier in this Report. Certainty and finality of land deals are enhanced by the rule that execution is a bar and there is less likelihood of the rule causing injustice in real estate transactions than there is in other kinds of transactions. Normally, there is sufficient time in real estate transactions for full inspection of the premises before contracting and many defects are patent. Furthermore, purchasers often seek professional opinion on the structural integrity of premises. Legal advisers normally check issues of title, boundaries and outstanding liabilities before conveyance. Conditional contracts can also be used to provide time for inspections and surveys. Finally, the unravelling of á real estate transaction is seldom a discrete and contained operation. Usually the vendor has purchased another home, just as the purchaser has sold a home and has raised money by way of mortgage on the new property. Rescission is likely to be very messy in many cases. These arguments, however, did not carry the day in England. The Legislature created no exception to removal of the bar of executioń. It may have been persuaded by two arguments. The first is that some defects and deficiencies cannot be detected before the purchaser gains possession and, in those cases, the refusal to permit rescission can create injustice. Secondly, alarmist arguments relating to the consequences of rescission of executed real estate transactions are met in part by section 2(2) of the Act which permits damages to be awarded in lieu of rescission where justice dictates that solution.[11]

As we have noted, the remedy of rescission breeds fear of untoward economic and social dislocation. It is not surprising therefore that the Act, like the recommendations of the Ontario Law Reform Commission in its Report on *Amendment of the Law of Contract*, sought to balance the liberalized right to rescission with a control device to prevent rescission when the consequences would be inequitable. Section 2(2) plays that balancing role; it reads:

> Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the

[10] *Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.).

[11] Mention has also been made of the difficulty of *defining* an exception.

nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.[12]

A number of aspects of this section are worthy of comment. First, there is no discretion to award damages in lieu of rescission where there has been fraud. This is consistent with the general policy that fraud unravels all. Secondly, damages can only be awarded where the representee "would be entitled to rescind". This creates some uncertainty. It is not clear if the availability of rescission is to be judged upon discovery of the truth or at the time of the court order. The latter interpretation, which is probably correct, limits the power to award damages significantly. Finally, damages are only to be awarded where equity demands it. The guiding factors in its exercise, the nature of the misrepresentation, the loss caused by it and the loss that rescission would cause to the other party indicate that the discretion is broad and generous.

2. Damages for Negligent Misrepresentation

The Law Reform Committee Report indicates that the Committee was particularly concerned that the evidentiary and legal requirements of the action of deceit led to the failure of meritorious claims relating to deliberate wrongdoing.[13] The strategy that was devised to overcome this was to reduce that legal and evidentiary burden by imposing a liability for negligent misrepresentation. Some proof of wrongdoing would still be required but the difficult burden carried by the plaintiff in a deceit action would be lessened. Perhaps not surprisingly, the Legislature, in following this recommendation, took as its model section 43 of the *Companies Act* (England) which was passed in response to an investor's failure to prove fraud in the case of *Derry* v. *Peek*.[14] This, in part, explains the tortuous language of section 2(1) of the Act. It reads:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, the person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

Again, a number of aspects of this section deserve attention.

This statutory remedy, to a large extent, equates with the common law action established in *Hedley Byrne*.[15] Nevertheless, there are points of difference. There is no necessity to establish a duty of care, the burden of proof in respect of negligence is reversed, the strict contractual interpretation of misrepresentation is probably necessary and the use of the fraud model ("if the person . . . would be liable . . . had the misrepresentation been made fraudulently") suggests that some of the rules relating to deceit, such as damage assessment, remoteness and limitations, may be incorporated into the statutory remedy. Secondly, the burden on the defendant, achieved by the reverse onus, is a heavy one[16] which, in practice, may be difficult to discharge other than by proof that the representor was himself or herself a victim of fraudulent statements that were innocently passed on. Thirdly, after a period of judicial vacillation, it appears settled that

[12] *Misrepresentation Act 1967* (U.K.), 1967, c. 7, s. 2(2).

[13] English Law Reform Committee, *supra* n. 2, at 9.

[14] *Derry* v. *Peek*, (1889) 14 App. Cas. 337 (H.L.).

[15] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, *supra* n. 7.

[16] *Howard Marine Ltd.* v. *A. Ogden & Sons (Excavations) Ltd.*, [1978] 2 W.L.R. 515 (C.A.).

damages are to be assessed on a tortious or reliance measure rather than on an expectation basis.[17]

There are two substantial criticisms of section 2(2) of the Act. The first is that the use of the 'fraud model' is cumbersome, awkward and productive of too much uncertainty. Secondly, it is not clear why the action for damages should be restricted to negligent misrepresentations. If the law is correct in providing a rescission remedy for non-negligent misrepresentations in order to prevent unjust enrichment, there is little to be said for restricting an alternative damages remedy from achieving the same result.

3. Exemption Clauses

No discussion of the English *Misrepresentation Act 1967* would be complete without some reference to its treatment of exemption clauses. Both the Law Reform Committee and the Act (as passed in 1967) sought to prevent the erosion of the statutory rights by the use of exemption clauses. The current position was achieved by an amendment to the *Unfair Contracts Act* 1977. That Act dealt with the broad issue of exemption clauses and their control. Now, under section 3, an exemption clause excluding or restricting liability or remedies under the *Misrepresentation Act 1967* is enforceable only if the clause is fair and reasonable. The onus of proving reasonableness rests upon the person who seeks the protection of the clause.

4. Conclusion

Given the complexities of the Act and the evolution of the *Hedley Byrne* doctrine, the English model of reform is not one that has been or is likely to be followed to the letter. Nevertheless, it does support the view adopted by the Ontario Law Reform Commission in its Report on *Amendment of the Law of Contract* that the appropriate path to reform is a more liberal rescission remedy counterbalanced by a judicial discretion to deny rescission and award damages in lieu thereof and a supplementary damages remedy assessed on a restitutionary or reliance basis. The Ontario Law Reform Commission would not, however, limit the claim to negligent misrepresentations.

B. NEW ZEALAND: *THE CONTRACTUAL REMEDIES ACT 1979*

As its name suggests, the New Zealand *Contractual Remedies Act 1979*[18] has a broader purpose than the reform of the law of pre-contractual statements. The objects of the legislation include:

[17] R.D. Taylor, "Expectation, Reliance and Misrepresentation" (1982), 45 M.L.R. 139; *Sharneyford Supplies Ltd.* v. *Edge*, [1985] 1 All E.R. 976 rvsd. [1987] 1 All E.R. 588 (C.A.); *Andre & Cie S.A.* v. *Ets. Michel Blanc et Fils*, [1977] 2 Lloyd's Rep. 166 affmd. [1979] 2 Lloyd's Rep. 427 (C.A.); *McNally* v. *Welltrade International*, [1978] I.R.L.R. 497; *Chesneau* v. *Interhomes Inc.* (1983), 134 New L.J. 341 (C.A.).

[18] *Contractual Remedies Act 1979*, New Zealand Statutes, 1979, No. 11. The New Zealand legislation was prompted by the Report of the Contracts and Commercial Law Reform Committee on *Misrepresentation and Breach of Contract* (1967) and the *Further Report on Misrepresentation and Breach of Contract* (1979).

For helpful discussions of the New Zealand Act, see F. Dawson and D.W. McLauchlan, *The Contractual Remedies Act 1979* (1981); C.I. Patterson, "The Contractual Remedies Act 1979", [1980] N.Z.L.J. 307; R.S. Sutton "Contractual Remedies Act 1979", [1980] 6 Recent Law (N.S.) 19; D.W. McLauchlan "Contract Law Reform in New Zealand: The Contractual Remedies Act 1979" (1981), 1 O.J.L.S. 284; Rider, "Act Reforms Misrepresentation" (1980), 1 Company Lawyer 53; D.W. McLauchlan and F. Dawson, "Gallagher v. Young: The Contractual Remedies Act 1979" (1982), 10 N.Z. U.L.R. 47; D.W. McLauchlan "Jolly v. Palmer: Wrongful Repudiation or Valid Cancellation?" (1985), 11 N.Z.U.L.R. 271; J.F. Burrows, "The Contractual Remedies Act 1979 - Six Years On" (1986), 6 Otago L.R. 220; J.F. Burrows, "The Contractual Remedies Act 1979" (1980), 1 Cant. L.R. 82; F. Dawson, "The New Zealand Contract Statutes", [1985] L.M.C.L.Q. 42; B. Coote, "Debts Unpaid at Cancellation Under the Contractual Remedies Act 1979" (1991), 14 N.Z.U.L.R. 195.

- the rationalization and reform of the law relating to misrepresentations;
- the achievement of greater consistency among the rights to terminate a contract for misrepresentation, breach and anticipatory breach of contract;
- the implementation of broad discretionary powers to provide relief on termination of a contract.

Technically, only the first of these is of immediate relevance. However, the Act is comprehensive and integrated and it is useful to give consideration to all three aspects to understand and evaluate its approach to misrepresentations.

1. Misrepresentations

The linchpin of the reform to the law of misrepresentations is section 6 of the Act. It reads:

> 6(1) If a party to a contract has been induced to enter it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract -
>
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
>
> (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.
>
> (2) Notwithstanding anything in section 56 or section 60(2) of the Sale of Goods Act 1908 but subject to section 5 of this Act, subsection (1) of this section shall apply to contracts for the sale of goods.

It will be noted that the concept of misrepresentation has not been abolished. It continues to be defined as a misstatement of fact which induces the representee to enter the contract. The fundamental change is that the misrepresentation is treated as if it were a term of the contract. Consequently, the primary remedy is an action for damages assessed on a contractual or expectation measure of loss. Equitable rescission is no longer available. The tort actions for fraudulent and negligent misrepresentation are also unavailable. The reform applies to all contracts including those for the sale of goods.

Section 6 must be read in relationship with section 4 of the Act. It significantly reduces the protection of boilerplate merger and acknowledgement clauses in written contracts which declare, often in contradiction of the truth, that "no representations or terms outside the contract have been given" or that "representations made have not been relied on" or that words used do not amount to a representation or promise. Under section 4(a), a court is not prevented from ascertaining the truth and the clause will only be enforced if the court considers it fair and reasonable that the provision be conclusive between the parties. Section 4(2) is even stricter. It declares that clauses in a written contract denying the actual or ostensible authority of a person making a representation do not, under any circumstances, prevent the court from inquiring into and determining the true scope of authority.

The Act has certainly simplified the law relating to misrepresentation; it has rationalized and unified available remedies and, to some extent, it has controlled the use of the more objectionable of merger and acknowledgement clauses.

The approach of broadly equating misrepresentation with terms for the purposes of damages has considerable support in Canada in the area of consumer transactions and sales. A similar, but not identical, approach has been favoured by the Ontario Law Reform Commission in its Reports on *Consumer Warranties and Guarantees in the Sale of Goods* and *Sale of Goods*, the New Brunswick and Saskatchewan consumer warranty legislation and section 58(8) of *The Consumer Protection Act* (Manitoba). Proponents of this approach stress the advantages of consistency, uniformity, rationality and certainty. Criticism usually focuses on the measure of damages. Two problems are raised in respect of the expectation measure. In cases where the expectation measure is more generous than the restitutionary measure, it may work an injustice against non-merchant representors. Where reliance losses would outstrip an expectation measure,[19] the victim of a fraudulent misrepresentation may be disadvantaged. Much of this criticism could be met by the introduction of a discretion to vary the damage assessment where justice demands it.

The treatment of misrepresentations as if they are terms of the contract, however, serves a further purpose. It lays the foundation for a uniform approach to termination of the contract for misrepresentation, breach and anticipatory breach.

2. The Right to Terminate a Contract

The desire to unify and rationalize the right to terminate a contract arose primarily from the disparity between the availability of rescission *ab initio* for misrepresentation and repudiation for breach of contract. There were two main points of difference. First, rescission for misrepresentation operates retroactively, voiding the whole contract and returning the parties to their pre-contractual positions. Repudiation operates *de futuro*, terminating all obligations remaining to be performed. Secondly, in the absence of express stipulation, repudiation is only available for breach of fundamental obligations or where the breach has the effect of robbing the innocent party of substantially all the benefit that he or she hoped to gain under the contract. Rescission, on the other hand, is available for minor misrepresentations so long as they are material and induce the contract. Concern for this disparity may have been behind Huband J.A.'s comment in *Ennis* v. *Klassen* that the misrepresentation must be fundamental before the right of rescission arises.[20] His Lordship did not, however, give this as a reason for departing from the orthodox position. Sections 7 and 8 set out a new code creating a uniform right to terminate for misrepresentation, breach and anticipatory breach. Speaking generally, it more closely resembles the common law right of repudiation for breach than the equitable right of rescission. It should be noted, however, that the new right to cancel the contract is subject to the express provision of remedies by the parties.

Section 7 of the Act declares that a party may cancel a contract in the following circumstances:

1. where the other party has made it clear that he does not intend to perform his side of the contract (repudiation of obligations);

2. where the other party is guilty of a misrepresentation, breach or anticipatory breach where it is expressly or impliedly agreed that the truth of the

[19]Sutton, *supra* n. 18, gives the following hypothetical. A house is bought for $50,000 on the strength of a misrepresentation th[e] the property is zoned commercial. If the value of the property is $45,000 and the value of a commercially zoned propert[y] $55,000, the expectation measure is $10,000. The reliance measure is the difference between the value of the property $45,0[00] and the purchase price $50,000, i.e. $5,000. But suppose the commercial zoning makes no difference to the value of the proper[ty]. On an expectation measure no damages are available. The reliance measure continues to be $5,000.

[20]*Ennis* v. *Klassen*, *supra* n. 10.

misrepresentation or the performance of the stipulation is essential to him (breach of a fundamental requirement);

the effect of the misrepresentation, breach or anticipatory breach is such as to

(a) substantially reduce the benefit of the contract to the cancelling party, or

(b) substantially increases the burden of the contract to the cancelling party, or

(c) makes the benefit or burden of the contract substantially different from that represented or contracted for (fundamental breach).

Section 8 declares that cancellation must be made known to the guilty party or, if that is not possible, there must be some indication of a desire to cancel by overt actions which are reasonable in the circumstances. No cancellation is permitted after affirmation of the contract. Most importantly, cancellation discharges all unperformed obligations but does not, of itself, divest property or money transferred under the contract. Finally, nothing in this part of the Act diminishes the cancelling party's right to damages. The change in the law relating to misrepresentation is obvious. The contract cannot be cancelled unless the misrepresentation is, by some definition, fundamental and that cancellation does not operate *ab initio* but from the time of cancellation.

This new 'cancellation code' has advantages of providing uniformity and consistency in the remedy of termination of the contract. This consistency applies not only to misrepresentation, breach and anticipatory breach but also, broadly speaking, to mistake where termination is permitted only when the error is fundamental.

3. Increased Judicial Discretion to Provide a Broader Range Relief on Cancellation

As noted earlier, nothing in the Act derogates from the right of an innocent party to claim damages. However, section 9 of the Act gives to the court broad discretionary powers to grant a wide range of relief on cancellation. The court *may* order the transfer of property which was the subject matter of the contract, order the payment of money or order any party to do or refrain from doing any act. In determining the appropriate relief, the court is directed to consider the terms of the contract, the extent of performance of the contract and the ability of the parties to have further performed the contract, the cost of performance, the value of work or services provided under the contract and other benefits and advantages obtained by reason of the contract. In essence, section 9 restores to the court a power to permit restitutionary or reliance relief which, in some circumstances, will approximate rescission. This power is, however, applicable to all cancelled contracts, whether cancelled for misrepresentation, breach or anticipatory breach. Not surprisingly, the Act contains restraints on the exercise of this discretionary relief which reflect some of the bars to rescission. Section 9(5) prevents any order being made which would divest the rights of *bona fide* third parties to property which was the subject matter of the contract. Section 9(6) prohibits any order in respect of property if any party has so altered his or her position in relation to the property as to make such an order inequitable. This kind of 'reliance' has a covert presence in many of the bars to rescission. While these remedies do not derogate from the right to damages, the value of relief given under section 9 must be taken into account in assessing damages.

Section 9 gives very wide discretionary powers to the court and consequently greatly expands the range of relief that can be provided on termination. Relief may even be provided to

the guilty party. Many will welcome the approach of the Act towards individualized, tailor-made remedies which increased judicial discretion can achieve. The approach, however, exacts a price. In New Zealand, two hundred years of judicial authority on remedies for termination was swept away[21] and a period of uncertainty and unpredictability inevitably followed as the New Zealand judiciary began to interpret and apply the Act.

4. Conclusion

For present purposes, it is section 6 which demands primary considerations. Overall, the section appears to have worked well. Burrows examined both reported and unreported cases during the six years following passage of the Act. He notes:

> The main effect of the new section may have been to allow the courts to arrive at the same results by a simpler line of reasoning.[22]
>
> In some respects the Act has changed the law little .... It is [not] likely that s. 6 will lead to a much greater number of successful claims for damages for misrepresentation but the reasoning will now be mercifully more direct. . . .[23]

The reported cases since 1985 appear to support these conclusions.[24] Another commentator remarked that:

> In practice the section has proved easy to interpret and as a consequence does not appear to have required detailed judicial consideration.[25]

The Act does not appear to have inhibited the gradual evolution of the concept of misrepresentation to cover a wider range of misstatements such as opinion expressed by a person with superior information. Nor does the requirement that damages be assessed on a contractual basis appear to have caused unfair results. Some speculation that there was sufficient flexibility in the 'contractual' measure to permit damages to be assessed on a restitutionary or reliance basis appear, however, to be unfounded.[26] Recently, the New Zealand Court of Appeal in *Walsh* v. *Kerr*[27] held that damages must be calculated on an expectation measure. One commentator has lamented the fact that section 4, which controls the use of integration clauses, is not applicable to all exemption clauses.[28] This underlines the intractable problem involved in contract reform of where to draw the line.

The remainder of the Act has raised more difficult questions. In particular, section 9 requires further interpretation before certainty is re-built. However, an Auckland barrister recently gave the whole Act a strong endorsement. He wrote:

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[21]D.W. McLaughlan, "Contract Law Reform in New Zealand: The Contracted Remedies Act 1979" (1981), 1 O.J.L.S. 113 at 292.

[22]J.F. Burrows, "The Contractual Remedies Act 1979 - Six Years On" (1986), 6 Otago Law Review 220 at 220.

[23]*Id.*, at 243.

[24]*Bird* v. *Bicknell*, [1987] 2 N.Z.L.R. 542; *Shing* v. *Ashcroft*, [1987] 2 N.Z.L.R. 154 (C.A.); *Walsh* v. *Kerr*, [1989] 1 N.Z.L.R. 490 (C.A.); *Sharplin* v. *Henderson*, [1990] 2 N.Z.L.R. 134 (C.A.); *Hughes* v. *Huppert*, [1991] 1 N.Z.L.R. 474.

[25]R.J. Asher, "The Statutory Reforms of the Contracts and Commercial Law Reform Committee from a 1988 Perspective" (1988-89), 13 N.Z.U.L.R. 190 at 191.

[26]Burrows, *supra* n. 22, at 229-230; Sutton, *supra* n. 18, at 20; Dawson and McLaughlin, *supra* n. 18, at 31.

[27]*Walsh* v. *Kerr*, *supra* n. 24.

[28]Asher, *supra* n. 25, at 190-191.

The Act has succeeded in simplifying aspects of existing contract law and making it more just. Given the profound nature of the reforms in the Act it has given rise to surprisingly little litigation. Rather than lead to endless rounds of argument it can be suggested that the Act has actually resulted in a reduction of litigation. It has made contract law more clear and certain.[29]

The detractors of the Act focus on the increased judicial discretion in awarding relief - particularly under section 9. For some, the departure from principle to discretion is worrying because of a perceived reduction in certainty and predictability in the law and a reduced fidelity to the agreement that the parties have made for themselves.[30]

5. A Final Note: *The Fair Trading Act 1986*

One advantage of the *Contractual Remedies Act 1979* is its adoption of a consistent and uniform approach to the treatment of pre-contractual statements. This advantage was, however, in large part, lost seven years later with the passage of the *Fair Trading Act 1986*.[31] The Act is not dissimilar in approach and function from *The Business Practices Act* 1990 (Manitoba).[32] The centrepiece of the Act so far as it relates to misrepresentations is section 9. It reads:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

There are other sections dealing with more specific instances of misleading words and conduct[33] but most claims are brought under the broad terms of section 9. It will be noted that this section applies to all 'trade', i.e. contracts in a business context which includes not only contracts between business and consumers but also contracts between businesses. Section 43 allows a civil action wherever a person suffers damage or is likely to suffer damage as a consequence of a breach of section 9. It differs from the *Contractual Remedies Act 1979* by listing an extensive range of remedies which may be awarded by the court. It may order that the contract be declared void, that the contract be varied, damages, a refund of money or property, the payment for repairs, or the cost of services. A passage from a leading authority on New Zealand contract law sums up the ambivalence towards such a development.

> When one recalls that the Contractual Remedies Act 1979 was passed to provide a single, simple, structure for remedying misrepresentation, some may regard it as unfortunate that this simplicity has now been compromised by an overlay of alternative remedies. Nevertheless in many branches of the law the existence of alternative remedies is commonplace and well accepted.[34]

The same situation will arise in Manitoba if the general law is reformed. However, the reach of *The Business Practices Act* is clearly not as great as that of the *Fair Trading Act 1986*.

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[29]Asher, *supra* n. 25, at 192-193.

[30]See F. Dawson, "The New Zealand Contract Statutes", [1985] 1 L.M.C.L.Q. 42, cf. B. Coote, "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988), 13 N.Z.U.L.R. 160.

[31]*Fair Trading Act 1986*, New Zealand Statues. 1986, No. 121.

[32]*The Business Practices Act*, C.C.S.M. c. B120.

[33]*Fair Trading Act 1986*, New Zealand Statutes, 1986, No. 121, ss. 10-14.

[34]*Cheshire, Fifoot and Furmston's Law of Contract* (7th N.Z. ed., 1988) 281.

C. UNITED STATES OF AMERICA

The main contribution of the United States to the reform of the law relating to pre-contractual statements has been in the area of sales law. Changes to traditional common law principles have been made in both contract law and tort law. The most influential has been the change in contractual principles relating to sales and these will be considered first.

1. Sales and Contract Law

The change in contract law has been in the direction of treating pre-contractual statements which do not evince the requisite contractual intention as warranties in the contract of sale. This approach began very early with the American *Uniform Sales Act*[35] adopted in 1906. Section 12 reads:

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

From this, it is clear that very early on the American view was that reliance, rather than contractual intent, was the key component of contractual responsibility. It was this provision which was adopted by the Ontario Law Reform Commission in its Report on *Consumer Warranties and Guarantees in the Sale of Goods* (1972). Its influence can be traced through to the New Brunswick and Saskatchewan consumer warranty legislation, into the Ontario Law Reform Commission Report on the *Sale of Goods* in 1972, and the Draft *Sale of Goods Act* of the Uniform Law Conference. Section 58(8) of *The Consumer Protection Act* (Manitoba) closely reflects this approach.

In the United States, however, the *Uniform Sales Act* has been superseded by section 2-313(1)(a) of the *Uniform Commercial Code*.[36] The general thrust of this provision appears to be similar, but the wording has caused some difficulties. The section reads:

> 2-313(1)(a) Any affirmation of fact or promise by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> ....
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Two aspects of this provision warrant some comment. The first and most difficult is the meaning of "the basis of the bargain" and the second is the dichotomy between statements of fact and opinion.

There has been much dispute over the meaning of the words "basis of the bargain". It appears to replace the reliance requirement that was the essential criterion in section 6 of the *Uniform Sales Act* 1906, but the nature and meaning of the wording replacing it is elusive. The third commentary note on section 2-313(1)(a) is also enigmatic.[37] It reads:

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[35]*American Uniform Sales Act* (National Conference of Commissioners on Uniform State Laws) 1906.

[36]*Uniform Laws Annotated: Uniform Commercial Code* (Master Edition), Vol. 1A (1989).

[37]*Ibid.*, 102.

The present section deals with affirmations of fact by the seller, . . . exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

This commentary seems to suggest that neither proof of promissory intent nor reliance is essential. The section seems to suggest a strong presumption of reliance which could be rebutted only by clear proof. One American commentator has noted that:

Most courts treat the basis of the bargain requirement either as a reliance requirement or as a liberalized substitute for the reliance requirement that is satisfied merely by showing that the buyer was aware of the affirmation. A few Courts have gone even further and suggest that an express warranty is effective even if the buyer is unaware of its existence.[38]

Whatever the intent of the drafters, it is clear that once an affirmation of fact is made, it is very difficult to persuade the court that it is not a warranty. It is clear from section 2 that there was a desire to retain the fact/opinion dichotomy which is a part of the common law. It has, however, proved no less intractable a problem. The American courts appear to have taken a similar position to Canadian courts in treating statements of opinion by those with superior knowledge or special facility for discovering information as warranties when made to ignorant buyers. One court has stated:

Representations of fact capable of determination are warranties but mere expressions of opinion, belief judgment or estimate by a dealer in sales talk are not. Where opinions are coupled with representations of fact which relate to such matters and are susceptible of exact knowledge, they constitute more than a mere opinion and are properly regarded as representations of fact and to the extent that they are representations of fact, they constitute warranties.

An important factor is whether the seller asserts a fact of which the buyer is ignorant or whether the seller merely expresses an opinion on which the buyer may be expected to have an opinion and be able to express his own judgment.[39]

Clearly, the American courts are committed to treating a wide range of pre-contractual statements including misrepresentations as terms of the contract of sale.

2. Sales and Tort Law

American tort law has also evolved to provide a damages remedy for misrepresentation as an alternative to rescission. Article 552C of the American Law Institute *Restatement of Torts Second* states:

552C(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or refrain from acting on reliance upon it, is subject to liability to the other for pecuniary loss caused by him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

(2) Damages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction.

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[38] G.I. Wallach, *The Law of Sales Under The Uniform Commercial Code* (1981) 11-35.

[39] *Inerco Inc.* v. *Randustrial Corp.* 533 S.W. 2d 257 at 263 (Mo. Ct. of Appeals, 1976).

It will be noted that this strict liability is reliance-based and at present is restricted to sale, rental and exchange transactions. The primary difference between this tort liability and the extended warranty protection under section 2-313(1)(a) of the *Uniform Commercial Code* is in the assessment of damages. Damages for breach of warranty are assessed on an expectation measure. Article 552(c)(2) of the Restatement makes it clear that damages are restricted to a restitutionary measure and therefore replicate the restitutionary effect of rescission. No consequential losses are available. Clearly this kind of action to a large extent fills the gap in Manitoba law that denies liability in damages for a truly innocent misrepresentation.

3. Conclusion

There are two important lessons to be learned from the United States. The first is that the approach which treats representations as warranties has proved workable in relation to the most common form of transaction (sale) in one of the most sophisticated free market economies in the world. There is no reason to think that such an approach would not be appropriate in Manitoba. Secondly, the evolution of tort law shows how a damages remedy may be created to mirror the restitutionary function of rescission.

CHAPTER 9

OPTIONS FOR REFORM AND RECOMMENDATIONS

A. INTRODUCTION

Some will argue that statutory reform of the law of pre-contractual statements is unnecessary and undesirable. It is argued to be unnecessary on two grounds. First, the current richness and diversity of legal rules and principles relating to pre-contractual statements provide sufficient opportunity for able judges to craft fair and reasonable results in all cases. There is, therefore, no pressing need for law reform. Secondly, it may be pointed out that there is some indication in Canada that the judiciary may recraft remedies to permit damages for an innocent misrepresentation. Lambert J.A., of the British Columbia Court of Appeal, has alluded to this possibility.[1] Some may prefer to allow judicial reform to occur. It may be suggested that legislative law reform is undesirable on the ground that any legislative reform involves a disruption to established legal principles which inevitably brings a period of uncertainty in the law. It also raises new issues about the relationship between the statutory wording and related common law principles.

These points must be addressed. There is much truth to the suggestion that judges can manipulate their way through the current tangle of rules relating to pre-contractual statements to produce a fair result. Nevertheless, there is much to be said for simplification, rationality and certainty in the law. Complexity, irrationality and uncertainty lead to a lack of predictability, a less efficient settlement process and an increased risk of judicial error and injustice. Secondly, there is no doubt that the common law has not lost its innate ability to evolve and meet new societal challenges. However, the process is slow and entirely dependent upon appropriate cases coming before reform-minded appellate judges. If the case for law reform is made, it should occur sooner, rather than at an indeterminate and uncertain later. In any event, the Manitoba Court of Appeal has not indicated immediate desire to change the law. Indeed, it was Twaddle J.A. who referred the question to the Manitoba Law Reform Commission. The final point is an important one. Statutory reform of contract law must strive for clarity and certainty and must guard against causing related problems and difficulties in the general body of contract principles. These goals are not beyond substantial achievement.

One further issue that deserves preliminary comment is the difficulty of containing reform of contractual principles within pre-determined boundaries. It has been shown earlier that reform of the law relating to pre-contractual statements raises a variety of related issues including the parol evidence rule, the failure to disclose material facts, the right to terminate for breach and the control of exemption clauses. England's *Misrepresentation Act 1967* addressed the issue of exemption clauses and the New Zealand *Contractual Remedies Act 1979* addressed the whole question of termination for breach, misrepresentations and corresponding remedies. Nevertheless, an attempt has been made in outlining the options for reform to contain recommendations within the area of pre-contractual statements and to avoid addressing wider issues. To some extent, however, impact on other issues is inevitable and sometimes problematic. These issues will be alluded to in relation to the various options presented.

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[1] *Bank of Montreal* v. *Murphy* (1986), 6 B.C.L.R. (2d) 169 (B.C.C.A.); *Canson Enterprises Ltd.* v. *Boughton & Co.* (1989), 61 D.L.R. (4th) 732 (B.C.C.A.).

B. BROAD OPTIONS FOR REFORM AND RECOMMENDATIONS

We have considered four broad options for reform of the law relating to pre-contractual statements. The first and narrowest approach is to supplement the law with a discrete action for damages for a non-fraudulent, non-negligent misrepresentation which induces one party to enter a contract. This approach fills an obvious gap in the remedial power of contract law. The second approach calls for strengthening the power of contract law to defeat unjust enrichment caused by misrepresentation by expanding the scope of rescission and introducing a discretionary power to award damages on a restitutionary or reliance basis. The third approach calls for the abolition of the dichotomy between terms and representations for the purposes of remedies by treating representations as if they were terms of the contract, breach of which would give rise to damages assessed on an expectation measure and/or repudiation. The fourth approach builds upon the third but amplifies the concept of abolishing the dichotomy between terms and representations for the purposes of remedies by coupling it with a residual judicial power to award damages on a reliance or restitutionary basis or to order rescission on terms. Each will be considered in turn.

1. A Supplemental Remedy in Damages for a Non-fraudulent, Non-negligent Misrepresentation

This approach focusses on the particular deficiency in the law relating to pre-contractual statements and attempts to remedy it. The deficiency is that there is no right to damages for an honest, non-negligent misrepresentation (the truly innocent misrepresentation) which induces a contract. The representee has a right to rescind before the bars to rescission foreclose that option but he or she has no alternative right to sue for damages if that is a preferred remedy. The approach is, therefore, to introduce a discrete statutory remedy in damages for an innocent misrepresentation. This approach finds support in section 552(1) of the American Law Institute *Restatement of the Law of Torts (Second)*. The representee secures a right to damages in lieu of rescission. Damages have a restitutionary function which mirrors the purpose of rescission. Damages are awarded whether or not the remedy of rescission is barred.

This approach would result in an improvement to the law. There would be no need to extend rescission beyond traditional boundaries to secure a remedy or invent contractual intention to achieve a just result. Damages would be available for an innocent misrepresentation. Such a remedy may well have been appropriate in *Ennis* v. *Klassen*[2] and much of the difficulty and complexity of that case would have been avoided. This approach also has the advantage of being a discrete reform which would not unduly dislocate established contractual and tort principles. The primary criticism of such an approach is that it does nothing to simplify or rationalize the law. The complexity and difficulty of the current law relating to pre-contractual statements remain. A discrete and supplementary action in damages merely adds a new component to the puzzle. Furthermore, it may be argued that, in respect of some pre-contractual statements, the measure of damages is too narrow and reliance or expectation damages may be more appropriate in some cases.

On balance, we do not recommend this approach. In our opinion, such a reform would be too narrow and would not sufficiently clarify, rationalize and simplify the law of pre-contractual statements.

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[2]*Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.).

2. An Enlarged Right of Rescission Coupled with a Discretionary Damages Remedy for Non-fraudulent Misrepresentations

This approach favours maintenance of the traditional scheme of remedies for pre-contractual statements but seeks to enhance the power of the law to prevent unjust enrichment achieved by untrue statements prior to contract formation. This approach involves strengthening the rescission remedy and adding a supplementary remedy in damages for non-fraudulent misrepresentations. This approach is similar to the *Misrepresentation Act 1967* (U.K.) and is recommended by the Ontario Law Reform Commission in their Report on the *Amendment of the Law of Contract* (1987). It should be noted that this approach has very little effect on the law relating to fraudulent misrepresentation other than confirming that execution is not a bar to rescission for fraudulent misrepresentation.

Rescission for misrepresentation is extended by removing the bar of 'execution' in respect of all representations and all contracts. This extended power of rescission is, however, tempered by a judicial discretion to deny rescission for non-fraudulent misrepresentations so long as damages are awarded in lieu of rescission. In exercising its power to deny rescission, the court is directed to take into account a variety of factors including undue hardship to the representor or third parties, the difficulty in achieving restitution, fault on the part of the representor and the adequacy of damages as a remedy.

The damages remedy is extended by giving the court a discretion to award restitutionary or reliance damages for non-fraudulent misrepresentations whether or not rescission has taken place. In making such an award, a court must take into account a variety of factors including whether or not the misrepresentation was made in the course of business, whether or not the misrepresentator had personal knowledge of the matters represented and whether or not reasonable care was taken.

The primary advantage of this approach is that the court has broad discretionary powers to achieve a restitutionary remedy and defeat the unjust enrichment of the representor. This approach is, however, subject to a number of disadvantages. First, it does little to simplify and rationalize the law. Tort remedies and contractual remedies for warranty and collateral contract remain.

Secondly, it extends the rescission remedy and thereby favours termination of the contract as a *prima facie* remedy for both minor misrepresentations and for executed contracts involving an interest in land. This increases the risk of long periods of uncertainty and unpredictability in respect of the subject matter of the contract after rescission and diminishes the policy favouring the maintenance of contractual links with the adjustment of losses being made by damages. Some of these drawbacks are controlled by the judicial power to deny rescission. Nevertheless, this approach clearly anticipates a wider power to terminate the contractual link.

Thirdly, this approach establishes broad judicial discretionary powers to deny rescission and in the award of damages. Discretion is a double-edged sword. On the one hand, it permits remedies to be crafted to the particular circumstances of the case. It is hoped thereby to reduce the number of 'hard cases' and increase fairness and equity in dispute resolution. However, as discretion expands, certainty and predictability diminish. One should not underestimate the importance of certainty and predictability in the commercial marketplace. However, this is not a debate about discretion and no discretion. All rules have some flexibility. It is about the *degree* of discretion that is appropriate. In this approach, the discretion is quite wide. It deals with both the denial of rescission and the award of damages. The former discretion is needed to control the extended rescission remedy and the latter is designed to operate where, in many cases, damages should be awarded. An argument can be made that too much uncertainty is created for too little

purpose. We have already noted some of the difficulty in predicting how the judicial discretion would have been exercised in the *Ennis* case.[3]

On balance, we do not recommend this approach. We do not favour an approach which is premised on wider powers of termination of a contract. In general, we favour a policy of maintaining contractual links unless there are fundamental reasons calling for its dissolution. We do not favour the rescission of executed contracts involving an interest in land for reasons discussed earlier in this Report. We do not favour a *prima facie* rescission remedy for minor misrepresentations. In our view, the power to deny rescission would introduce considerable uncertainty and unpredictability to the law. A similar problem relates to the exercise of the discretion to award damages.

3. Abolition of the Distinction Between Misrepresentations and Terms for the Purposes of Remedies

This approach calls for legislation which would abolish the distinction between terms and representations for the purposes of remedies. This is achieved by treating representations as if they were terms. This approach derives support from the Ontario Law Reform Commission Report on *Consumer Warranties and Guarantees in the Sale of Goods* and its Report on *Sale of Goods*, section 58(8) of *The Consumer Protection Act* (Manitoba), the New Brunswick *Consumer Protection Warranty and Liability Act*, the Saskatchewan *Consumer Product Warranties Act* which treat certain pre-contractual statements as terms for all purposes and the New Zealand *Contractual Remedies Act 1979* which treats representations as terms for the purposes of remedies.

This approach is closer to the New Zealand model. The distinction between representations and terms is not removed for all purposes. It remains relevant in the interpretation of exemption clauses and it is operative 'misrepresentations' which are treated as terms for the purposes of remedies. The approach declares that a person who has been induced to enter a contract by a misrepresentation is entitled to damages and to any other remedy such as a repudiation for breach as if the representation was a term of the contract which has been broken. This removes the right of rescission for misrepresentation from the law and makes the contractual remedy in damages based on an expectation measure the primary remedy. Where the representation is fundamental or where there has been a failure to provide substantially all the benefit to be gained under the contract, the secondary remedy of repudiation for breach of condition would arise. This would be consistent with the usual policy of contract law which favours termination of contract only for a substantial failure of performance. No remedy would be available in tort, either in deceit or negligence, for a misrepresentation.

This approach has a number of advantages. First, it will bring some order and rationality to the disparate strands of legal principles relating to pre-contractual statements. It will encourage a more direct, clearer and more predictable analysis of most cases. It reduces the significance of the difficult and uncertain dichotomy between terms and representations. It unifies the remedies available for each. Consequently, there will be gains in certainty and predictability. Secondly, the approach favours the sustenance and continued performance of contractual links by securing damages as the primary remedy. Termination will only be available in circumstances of fundamental failure of performance. Thirdly, it excludes tort law from intrusion into contractual principles. This assists in simplifying the law. Fourthly, the reform can be achieved without substantial dislocation to substantive contractual principles. It merely transfers representations to the status of terms and allows contractual principles to operate therefrom for the purpose of remedies. Finally, the approach has the advantage of

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[3] *Id.*

successful implementation albeit in differing degrees in Manitoba, New Brunswick, Saskatchewan, the United States and New Zealand.

These benefits must, however, be weighed against the costs of this approach. First, the equitable right of rescission for misrepresentation is no longer available. In some circumstances, the self-executing remedy of rescission is appropriate, efficient and just. Secondly, rescission for fraud is not available. Where a fraudulent misrepresentation is fundamental, the remedy of repudiation and damages will play a role similar to rescission and damages for deceit. However, damages is the only remedy for a minor fraudulent misrepresentation. It may be argued that an innocent party ought not to be held to a contract tainted by the dishonesty of the other contracting party. Thirdly, the removal of rescission creates an inconsistency with *The Business Practices Act* (1990). Under section 23(2), rescission continues to be a remedy for misrepresentations made in a consumer transaction. This may be justified on the grounds of the particularly weak position of consumers. Furthermore, the range of possible remedies under that Act makes some inconsistency in remedies with the general law unavoidable.

Fourthly, since a misrepresentation is treated as a term of the contract for the purposes of remedies, damages would be assessed on an expectation measure. This may prove to be problematic in some cases. It may, for example, impose too onerous a burden of the non-merchant misrepresentor for innocent misrepresentations and in rare cases a reliance or restitution measure may prove to be a more generous measure of damages and consequently would be desirable in respect of representations by merchants and in cases of fraud.

We do not recommend that this approach be adopted. We are particularly concerned about the loss of rescission as a remedy for misrepresentation. We accept the case for a diminution of the rescission remedy and for the strengthening of damages and repudiation as the primary remedies for breach of both terms and misrepresentations. Nevertheless, there will be cases where rescission will provide an appropriate and just remedy. We believe it should be retained in some form. We also express reservations about adopting an expectation measure as the sole measure of damages. Some flexibility in assessment criteria seems desirable.

4. Abolition of the Distinction Between Misrepresentations and Terms for the Purpose of Remedies Coupled with a Judicial Power to Award Damages on a Reliance or Restitutionary Measure or to Rescind the Contract

This approach seeks to capture the gains and advantages of an abolition of the dichotomy between representations and terms for the purposes of remedies and to avoid some of its disadvantages by coupling it with a residual discretion to award damages on a reliance or restitutionary measure or to order rescission of the contract where justice demands it. This approach seeks to strengthen the centrality of damages and/or repudiation as the primary remedy for breach of both representations and terms and to diminish rescission to a residual and extraordinary role. The misrepresentation is treated as a term of the contract for purposes of remedies. Damages for breach are awarded on an expectation measure. Repudiation is available for serious failure of performance of the contract. Gains will be made in order, rationality, simplicity, certainty, predictability and in furtherance of the policy to restrict rescission of a contract to circumstances of a fundamental failure of performance. The residual power to vary the measure of damages and to rescind the contract is designed to cover those cases where the usual remedies for breach of contract prove to be inadequate or inappropriate. Damages on an expectation measure may be too burdensome on an innocent, non-merchant misrepresentor and, in some circumstances, a reliance or restitutionary measure may be more generous than the usual contract measure and consequently may be preferable in cases of merchant or fraudulent misrepresentations. Flexible damage assessment needs are desirable given the broad range of circumstances that may arise. Rescission is retained as a residual and extraordinary remedy to be

exercised when all other available remedies are inadequate to do justice between the parties. It may, for example, provide an appropriate remedy in cases of a minor fraudulent misrepresentation leading to a long term contract. Even though repudiation may not be available because of the minor nature of the misrepresentation, a court may favour the dissolution of the contract on the grounds that one should not be forced to maintain a continuing relationship with a dishonest person. This power to order rescission would not be exercisable where other priority rights would be affected, nor where there has been reliance on the contract.

We recognize that there are some disadvantages to this approach. The self-executing remedy of rescission for misrepresentation, which may in some circumstances provide a swift and fair remedy, is removed from the law. Furthermore, the introduction of judicial discretion in the measure of damages and to order rescission introduces some degree of uncertainty and complexity which do not arise in option three.

Nevertheless, we recommend this approach as the most appropriate vehicle for reform of the law relating to pre-contractual statements. It will, to a large extent, simplify and rationalize the law while retaining a sufficient range of remedies to do justice in most cases. It strongly favours a policy of maintenance of contractual links unless there has been a fundamental failure in performance of the contract. Finally, it minimizes the degree of dislocation to substantive contract principles. It primarily transfers representations to the status of terms for the purposes of remedies and provides residual and extraordinary remedies which themselves are well understood in contractual theory. Its disadvantages seem less in number and substance than those of the other options.

We recommend:

RECOMMENDATION 1

As a general rule, the distinction between terms and representations should be abolished for the purposes of remedies.

RECOMMENDATION 2

The primary remedy should be damages calculated on an expectation measure coupled with the remedy of repudiation for breach of condition.

RECOMMENDATION 3

The court should be given the discretion to award damages on a reliance and/or restitutionary basis where justice demands it and an extraordinary judicial power to order rescission of the contract where damages on any measure are an inadequate remedy.

C. RECOMMENDATIONS ON COLLATERAL MATTERS

We have considered a number of proposals which arise in the implementation of our central proposal. We shall identify these issues and make further recommendations where appropriate.

1. Definition of Misrepresentation

Earlier in this Report we commented on the definition of misrepresentation. We noted the narrowness of the concept and the difficulties in defining misrepresentation at the margins. We also noted that the narrowness of the concept is explained in part by a desire to restrict the rescission remedy within narrow boundaries. Termination of a contract is a harsh remedy which should not be given undue scope. However, under our central proposal, the primary remedy for a misrepresentation is damages with termination being restricted to a fundamental failure of performance (repudiation) and the residual remedy of court-ordered rescission.

Consequently, we deem it appropriate to loosen the definition of misrepresentation under the proposed Act to provide broader protection for the misrepresentee. In particular, we propose that misrepresentation include a misrepresentation of law and statements which have a capacity to include reasonable reliance and do induce such reliance. There is already some support in the cases for a remedy for misrepresentations of law and reasonable reliance lies at the heart of many principles providing remedies for pre-contractual misstatements (misrepresentation, warranty, tort liability). It is time to isolate the crucial factor which defines responsibility and to provide directly an appropriate remedy. This will permit a more direct and simple approach and may assist a court in fashioning a remedy in a case such as *Andronyk* v. *Williams*[4] where traditional rules failed to provide a remedy for a deserving misrepresentee. We recognize that the proposed definition of misrepresentation will include statements of opinion and forecasts. We hasten to *underline*, however, that such statements must have the capacity to induce reasonable reliance and must be *relied on* by the misrepresentee. These conditions will protect the speaker from responsibility for casual or off-hand statements.

We recommend:

RECOMMENDATION 4

For the purposes of the proposed legislation, 'misrepresentation' should include statements of law and statements which have a capacity to induce reasonable reliance, and do induce such reliance.

2. Duty to Disclose

We noted earlier in this Report that as a general rule contracting parties are not under a duty to volunteer information pertinent to the contract in question. Silence is permissible. Conduct or statements which misrepresent the current situation are not. We recognized, however, that the law does impose a duty to disclose information in situations where the nature of the contract demands utmost good faith. We make no recommendations on the current state of the law relating to disclosure requirements but we do take the view that the remedies for positive misrepresentation and failure to disclose in breach of a legal duty to do so should be uniform. We propose therefore that the definition of misrepresentation under the Act incorporate both situations. This can be achieved by declaring that a failure to disclose information pursuant to an existing duty amounts to a representation that the material fact does not exist.

We recommend:

RECOMMENDATION 5

The definition of 'misrepresentation' should extend to the failure to discharge a duty to volunteer information under existing contract law.

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[4]*Andronyk* v. *Williams* (1985), 21 D.L.R. (4th) 557 (Man. C.A.).

3. Tort Liability for Pre-contractual Statements

Earlier in this Report we canvassed the important role of tort law in providing a remedy in damages for certain pre-contractual statements. Tort law supplemented a contract law which failed to provide a remedy in damages for a misrepresentation which induced a contract. Under a central proposal, however, the primary remedy for a pre-contractual misrepresentation is damages and the need to resort to the tort doctrines of deceit or negligent misrepresentation disappears. Furthermore, the amplification of the definition of misrepresentation will remove any advantage that may have been gained by relying on a more literal tort definition of misrepresentation. Consequently, we propose that a tort action not be available in respect of a pre-contractual misstatement which induces a contract. This will simplify the law and reduce the diversity of legal analysis without being detrimental to the misrepresentee.

We recommend:

RECOMMENDATION 6

Tort damages should be no longer available in respect of pre-contractual representations.

4. The Right of the Parties to Choose Their Own Remedies

We see no reason to restrict the normal power of contracting parties to expressly stipulate their own regime of remedies. We noted earlier that consumer transactions are now largely governed by *The Business Practices Act*.[5] The proposed legislation will deal predominantly with contracts between private individuals and contracts between businesses. The former are unlikely to be involved in contract planning. The latter will normally use a standard form contract. There is no reason not to allow such parties to arrange contractual remedies in their own interest. They may, for example, wish to expressly include a right of rescission *ab initio*.

We therefore recommend:

RECOMMENDATION 7

The proposed Act should apply subject to an express choice of remedies by the contracting parties.

5. Acknowledgement Clauses

In the past few decades, much judicial attention has been paid to the issue of unfair exemption clauses. The courts have developed a number of rules and techniques to control abusive exemption clauses not least of which is the rule of construction that exemption clauses normally do not protect a contracting party in fundamental breach of his or her contractual obligations. In this Report, we have not discussed the general law as it relates to exemption clauses and we make no recommendations in respect thereof. We do, however, make recommendations in respect of a narrow class of exemption clauses which are particularly pertinent to pre-contractual statements. These clauses are described variously and imprecisely as acknowledgement or merger clauses. They do have, however, an identifiable purpose. They are

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[5] *The Business Practices Act*, C.C.S.M. c. B120.

designed to negate the effect of statements made in the process of contract negotiation. This is sometimes done by declaring that no representations were made prior to contract or by declaring that no representations other than those in the contract were made or that the contract contains the whole agreement. Alternatively, they may seek to make a misrepresentation inoperative by denying an essential element of legal liability. The clause may declare that the misrepresentee did not rely on the representation made or that the misrepresentee relied on his or her judgment or that statements are true. All of these clauses relate to misrepresentations and are particularly offensive because the misrepresentor seeks to 'shelter behind a lie'.[6] The wrong of misrepresentation is compounded by an express denial of its occurrence or its nature. We recommend that, in such circumstances, a court be permitted to discover the truth of the situation and, having discovered the truth, be empowered to enforce the protective clause only if it is fair and reasonable to do so in the particular circumstances. Relevant circumstances would include the subject matter and value of the contract, the respective bargaining positions of the parties and whether legal advice had been sought by the parties to the contract. This power to contract a limited range of exemption clauses would not affect the general law as it relates to exclusion clauses and does not restrict the use of exemption clauses to preclude or limit a liability for misrepresentation.

We recommend:

RECOMMENDATION 8

A court should not be prevented from determining the truth of a situation relating to a misrepresentation and should only enforce a clause denying the truth where it is fair and reasonable to do so.

6. Agency Clauses

A situation analogous to that discussed under acknowledgement clauses is where a contracting party, by way of an appropriately worded clause in a contract, denies that his or her agent had authority to make the statement. In essence, the principal seeks to insulate himself or herself from responsibility for his or her agent's words by denying the extent of an agent's authority. We recommend that such a clause should be ineffective and that a court should be permitted to discuss the truth in all circumstances.

RECOMMENDATION 9

The court should not be prohibited from determining the truth in respect of contractual provisions which deny that a person is an agent of the contracting party or which declare that an agent of the contracting party has no authority to make a representation.

7. *The Business Practices Act* 1990 (Manitoba)

We recognize that the law relating to pre-contractual statements in *consumer transactions* is largely, though not exclusively, controlled by the recent enactment of *The Business Practices Act*. In that statute, the Legislature has set out the rights and remedies of consumers who have been induced to enter a contract by misrepresentation. It will probably prove to be sufficient in itself to craft fair remedies for consumers. Our proposal for reform of the general law of contract is not intended to derogate in any way from the rights and duties that arise under that Act. Our

[6] Comment by Mr. Ball, M.P. (1979) NZPD cited in F. Dawson and D.W. McLaughlan, *The Contractual Remedies Act 1979* (1981) 37.

proposal will provide an alternative remedy for a consumer but we anticipate that the reform we propose will predominantly, though not exclusively, impact on transactions between non-merchants and transactions between commercial entities.

We recommend:

RECOMMENDATION 10

Nothing in this proposal derogates from any rights or remedies available under The Business Practices Act.

8. *The Consumer Protection Act*, section 58(8)

We have noted the difficulties and uncertainties in the interpretation of section 58(8) of *The Consumer Protection Act*. If its scope, as most believe, is restricted to consumer transactions, it has been largely superseded, if not impliedly repealed by *The Business Practices Act*. If it is of broader scope, it is incompatible with our central proposal defining the rights and remedies for a pre-contractual misstatement. On either view, we recommend that section 58(8) *The Consumer Protection Act* be repealed.

We recommend:

RECOMMENDATION 11

Section 58(8) of The Consumer Protection Act should be repealed.

9. Termination for Breach under *The Sale of Goods Act*

It is intended that our proposals apply to contracts for the sale of goods. Consequently, the remedy for a misrepresentation inducing a sale of goods will be an action in damages as if the representation is a term of the contract and repudiation. Repudiation is controlled by *The Sale of Goods Act* which contains a particularly strict control in respect of repudiation for breach of a condition in a contract for the sale of specific goods. Repudiation in such a case is denied when property passes which, unless otherwise agreed, occurs when the contract is made. Much of the strictness of this provision has been awarded by judicial interpretation and usually the buyer will not lose a right to repudiate until he or she has had a chance to inspect the goods and accept them. However, it seems an appropriate time to amend *The Sale of Goods Act* to prevent the loss of a right of repudiation for breach of a condition before the goods are accepted by the buyer. This was a change that was made to English law by the *Misrepresentation Act 1967*.

We recommend:

RECOMMENDATION 12

The Sale of Goods Act should be amended to prevent the loss of a right to repudiate for breach of condition before the goods are accepted by the buyer.

10. Impact on Other Areas of the Law

We sought advice on, and gave careful consideration to, the application of our recommendations to contracts of insurance. Contracts of insurance present unique problems

which demand individual and particularized solutions. Currently these solutions are embodied in both common law principles and in legislation.[7] To a very large degree the law relating to insurance enjoys a high degree of uniformity across the country which is clearly advantageous to both insurer and the insured. We believe that many of our recommendations might profitably be applied in the area of insurance law but we are unwilling to put at risk the high degree of uniformity and consistency among the provinces in this area. Furthermore, in the insurance area, the misrepresentor is normally the receiver of services rather than, as in most other areas, the seller of property and services. This may create some difficulties. For example, some of our recommendations may conflict with provisions of *The Insurance Act*. One example is the recommendation which permits the parties to choose their own regime of remedies. *The Insurance Act* does not permit the parties to vary or modify statutory conditions. Recommendation 2 may also create some difficulties in respect of misrepresentations by the insured. Our conclusion is that it would be prudent at this time to exclude contracts of insurance from the scope of our recommendations.

We do not wish to indicate that some reform of insurance is unnecessary. We do, however, doubt that this is the appropriate vehicle to deal with such matters.

RECOMMENDATION 13

The proposed Act should be inapplicable to contracts of insurance.

We also sought advice on, and gave careful consideration to, the application of our recommendations to transactions governed by *The Securities Act*. Again we do not wish to impair the high degree of uniformity of legislation across the country relating to such transaction. We are therefore of the view that these recommendations should not apply to transactions governed by *The Securities Act*.

RECOMMENDATION 14

The proposed Act should be inapplicable to contracts governed by The Securities Act.

We also sought advice and gave consideration to section 44 of *The Partnership Act* which outlines certain rights of a partner after rescission of the partnership agreement for fraud or misrepresention. We do not wish to make any substantive change to those right. We do suggest, however, that the language of the section be changed to make it compatible with the proposed *Misrepresentation Act*. Those rights will arise upon repudiation and termination of the contract or on court ordered rescission. We therefore recommend:

RECOMMENDATION 15

Section 44 of The Partnership Act should be amended to make the language of that section compatible with the proposed Misrepresentation Act.

[7] *Insurance Act*, C.C.S.M. c. I40; *Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215.

CHAPTER 10

DRAFT MISREPRESENTATION ACT AND COMMENTARY

In this Chapter, we attempt to demonstrate how our proposals would work in practice. We set out a draft Misrepresentation Act, together with commentary explaining the intent and effect of each section. The Act is restated without comentary in Appendix A.

DRAFT ACT

INTERPRETATION

Definitions

1(1) In this Act,

"contract" includes a contract under seal;

"misrepresentation" means misrepresentation at common law and also includes

(a) a false representation of law; and

(b) a false statement that is made before or at the time a contract is made and that has the capacity to induce a reasonable person to rely upon it.

Deemed misrepresentation

1(2) Where a person contravenes a legal duty to disclose a material fact before or at the time that person makes a contract, that person is deemed to make a misrepresentation that the material fact does not exist.

COMMENTARY

Section 1 contains the definitions of 'contract', 'misrepresentation' and 'deemed misrepresentation'.

The Act makes it clear that 'contract' is to include a document under seal.

The meaning of 'misrepresentation' is extended to include representations of law and statements which have the capacity to induce reasonable reliance. This extended definition will include statements of opinion, forecast and intention which would induce reasonable persons to rely on them. This extended meaning of misrepresentation is for the purposes of the Act and does not apply to the definitions of misrepresentation for the purposes of the parol evidence rule, exemption clauses or other legislation.

The concept of 'deemed misrepresentation' is used to prevent an inconsistency between the remedies for a failure to disclose information where one is under a duty to do so and the remedies for making a positive misrepresentation.

APPLICATION

Non-application
2 This Act does not apply to a contract of insurance or to any transaction governed by The Securities Act.

The primary reason for excluding contracts of insurance and transactions governed by The Securities Act from the scope of the Act is to maintain the high degree of uniformity in the law across Canada in respect of such contracts.

No contracting out
3(1) Subject to subsection (2), no person may vary or waive the provisions of this Act and any agreement that purports to do so is void.

Section 3(1) is designed to prevent a wholesale avoidance of the provisions of the Act by a contracting party inserting a boiler-plate clause to that effect in a standard form contract. The Act does not, however, prevent the contracting parties from adopting their own regime of remedies.

May vary remedies
3(2) A person may agree to vary any remedy provided in sections 6 or 7.

Under section 3(2), the parties may provide for remedies such as liquidated damages clauses or for rescission ab initio. This section does not prevent the parties from using exemption clauses to the extent permitted by the general law so long as they fall short of an opting out of the Act and are compatible with section 9 of the Act.

Crown bound by Act
4 The Crown in right of Manitoba is bound by this Act.

Business Practices Act
5 Rights and remedies under this Act are in addition to and not in derogation from those available under The Business Practices Act.

These sections are self-explanatory and dictate the scope and reach of the Act.

REMEDIES FOR MISREPRESENTATION

Remedies for misrepresentation
6(1) Where a party to a contract is induced to enter the contract by an innocent, negligent or fraudulent misrepresentation made to that party by or on behalf of another party to that contract, the party so induced is entitled

Section 6(1) begins by requiring that the misrepresentation must 'induce' the contract. The word 'induce' carries its meaning at common law and requires that there be reliance on the misrepresentation. The remainder of section 6(1) contains the central reform

to damages and any other remedy in the same manner and to the same extent as if the representation were a term of the contract that is breached.

of the law. It declares that a misrepresentation is to be treated as a term of the contract, which, when broken, gives rise to an action for damages and any further remedy available for breach of contract such as repudiation, specific performance, etc. Damages are to be assessed on the normal contractual measure unless the court resorts to section 6(2). This subsection empowers the court to resort to a restitution or reliance measure of damages, or use some combination of restitution and reliance measures if it is equitable to do so. This power may be used where damages on an expectation measure would be oppressive on a non-merchant misrepresentor or, alternatively, where reliance damages are more generous than an expectation measure and that, in the circumstances, would be more just.

Measure of damages
6(2) Where a court considers it equitable to do so, the court may alter the measure of damages under subsection (1) and allow compensation

(a) according to the principles of restitution;

(b) for losses incurred in reliance on the misrepresentation; or

(c) by using both methods.

Discretionary rescission
7(1) Where a court considers that all remedies under section 6 are inadequate to do full justice, the court may order rescission of the contract on such terms as it sees fit.

Section 7 gives the court a discretion to order rescission of the contract where the remedies under section 6 are inadequate. This provision will be relied on only in rare instances where the full complement of remedies contemplated under section 6 are inadequate to do justice. For example, a court may order rescission where a minor fraudulent misrepresentation has induced a long term contract. It is designed to provide a residual and extraordinary judicial remedy.

Exceptions
7(2) A court shall not make an order under subsection (1) where

(a) a person who is not a party to the contract would thereby lose an interest in or possession of any property acquired by that person in good faith for valuable consideration; or

(b) a party to the contract so alters his or her position in reliance on the contract that rescission would be inequitable.

Section 7(2)(a) and (b) are designed to play a similar function to the bars to rescission at common law and to prevent rescission where third party rights would be affected or where there has been reliance on the contract.

No tort action
8 No action shall be brought in tort respecting a misrepresentation to which subsection 6(1) applies.

This section removes tort liability from the area of pre-contractual misrepresentations. The significant role of tort liability was in large part due to the inadequacy of contract law.

Since that is remedied by the proposed Act, there is no longer a need for tort principles to apply. One uniform regime of civil responsibility will govern all pre-contractual misrepresentations.

Power of court to inquire

9(1) Notwithstanding any provision in a contract, a court in any proceeding that relates to the contract is not precluded from inquiring into and determining any or all of the following issues:

(a) whether a person made a representation before or at the time the contract was made;

(b) whether that representation is a misrepresentation;

(c) whether any party was induced to enter the contract by a misrepresentation;

(d) whether a person who makes a representation before or at the time a contract is made acts under the actual, usual or apparent authority of a party to the contract.

This provision provides some control on those exemption clauses which seek to negate the effect of statements made in the process of contract negotiation and those which deny the true authority of an agent.

The court is permitted to investigate the truth of the situation but, nevertheless, to enforce clauses other than those which relate to the authority of an agent, if it is fair and reasonable to do so. Factors to be taken into account in determining fairness are set out. No discretion to uphold the clause is given in respect of the agency relationship. This ensures that a contracting party is responsible for all statements made within the scope of the agent's actual or ostensible authority. The contracting party cannot insulate himself or herself from responsibility by use of a boilerplate clause in a standard form contract.

Discretion of court

9(2) A court may give effect, in whole or in part, to a provision in a contract that purports to exclude a court from inquiring into and determining any issue under clauses (1)(a) to (c) where the court considers that it is fair and reasonable to do so, having regard to all the circumstances including

(a) the subject matter and value of the contract;

(b) the respective bargaining positions of the parties; and

(c) whether any party had independent legal advice at a relevant time.

CONSEQUENTIAL AMENDMENTS

The Partnership Act

Consequential amendment, C.C.S.M. c. P30
10 That part of section 44 of The Partnership Act preceding clause (a) is repealed and the following is substituted:

44 Where a party to a contract creating a partnership is induced to enter into the contract by an innocent, negligent or fraudulent misrepresentation made to that party by or on behalf of another party to the contract and the party so induced is thereby entitled to and does repudiate and terminate the contract, or where a court orders that the contract be rescinded on the grounds of misrepresentation, the party who terminates the contract or in whose favour an order of rescission is made, is, without prejudice to any other right, entitled

Section 44 of The Partnership Act outlines certain rights of a partner after rescission of the partnership agreement for fraud or misrepresentation. No substantive change is made to those rights. The intent of the amendment is to make the language of The Partnership Act compatible with the proposed Misrepresentation Act. Those same rights will arise upon repudiation and termination of the contract or on court-ordered rescission.

The Sale of Goods Act

Consequential amendment, C.C.S.M. c. S10
11 The following is added after subsection 60(1) of The Sale of Goods Act:

Exception
60(1.1) Notwithstanding subsection (1), The Misrepresentation Act applies to contracts for the sale of goods.

This section is self-explanatory.

GENERAL PROVISIONS

C.C.S.M. reference
12 This Act may be cited as The Misrepresentation Act and referred to as Chapter Mxx of the Continuing Consolidation of the Statutes of Manitoba.

Coming into force
13 This Act comes into force on the day it receives royal assent.

DRAFT AMENDMENTS
(for inclusion in a
***Statute Law Amendment Act*)**

C.C.S.M. c. C200 amended
X Subsection 58(8) of The Consumer Protection Act is repealed.

C.C.S.M. c. S10 amended
Y(1) The Sale of Goods Act is amended by this section.

Subsection 13(3) amended
Y(2) Subsection 13(3) is amended by striking out "or where the contract is for specific goods, the property in which has passed to the buyer,".

Section 37 amended
Y(3) Section 37 is amended by striking out "them, or when" *and substituting* "them or, subject to section 36, when".

These amendments relate to two collateral issues canvassed in our Report. The first repeals section 58(8) of The Consumer Protection Act on the grounds that it has been overtaken by The Business Practices Act and the proposed Misrepresentation Act.

The section relating to The Sale of Goods Act brings the legislation into line with the revised English Sale of Goods Act and judicial interpretation. Repudiation for breach of a condition shall not be lost where the property in specific goods has passed (at the time of contract). It will only be lost when there has been an opportunity to inspect the goods and the goods are accepted by the buyer.

CHAPTER 11

LIST OF RECOMMENDATIONS

1. As a general rule, the distinction between terms and representations should be abolished for the purposes of remedies. (p. 59)

2. The primary remedy should be damages calculated on an expectation measure coupled with the remedy of repudiation for breach of condition. (p. 59)

3. The court should be given the discretion to award damages on a reliance and/or restitutionary basis where justice demands it and an extraordinary judicial power to order rescission of the contract where damages on any measure are an inadequate remedy. (p. 59)

4. For the purposes of the proposed legislation, 'misrepresentation' should include statements of law and statements which have a capacity to induce reasonable reliance, and do induce such reliance. (p. 60)

5. The definition of 'misrepresentation' should extend to the failure to discharge a duty to volunteer information under existing contract law. (p. 60)

6. Tort damages should be no longer available in respect of pre-contractual representations. (p. 61)

7. The proposed Act should apply subject to an express choice of remedies by the contracting parties. (p. 61)

8. A court should not be prevented from determining the truth of a situation relating to a misrepresentation and should only enforce a clause denying the truth where it is fair and reasonable to do so. (p. 62)

9. The court should not be prohibited from determining the truth in respect of contractual provisions which deny that a person is an agent of the contracting party or which declare that an agent of the contracting party has no authority to make a representation. (p. 62)

10. Nothing in this proposal derogates from any rights or remedies available under *The Business Practices Act*. (p. 63)

11. Section 58(8) of *The Consumer Protection Act* should be repealed. (p. 63)

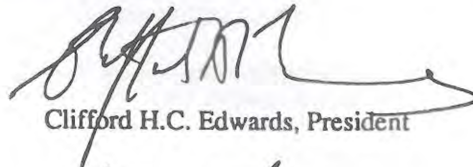
12. *The Sale of Goods Act* should be amended to prevent the loss of a right to repudiate for breach of condition before the goods are accepted by the buyer. (p. 63)

13. The proposed Act should be inapplicable to contracts of insurance. (p. 64)

14. The proposed Act should be inapplicable to contracts governed by *The Securities Act*. (p. 64)

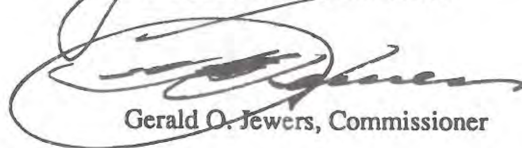
15. Section 44 of *The Partnership Act* should be amended to make the language of that section compatible with the proposed Misrepresentation Act. (p. 64)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 7th day of March 1994.



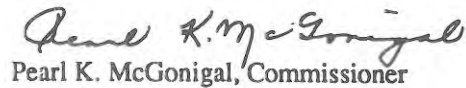
Clifford H.C. Edwards, President

John C. Irvine, Commissioner



Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner



Pearl K. McGonigal, Commissioner

APPENDIX A

DRAFT MISREPRESENTATION ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

INTERPRETATION

Definitions
1(1) In this Act,

"contract" includes a contract under seal;

"misrepresentation" means misrepresentation at common law and also includes

(a) a false representation of law; and

(b) a false statement that is made before or at the time a contract is made and that has the capacity to induce a reasonable person to rely upon it.

Deemed misrepresentation
1(2) Where a person contravenes a legal duty to disclose a material fact before or at the time that person makes a contract, that person is deemed to make a misrepresentation that the material fact does not exist.

APPLICATION

Non-application
2 This Act does not apply to a contract of insurance or to any transaction governed by The Securities Act.

No contracting out
3(1) Subject to subsection (2), no person may vary or waive the provisions of this Act and any agreement that purports to do so is void.

May vary remedies
3(2) A person may agree to vary any remedy provided in sections 6 or 7.

Crown bound by Act
4 The Crown in right of Manitoba is bound by this Act.

Business Practices Act
5 Rights and remedies under this Act are in addition to and not in derogation from those available under The Business Practices Act.

REMEDIES FOR MISREPRESENTATION

Remedies for misrepresentation
6(1) Where a party to a contract is induced to enter the contract by an innocent, negligent or fraudulent misrepresentation made to that party by or on behalf of another party to that contract, the party so induced is entitled to damages and any other remedy in the same manner and to the same extent as if the representation were a term of the contract that is breached.

Measure of damages
6(2) Where a court considers it equitable to do so, the court may alter the measure of damages under subsection (1) and allow compensation

(a) according to the principles of restitution;

(b) for losses incurred in reliance on the misrepresentation; or

(c) by using both methods.

Discretionary rescission
7(1) Where a court considers that all remedies under section 6 are inadequate to do full justice, the court may order rescission of the contract on such terms as it sees fit.

Exceptions
7(2) A court shall not make an order under subsection (1) where

(a) a person who is not a party to the contract would thereby lose an interest in or possession of any property acquired by that person in good faith for valuable consideration; or

(b) a party to the contract so alters his or her position in reliance on the contract that rescission would be inequitable.

No tort action
8 No action shall be brought in tort respecting a misrepresentation to which subsection 6(1) applies.

Power of court to inquire
9(1) Notwithstanding any provision in a contract, a court in any proceeding that relates to the contract is not precluded from inquiring into and determining any or all of the following issues:

(a) whether a person made a representation before or at the time the contract was made;

(b) whether that representation is a misrepresentation;

(c) whether any party was induced to enter the contract by a misrepresentation;

(d) whether a person who makes a representation before or at the time a contract is made acts under the actual, usual or apparent authority of a party to the contract.

Discretion of court

9(2) A court may give effect, in whole or in part, to a provision in a contract that purports to exclude a court from inquiring into and determining any issue under clauses (1)(a) to (c) where the court considers that it is fair and reasonable to do so, having regard to all the circumstances including

(a) the subject matter and value of the contract;

(b) the respective bargaining positions of the parties; and

(c) whether any party had independent legal advice at a relevant time.

CONSEQUENTIAL AMENDMENTS

The Partnership Act

Consequential amendment, C.C.S.M. c. P30

10 That part of section 44 of The Partnership Act preceding clause (a) is repealed and the following is substituted:

44 Where a party to a contract creating a partnership is induced to enter into the contract by an innocent, negligent or fraudulent misrepresentation made to that party by or on behalf of another party to the contract and the party so induced is thereby entitled to and does repudiate and terminate the contract, or where a court orders that the contract be rescinded on the grounds of misrepresentation, the party who terminates the contract or in whose favour an order of rescission is made, is, without prejudice to any other right, entitled

The Sale of Goods Act

Consequential amendment, C.C.S.M. c. S10

11 The following is added after subsection 60(1) of The Sale of Goods Act:

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Section 37 amended
Y(3) Section 37 is amended by striking out "them, or when" *and substituting* "them or, subject to section 36, when".

EXECUTIVE SUMMARY OF

REPORT ON PRE-CONTRACTUAL MISSTATEMENTS

EXECUTIVE SUMMARY

INTRODUCTION

This Report examines and evaluates the law relating to the remedies available to a contracting party who has been induced to enter a contract on the basis of a false pre-contractual statement. It responds to a suggestion by Twaddle J.A. made in *Ennis* v. *Klassen* (1990), 70 D.L.R. (4th) 321 at 339, that this area of the law should be reviewed in depth by the Law Reform Commission.

CURRENT LAW

The remedies for false pre-contractual statements inducing contracts are various and uncoordinated. Much depends upon whether or not contract law, tort law or particular legislation is applied to the circumstances of the case. In contract law, those statements which qualify as misrepresentations give rise to rescission (termination) of the contract. Those statements which are terms or collateral warranties lead to damages and/or repudiation (termination) in serious cases. In tort law, the wrongful conduct (fraud or negligence) of the person making the false statement may give rise to a claim for damages in deceit or negligent misrepresentation.

Legislation covers certain defined transactions. *The Sale of Goods Act* gives a right to the buyer to reject the goods and secure damages where the goods do not correspond to the description given by the seller. *The Consumer Protection Act* declares that certain statements made by the seller in a retail sale are terms of the contract, breach of which may give rise to damages. Subsequently, *The Business Practices Act*, enacted in 1990, now provides a broad range of remedies for a wide variety of misleading and deceptive statements made in the course of a consumer transaction. The *Competition Act* (Canada) also provides for a remedy in damages for misleading statements made in the course of supplying products.

THE NEED FOR REFORM

The primary need in this area is to clarify, rationalize and simplify the law relating to pre-contractual statements. Much of the incoherence in the current law arises because rescission (termination) of the contract is the primary remedy in contract law. In many cases, awarding of damages is the more appropriate remedy and this has led the courts to confine the remedy of rescission within narrow boundaries and to pursue alternative bases of liability which lead to an award of damages (collateral warranty or tort liability). A re-orientation of contract law away from the remedy of rescission towards a greater emphasis on damages and the maintenance of contractual links would lead to a reconciliation of theory and practice and enhance the certainty and predictability of the law.

THE PROPOSED REFORM

The main proposal is to abolish the conventional distinction between terms (damages) and misrepresentation (rescission) for the purposes of remedies and to treat all pre-contractual statements (including terms, misrepresentations, statements of law and other statements which have a capacity to induce reasonable reliance and do induce such reliance) as terms of the contract. Consequently, the primary remedy would be damages for breach of contract calculated on an expectation measure and/or repudiation. The court would also be given a discretion to award damages on a different measure such as a reliance or restitutory measure where justice demands it. Rescission would not be completely abolished. It would remain as an extraordinary judicial remedy available where damages on any measure are inadequate.

This reform broadens the scope of an operative pre-contractual misstatement and emphasizes damages as the primary remedy. Since tort remedies will no longer be necessary, they will not be available. The proposed reform will not prevent the parties from choosing their own scheme of contractual remedies so long as express provision is made in the contract. Some restrictions on the validity of exemption clauses which seek to avoid responsibility for pre-contractual statements are recommended. Finally, some changes are recommended to *The Partnership Act*, *The Sales of Goods Act* and *The Consumer Protection Act* to enhance the compatibility of that legislation with the primary recommendations in the Report.

Our recommendations do not apply to contracts of insurance or contracts governed by *The Securities Act*.

SOMMAIRE DU

RAPPORT SUR LES FAUSSES DÉCLARATIONS PRÉCONTRACTUELLES

SOMMAIRE

INTRODUCTION

Dans le présent rapport, nous examinons et évaluons le droit applicable aux recours dont peuvent se prévaloir les parties contractantes incitées à conclure un contrat sur la foi de fausses déclarations précontractuelles. Cet examen fait suite à une suggestion du juge Twaddle de la Court d'appel, dans la cause *Ennis* c. *Klassen* (1990), 70 D.L.R. (4th) 321 à 339. En effet, le juge Twaddle a suggéré à la Commission de réforme du droit de revoir en profondeur ce champ d'application du droit.

DROIT ACTUEL

Les recours en cas de fausses déclarations précontractuelles menant à la conclusion de contrats sont variés et manquent d'uniformité. Ils dépendent beaucoup du droit, à savoir le droit contractuel ou le droit de la responsabilité délictuelle, ou des lois particulières qui sont invoqués. En droit contractuel, les fausses déclarations mènent à la résiliation (annulation) du contrat. Les déclarations qui font partie des modalités ou des garanties accessoires du contrat donnent lieu à des dommages-intérêts, à la répudiation (annulation) du contrat ou, dans les cas graves, aux deux. En droit de la responsabilité délictuelle, le comportement fautif (fraude ou négligence) de la personne qui fait la fausse déclaration peut donner lieu à une demande en dommages-intérêts pour fraude ou assertion négligente et inexacte.

La législation couvre certaines transactions définies. La *Loi sur la vente d'objets* autorise l'acheteur à refuser les objets et à se prévaloir de dommages-intérêts lorsque les objets ne correspondent pas à la description qui en a été faite par le vendeur. Selon la *Loi sur la protection du consommateur*, certaines des déclarations faites par le vendeur dans le cadre d'une vente au détail constituent des modalités du contrat qui peuvent, si elles ne sont pas respectées, donner lieu à des dommages-intérêts. De son côté, la *Loi sur les pratiques commerciales*, adoptée en 1990, prévoit un grand nombre de recours pour une multitude de déclarations trompeuses et fallacieuses faites dans le cadre d'une transaction commerciale. La *Loi sur la concurrence* (Canada) prévoit également des recours en dommages-intérêts en cas de déclarations trompeuses faites dans le cadre d'une offre de produits.

BIEN-FONDÉ DE LA RÉFORME

Il s'impose avant tout de clarifier, de rationaliser et de simplifier le droit applicable en matière de déclarations précontractuelles. L'incohérence du droit actuel est attribuable en grande partie au fait que la résiliation (annulation) du contrat est le principal recours que prévoit le droit contractuel. Comme l'attribution de dommages-intérêts se révèle, dans bien des cas, un recours plus approprié, les tribunaux ont été amenés à circonscrire la résiliation à l'intérieur de limites étroites et à envisager d'autres dispositions d'imputation de la responsabilité leur permettant d'attribuer des dommages-intérêts (garanties accessoires ou responsabilité délictuelle). Pour réconcilier la théorie et la pratique et accroître la clarté et la prévisibilité du droit, il faudrait réformer le droit contractuel de sorte qu'il s'éloigne de la résiliation comme moyen de recours et qu'il favorise les dommages-intérêts et le maintien des liens contractuels.

RÉFORME PROPOSÉE

Nous proposons fondamentalement que soit éliminée la distinction conventionnelle entre les modalités du contrat (dommages-intérêts) et les fausses déclarations (résiliation) aux fins du choix des recours et que soient considérées comme des modalités du contrat toutes les déclarations précontractuelles (y compris les modalités du contrat, les fausses déclarations, les déclarations de droit et les autres déclarations pouvant inciter, et incitant de fait, à la confiance). Ainsi, les dommages-intérêts pour rupture de contrat deviendraient le recours principal, dommages-intérêts qui seraient calculés en fonction des effets d'anticipation, du refus d'exécution du contrat ou des deux. Les tribunaux auraient également le pouvoir discrétionnaire d'octroyer des dommages-intérêts calculés suivant une méthode différente, notamment la confiance ou la restitution, lorsque l'exige la justice. La résiliation ne serait pas totalement éliminée. Elle subsisterait comme recours extraordinaire lorsque toute autre mesure d'attribution de dommages-intérêts ne se révélerait pas appropriée.

La réforme proposée élargit la portée des déclarations précontractuelles essentielles et place l'accent sur les dommages-intérêts comme recours principal. Comme ils ne seront plus nécessaires, les recours en responsabilité délictuelle pourront être abolis. Cette réforme ne vise pas à empêcher les parties de choisir leurs propres recours contractuels pour autant que les contrats comportent une disposition expresse en ce sens. Nous recommandons également que soient apportées certaines restrictions à la validité des clauses d'exemption qui visent à soustraire les parties contractantes à leur responsabilité face aux déclarations précontractuelles. Nous recommendons finalement que des modifications soient apportées à la *Loi sur les sociétés en nom collectif*, à la *Loi sur la vente d'objets* et à la *Loi sur la protection du consommateur* afin d'en accroître la compatibilité avec les principales recommandations du présent rapport.

Nos recommandations ne s'appliquent pas aux contrats d'assurance ni aux contrats régis par la *Loi sur les valeurs mobilières*.