

Adequacy of Legal Warranty Plans in Canada

Final Report of the Project
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6226 Saint-Hubert Street
Montreal, Quebec H2S 2M2

Telephone: 514-521-6820
Toll free: 1 888 521-6820
Fax: 514-521-0736

union@consommateur.qc.ca
www.consommateur.qc.ca/union

Union des consommateurs members

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ACQC
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Written by

- Me Marcel Boucher and Me Yannick Labelle

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The masculine is used generically in this report.

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Union des consommateurs, *Strength through Networking*

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (*Associations coopératives d'économie familiale*), *l'Association des consommateurs pour la qualité dans la construction* (ACQC), as well as individual members.

Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households. Union des consommateurs' activities are based on values cherished by its members: solidarity, equity and social justice, as well as the objective of enhancing consumers' living conditions in economic, social, political and environmental terms.

Union des consommateurs' structure enables it to maintain a broad vision of consumer issues even as it develops in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Finally, regarding the issue of economic globalization, Union des consommateurs works in collaboration with several consumer groups in English Canada and abroad. It is a member of *Consumers International* (CI), a United Nations recognized organization.

Introduction

“On le voit, un régime de garantie unilatéralement défini par le manufacturier et contraire à la loi s’est, dans la pratique, imposé comme la norme dans les ventes au consommateur. Un régime conventionnel, moins protecteur des intérêts du consommateur et dont toute référence à la garantie légale, pourtant impérative, est absente, constitue la règle commune entre les parties¹.”

Thierry Bourgoignie

When purchasing goods and services, a consumer cannot be confident unless he is sure the purchase meets certain minimal expectations: adequate operation, reasonable durability, conformity with the description made in the contract or in statements made to him, etc. Consumers dissatisfied with a product used to go the neighbourhood’s general store for a refund or exchange – the personal relations that went hand in hand with commercial relations guaranteed an effort toward mutual satisfaction. Today’s consumer society – featuring mass production, transborder trade, market globalization, depersonalized merchant-consumer relations – closes the door to that easy solution.

Those warranties formerly seemed natural, but legislators have been forced to define them and impose them on merchants. Although Canada’s provincial and territorial legislatures have enshrined legal warranties benefiting consumers, the latter (and often merchants as well) are not aware of the scope of those warranties, or even their existence. In addition, great confusion appears to persist about the various types of warranties on the market.

As explained by Professor Claude Masse:

[...] on doit entendre par le concept de garantie, toute assurance donnée quant au rendement ou à la durabilité d’un produit. Cette garantie est légale lorsqu’elle est imposée par le droit, elle est conventionnelle lorsqu’elle a été déterminée par les parties au contrat de vente ou dans un contrat accessoire².

Despite the explicit intention of some provincial legislatures to assert the legal warranty’s primacy over other forms of existing warranties, consumers are, in some market sectors, strongly induced to acquire an extended warranty, or are led to believe that only the manufacturer’s conventional warranty is available free of charge. According to the Quebec magazine *Protégez-vous*, merchants succeed in selling extended warranties to as many as 40 to 75% of consumers³. In a study conducted in 2007, *Garanties prolongées : Le consommateur en a-t-il pour son argent*, Union des consommateurs concluded:

¹ BOURGOIGNIE, T. *Garanties légales et commerciales liées à la vente de produits de consommation : la confusion des genres*, in *Propos autour de l’effectivité du droit de la consommation*, Cowansville, Éditions Yvon Blais, 2008, pp. 77-78.

² MASSE, c. *Garanties conventionnelles et garanties légales - Une harmonisation difficile mais nécessaire*, 11 *Can. Bus. L.J.* 477 1985-1986, p. 477.

³ DUSSAULT, S., “Une garantie avec ça?,” in *Protégez-vous*, December 2004, Montreal, Canada, p. 30.

[...] le seul avantage véritable dont bénéficiera le consommateur en échange de l'achat de la garantie prolongée consiste, à défaut d'une certitude, en une moins grande incertitude quant à la collaboration du commerçant pour qu'il procède, sans frais, à la réparation d'un produit qui présenterait un problème de fonctionnement attribuable à un vice de matériaux, de main-d'œuvre ou de fabrication, obligation à laquelle il est par ailleurs tenu par la loi⁴.

It would seem that the legal warranty is often incognito in consumer transactions and continues to be ignored when problems arise with the good or service acquired by a consumer – problems that in many cases would be covered by legal warranties. Ignorance of the existence and scope of legal warranties, or consumers' negative perception of legal warranties, are among the factors that may be contributing to the ineffectiveness of this legal protection plan. Merchants' lack of cooperation with attempts to apply the legal warranty, and the obligation of going to court to have the latter honoured – which costs time and money – also appear to be factors that dissuade consumers from depending on the legal warranty, and rather lead them to purchase, at a high price, the relative certainty offered by an extended warranty.

So should we conclude that the legal warranty plans are inadequate?

The present study attempts to assess why consumers are not satisfied with the legal warranty. It will also enable us to answer the following questions: Do legal warranties protect consumers sufficiently? Are they easy enough to apply, or is their applicability illusory or too complicated? What is actually covered by legal warranties? Do foreign jurisdictions have regulatory frameworks that are easier to apply?

Although it discusses legal warranties generally, our study will focus on protections offered in consumer contracts.

After a brief history of legal warranties and putting them in the context of common law and civil law plans, Chapter 2 of our report will draw a portrait of legal warranty plans in Canada: their codification and the objectives set at the time of their establishment will be subjects of interest⁵. We will examine the various protections offered by existing legal warranty plans in consumer affairs, as well as the application of those plans in Canada.

A major part of our research will be an analysis of consumers' perception of legal warranties, on the basis of data collected through a Canada-wide poll and discussion groups held in Quebec and Ontario. Chapter 3 contains an accounting and analysis of those initiatives. The following chapter will report on a survey of governmental consumer protection organizations.

In Chapter 5, our report will examine legal warranty models found in certain foreign jurisdictions, in order to identify the approaches taken to offer consumers protections or methods of application that are more complete or effective.

⁴ DUCHESNE, G. *Garanties prolongées, le consommateur en a-t-il pour son argent?*, June 2007, p. 71. Available on the website of Union des consommateurs. [Online] http://uniondesconsommateurs.ca/docu/protoc_conso/Garanties_prol.pdf (page consulted on April 15, 2012).

⁵ Although an in-depth history of legal warranties would certainly have been interesting, our research will be limited to an overview of their contemporary development.

While keeping in mind the central role of case law in legal warranty plans (under both the common law and civil law), our study did not seek to be exhaustive, but focused on key decisions that have clarified certain aspects of legal warranties and have affected their application.

We also studied general legal warranty plans, while mentioning the existence of specific plans in some Canadian jurisdictions – the used car warranty found in Quebec’s *Consumer Protection Act*⁶, for example. Legal warranties for new and used cars have already been written about several times⁷; we will thus not spend much time on them in this study. Regarding common law provinces, our study of legal warranty plans will be limited to laws directly covering warranties: consumer protection laws and others, such as the *Sale of Goods Act*. Laws governing trade practices – Alberta’s *Fair Trading Act*, for example, which contains provisions, such as those on false representations, that can be applied to warranties – will not be studied here.

Some authors⁸ (and some jurisdictions) opine that a legal warranty plan of general application should include issues of product safety and manufacturer responsibility. Other authors think that ways should be found to make legal and commercial warranty plans associated with consumer contracts more complementary with general safety obligations affecting the public⁹. Given that Canadian legal warranty plans do not incorporate those notions, our study will not address product liability.

Our study will thus pertain to warranties related to the good operation of products. We will also not focus on warranties against the eviction of goods.

⁶ *Consumer Protection Act*, R.S.Q., c. P-40.1: sections 151 to 153 and 176 to 177 concern the warranty for repairs done on a car or motorcycle. Sections 159 to 166 pertain to used car warranties.

⁷ ROUSSEAU-HOULE, T. *Les garanties légales relatives aux automobiles neuves et d’occasion*, 23 v. de D. 823 1982; PAYETTE, L. *La garantie des défauts cachés chez les marchands de voitures usagées*, 11 R.J.T. o.s. 148 1961; BOURGOIGNIE, T. *Garanties légales et commerciales liées à la vente de produits de consommation : la confusion des genres*, in *Propos autour de l’effectivité du droit de la consommation*, Cowansville, Éditions Yvon Blais, 2008; MANIET, F. *Qualité et sécurité des produits de consommation au Québec*, in *Pour une réforme du droit de la consommation au Québec – Actes du colloque des 14 et 15 mars 2005*, dir. by F. Maniet, Claude Masse Foundation, Cowansville, Éditions Yvon Blais, 2005, pp. 107-108.

⁸ PERRET, L. *Les garanties légales relatives à la qualité d’un produit selon la nouvelle Loi sur la protection du consommateur*, 10 Rev. Gen. 343 1979.

⁹ See to that effect the analysis of Professors Thierry Bourgoignie and Pierre-Claude Lafond, in: *La réforme de la Loi sur la protection du consommateur du Québec : Jalons pour un Code de la consommation du Québec*. Montreal, February 1, 2010. Groupe de recherche en droit international et comparé de la consommation, pp. 249-252.

1. HISTORY

1.1 Definitions, Concepts and Origin

Although it may make sense to expect that a product or service we purchase has a reasonable level of quality, performance and durability, that assumption – the very basis of the concept of legal warranty – appears to have foundered on opposing principles for a long time.

And yet, that legitimate expectation has been the object of legislation from time immemorial. Already, in the Babylonian dynasty, over 4,000 years ago, the Hammurabi Code provided an obligation that certain defects be absent when slaves were sold¹⁰. Similar terms prevailed in the Egyptian empire and in ancient Greece¹¹. As we will see in the present section, only during the 1970s did the legal warranty become a pillar of consumer protection plans, by being enshrined in consumer protection legislation, in civil as well as common law. In Quebec, the new provisions of the 1978 *Consumer Protection Act* gave new impetus to such legislation, on the basis of case law derived from regulations of the *Civil Code of Lower Canada*.

We will first study the history of legal warranties under Quebec civil law, and then under Canadian common law.

a) Legal Warranties under Civil Law

Since the advent of the *Civil Code of Lower Canada* (hereinafter the C.C.L.C.) in 1866, the principles of contractual freedom and absolute contractual primacy competed with the principle of contractor protection in matters of warranty. Although C.C.L.C. articles 1506 to 1531 provided contractors some guarantees, the protection measures offered by those provisions appeared nullified by other provisions that, justified by contractual freedom dogma, allowed one party, such as a merchant, to free itself from any liability and set aside legislated protections.

It should first be noted that the C.C.L.C.'s legal warranties, which only applied to the sale of an item, had a rather narrow scope. Apart from a guarantee against eviction of the item, there was no guarantee against its hidden defects¹². C.C.L.C. article 1507, which stated that "Legal warranty is implied by law in the contract of sale without stipulation," also allowed the parties to add to the legal warranty, but also to reduce or completely exclude such guarantees contractually, through what were commonly known as explicit warranty disclaimer clauses¹³. The law also stated affirmed that legal warranties had a suppletive nature that must be overruled by clauses in the contract between the parties.

¹⁰ JEFFREY, E., *La garantie de qualité du vendeur en droit québécois*. Wilson et Lafleur, Montreal, 2008, p. 28.

¹¹ *Ibid.*

¹² Sec. 1506 of the *Civil Code of Lower Canada* [hereinafter C.C.L.C.]

¹³ POUPART, F., *Les garanties relatives à la qualité d'un bien de consommation*, 17 R.J.T. n.s. 234 1982-1983, p. 235.

The guarantee against eviction required the seller to guarantee the buyer against “eviction of the whole or any part of the thing sold, by reason of the act of the former, or of any right existing at the time of the sale, and against encumbrances not declared and not apparent at the time of the sale¹⁴.” Articles 1510 and 1511 stipulated that no agreement could free the seller from a “warranty against his personal acts,” unless the buyer had known the danger of eviction and made the purchase at his own risk.

The C.C.L.C.’s warranty against hidden defects is of greater interest to us:

1522. The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

However, this warranty against hidden defects had the same shortcomings as the warranty against eviction: article 1524, which indicates that the seller is liable for hidden defects even if he was not aware of them, also stipulated that the legal warranty could be set aside contractually and the seller thus exempted from any obligation¹⁵.

Essentially, the C.C.L.C.’s plan for legal warranties against hidden defects was presented in articles 1522 to 1531 and only imposed on the seller an obligation to guarantee to the buyer that no defect, known or unknown to the seller, would make the thing unfit for use or would drastically limit its usefulness. Under article 1523, this warranty did not apply if the defect was apparent or if the buyer knew of its existence beforehand.

If a good was affected by a hidden defect, the buyer had the option to return it and be refunded the price and expenses incurred by the sale (redhibitory action), or to keep it and receive part of the price (estimatory action)¹⁶. A seller who knew the item’s defects (or was presumed to know them) could also be required to pay damages¹⁷.

To bring an action successfully, a consumer/buyer had to be able to prove the defect and its hidden nature, in addition to proving that the defect made the thing unfit for use or would drastically reduce its usefulness. To obtain damages, he also had to establish that the seller was aware of the defect (unless a legal presumption applied). But how was a hidden defect identified under the C.C.L.C.? “En résumé, le vice doit être suffisamment grave pour compromettre l’usage ou l’utilité de la chose de façon appréciable, il doit aussi être antérieur ou concomitant à la vente, non apparent et inconnu de l’acheteur¹⁸.”

To apply the warranty, the first criterion of C.C.L.C. article 1522 was that the defect be sufficiently serious to make the item unfit for its intended use or to so reduce its usefulness that the buyer, had he known of the defect’s existence, would not have purchased the product or would not have paid so high a price. This is not a matter of law, but a matter of fact, and its appreciation is left to the discretion of the parties and, ultimately, of the court. There is

¹⁴ Art. 1508 C.C.L.C.

¹⁵ Art. 1524 C.C.L.C.

¹⁶ Art. 1526 and 1528 C.C.L.C.

¹⁷ Art. 1527 C.C.L.C.

¹⁸ POUPART, F., *Op. cit.*, note 13, p. 236.

substantial case law regarding a defect's serious nature (particularly in the automotive sector¹⁹), which clearly illustrates the extent to which each case could be unique. The second criterion was that of the moment when the defect existed. The legal warranty's application required the defect to be present at the time that the sale contract was concluded. This is an application of the *res perit domino* rule that the owner of the good bears the risks of its deterioration as soon as he acquires its ownership. "Le facteur temps, [...] joue ici un rôle prépondérant car, plus le recours de l'acheteur s'exercera tardivement, plus il deviendra difficile de démontrer que le vice existait lors de la vente²⁰." The third criterion: the defect must neither be apparent nor known to the buyer.

By "a defect that is apparent or known to the buyer" is meant any defect that the latter could have detected during an ordinary examination. Court decisions added some clarifications... or some confusion: an apparent defect is a defect that a prudent and normal person would have detected in examining the item carefully before acquiring it²¹. Moreover, in relation to the criterion of apparent defects, there was a case law debate as to the necessity of consulting an expert. According to Fernand Poupart, under the C.C.L.C. "[...] particulièrement en matière d'immeuble, on soutient souvent qu'un défaut perd son caractère de vice caché s'il peut être découvert par un expert²²." In the real estate sector, the criterion of examination by an expert was often retained, given the substantial amounts spent in such transactions, and given the privilege constituted by purchase of a building²³; in such cases, it was considered negligent not to have an expert conduct an examination. This practice of retaining the expert criterion eventually spread to the sale of used cars. As Claude observed, "Même dans le cas de contrat de vente de quelques centaines de dollars, un courant jurisprudentiel s'est mis à exiger que l'acheteur démontre que le vice du véhicule au moment de la vente aurait été caché même aux yeux d'un expert²⁴."

This criterion of expert examination could obviously have a major effect on the defect's characterization. Despite the clear text of C.C.L.C. article 1523, which specifies that the buyer himself must be aware of the apparent defect's existence for the seller not to be liable – with no reference to any necessity to consult an expert – the courts nevertheless established many times that the seller could be freed from his warranty obligation if the defect could have been apparent to an expert, if the buyer had hired one who could have informed him of the defect's existence²⁵. This case law trend, which imposed in consumer contracts a burden and consequences that were disproportionate, clearly put the consumer at a disadvantage in relation to the merchant and increased the existing imbalance between parties.

¹⁹ For a complete list of decisions rendered, see Fernand Poupart's text, *Les garanties relatives à la qualité d'un bien de consommation*, pages 236 and 237.

²⁰ POUPART, F., *Op. cit.*, note 13, p. 239.

²¹ *Ibid.* Poupart draws a list of court decisions regarding the definition of the term "apparent defect." A few of those decisions are: *Bourget v. Martel*, [1955] B.R. 659; *Benoît v. Métivier et al.*, [1948] C.S.53; *Latour v. Pagé et Fils Ltd.*, [1956] C.S. 153.

²² *Ibid.*, p. 240.

²³ MASSE, C., *La responsabilité du constructeur et du vendeur de maison d'habitation au Québec*, 12 R.J.T. 419 (1977).

²⁴ MASSE, C., *Op. cit.*, note 2, 11 Can. Bus. L.J. 477 1985-1986, p. 484.

²⁵ The latest court decisions on the subject are: *Levine v. Frank W. Horner Ltd.*, [1962] R.C.S. 343; *Perron v. Morin et al.*, [1957] R.L. 522 (C.S.); *Dallaire v. Villeneuve*, [1956] B.R. 6.

As the author Poupart points out:

[L]e maintien de cette exigence serait contraire à l'esprit du Code civil, comme l'ont souligné certains auteurs. [...] la doctrine française et québécoise appuie généralement la jurisprudence qui opte, non pas pour une notion objective de vice caché établie en fonction d'un petit groupe d'experts mais bien pour une notion relative fondée sur le concept de l'acheteur moyen ordinaire, parce que plus en harmonie avec la présomption de bonne foi qui doit présider aux transactions commerciales normales et plus favorable à la bonne marche des affaires²⁶.

The primacy of the contract over legal warranties, under the C.C.L.C. and the dogma of contractual freedom, eventually came to be questioned by the courts, particularly in consumer disputes, after a slow evolution of over 120 years. According to Professor Claude Masse:

[L]es tribunaux québécois semblent avoir prêté une oreille compatissante aux réclamations d'un nombre grandissant de consommateurs et considéré de plus en plus le contrat de consommation comme une fiction qui ne doit pas enlever au contractant réputé le plus faible ses droits fondamentaux²⁷.

So one small step at a time, the courts attempted to establish a balance between consumer and merchant. Recognizing that the contractual principles of the *Civil Code of Lower Canada* were incompatible with current realities of consumer issues, the courts adopted in consumer disputes a position further and further removed from those principles, and lightened the heavy burden of proof incumbent on consumers wanting to prove a defect's hidden nature. Those legal warranty rulings under Quebec law also influenced the law prevailing in other provinces, particularly of course when the rulings were made by the Supreme Court of Canada.

The courts' key role before the advent of the 1978 Consumer Protection Act

The courts' role in the legal warranty's evolution under civil law was crucial. After many recriminations by consumers discouraged by the heavy burden they had to bear under the C.C.L.C. when bringing actions arising from hidden defects, the courts, notably based on the presumption of the merchant's knowledge of the defect as mentioned in C.C.L.C. article 1527, came to interpret the legal warranty provisions so as to increase consumer protection. This case law evolution may be divided into three main eras²⁸. It is ironic that many of the rulings we will cite, which led to important case law debates, concern soft drink manufacturers. The disputes bubbled over!

²⁶ POUPART, F., *Op. cit.*, note 13, p. 244 and following.

²⁷ MASSE, C., *Op. cit.*, note 2, p. 478.

²⁸ Author Fernand Poupart, in *Les garanties relatives à la qualité d'un bien de consommation (Op. cit.*, note 13, pages 247 to 258), wrote an excellent history of case law with respect to legal warranties from the coming into effect of the Civil Code of Lower Canada in 1866 to the enactment of the new Consumer Protection Act in 1971. For the purposes of our research, we are borrowing his categorization of that case law.

1866: The Civil Code of Lower Canada comes into effect and the Supreme Court of Canada issues the Ross ruling

The era preceding the adoption of the *Civil Code of Lower Canada* was marked by divergent interests, i.e., those of English-speaking merchants (and of some settlers) wanting to make the Lower Canada colony favourable to trade, and those of local farmers wanting a predominant position²⁹. The adoption of the C.C.L.C., based on the principles of contractual freedom and primacy, was intended to support economic liberalism and capitalism. The researcher Cristina Nitu summarizes as follows the devastating effect of the C.C.L.C.'s codification on essential aspects of consumer protection:

Malgré les avantages de la codification, les dispositions du code ont écarté des principes de valeur sur lesquels repose aujourd'hui la protection du consommateur en affirmant, entre d'autres, le caractère subjectif de la faute et la non-reconnaissance de la théorie du risque et en supprimant le principe de la lésion entre majeurs en faveur de la liberté absolue. L'affaiblissement du contrôle judiciaire sur les clauses pénales, l'introduction du pacte compromissaire ainsi que la limitation conventionnelle de la garantie pour des vices cachés sont allés dans le même sens³⁰.

Under the C.C.L.C., consumer protection by means of legal warranties thus proved very arduous. Here are a few examples of difficulties imposed on consumers by the legal approach that prevailed.

In two cases, in 1902 and 1916, the court applied the tort liability rules when consumers brought an action against a manufacturer³¹. One case concerned the explosion of a soft drink bottle, and the other a consumer's ingestion of a pin that was in a bottle of beer³². In both cases, the court ruled that for the manufacturer's liability to apply, the plaintiff was obliged to prove the manufacturer's fault, i.e., the exact cause of the accident. This case law approach held sway until the Supreme Court of Canada, in 1921, in the *Ross v. Dunstall* case³³, established new parameters.

In that case, two consumers, Dunstall and Emery, sued Ross, the manufacturer who had put on the market rifles whose initial cleaning – necessary to remove the oil covering the weapon – required the bolt's parts to be removed. However, the manufacturer had not provided reassembly instructions or cautions about the danger of using the rifles if the bolt's parts were inadequately reassembled. Both users, wounded at the first use of the rifle, sued the manufacturer for negligence and pleaded that the rifles were affected by a hidden defect. The Superior Court opined that the accident had not been caused by any defect in materials or workmanship, but rather by a defect in the bolt's model and mechanism. After declaring that “indépendamment de toute responsabilité contractuelle, la vente publique d'une arme affectée

²⁹ NITU, C., *L'autonomie du droit de la consommation*, Master of Laws dissertation, July 2009, Université du Québec à Montréal, p. 81.

³⁰ *Ibid.*, p. 81.

³¹ Article 1053 of the C.C.L.C. stated that “Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.”

³² *Guinea v. Campbell*, (1902) 22 C.S.527; *Galardo v. Landes*, (1916) 22 R.L.n.s. 199 (C. Rev.).

³³ *Ross v. Dunstall and Emery*, (1921) 62 R.C.S. 393, p. 396.

de ce vice constitue un quasi-délit dont l'auteur est responsable du dommage qui peut en résulter³⁴,” the Superior Court awarded damages of \$11,060 to the plaintiff Dunstall and \$10,000 to the plaintiff Emery. The manufacturer Ross appealed the decision to the court of first instance, which maintained the decision, while reducing the amount of damages, which it deemed excessive³⁵.

Ross decided to appeal before the Supreme Court of Canada. The country's highest court, focusing on the issue of liability, dismissed Ross's appeal with costs. It declared that “*a manufacturer is responsible if he negligently manufactures and puts into circulation a mischievous thing which is or may be a trap to people using it*”³⁶.

This supreme Court decision also stated the principle that a manufacturer is obliged to take reasonable measures to inform users about any danger posed by the product it puts to market, whether or not that danger results from a defect of the product:

*The failure of the appellant to take any reasonable steps to insure that warning of the latent danger of the misplaced bolt-whether it did or did not amount to a defect in design-should be given to purchasers in the ordinary course of the sporting rifles which he put on the market in my opinion renders him liable to the plaintiffs in these actions. His omission to do so was a failure to take a precaution which human prudence should have dictated and which it was his duty to have taken and as such constituted a fault which, when injury resulted from it to a person of a class who the manufacturer must have contemplated should become users of the rifle, gave rise to a cause of action against him*³⁷.

Countering the era's prevailing doctrine, the Court was also recognizing the possibility of cumulating contractual (C.C.L.C. 1522) and tort (C.C.L.C. 1053) remedies³⁸. Essentially, in this ruling the Court applied civil law principles of liability. But it implied, for the first time, that there may well exist a direct contractual law relationship between a product's manufacturer and buyer, even if there is no contract binding the two parties. It was not until the 1970s, with the Peugeot and Kravitz rulings, that the courts clarified this issue.

1920 to 1973: the Peugeot ruling

The case law trend following the *Dunstall* ruling led to “une interprétation différente de la notion de faute et à l'élaboration d'un régime de présomptions de fait en faveur de la victime³⁹.” The burden of proof regarding manufacturer liability was lightened. In the *Ferstendfeld v. Kik Co.* case⁴⁰, concerning injuries caused by the explosion of a soft drink bottle, the Court had required, as proof of defect, a demonstration that the product had been delivered to the consumer in the same condition as on its exit from the factory; but the Superior Court deemed,

³⁴ *Dunstall v. Ross*, Q.R. 58 S.C. 123.

³⁵ *Ross v. Dunstall*, Q.R. 29 K.B. 476.

³⁶ *Ross v. Dunstall and Emery*, (1921) 62 R.C.S. 393, p. 396.

³⁷ *Ibid*, p. 399.

³⁸ *Ibid*, p. 396.

³⁹ POUPART, F., *Op. cit.*, note 13, p. 249.

⁴⁰ *Ferstendfeld v. Kik*, (1939), 77 C.S. 165.

a few years later in another case involving soft drink bottles, that the manufacturer was liable because it had been negligent in not inspecting the bottles prior to their use⁴¹.

As Poupart explains:

Alors que, dans la cause précédente, on avait exigé la démonstration par le demandeur que les défendeurs avaient commis un acte fautif, on conclut plutôt ici que la bouteille était défectueuse, d'où l'éclatement, et qu'il appartenait dès lors au fabricant du bien de démontrer qu'il avait pris tous les moyens nécessaires pour éviter qu'une telle bouteille soit mise sur le marché⁴².

Another wave of decisions thus established the manufacturer's obligation to inform buyers and users about the dangers of using the products sold⁴³, and to show prudence and diligence in manufacturing its products and putting them to market⁴⁴.

In that context, the Court of Queen's Bench ruled in the *Gougeon v. Peugeot Canada Ltd.* case⁴⁵. Based on the legal warranty plan of articles 1522 and following of the *Civil Code of Lower Canada*, the Court of Appeal clearly recognized, for the first time, the possibility for a buyer to directly sue the manufacturer because of a hidden defect, despite the absence of a direct contractual relationship between them, thus declining to apply the privity of contract principle. As will be seen below, this measure would become widespread in the following years, and would be implemented in the consumer protection laws of provinces and territories. After the tortuous development of case law in matters of legal warranty, particularly regarding the manufacturer's liability for hidden defects, the Peugeot decision's restriction of the privity of contract principle was condemned by the era's authors:

[L]a doctrine a critiqué l'arrêt Peugeot. Même si on admettait d'emblée les avantages et l'efficacité d'un recours en garantie direct contre le fabricant, on avait de la difficulté à le justifier juridiquement en l'absence d'un contrat de vente, l'obstacle majeur demeurant toujours le principe de l'effet relatif des contrats puisqu'on estimait que les règles des articles 1522 et ss. C.c. avaient été "conçues uniquement dans la perspective de la relation acheteur vendeur⁴⁶."

Despite this opposition to the case law trend that was emerging, the courts later further restricted the privity of contract principle. In 1979, the Supreme Court of Canada's decision in the *Kravitz* case would shake up civil law for good, along with this newborn field of consumer law.

⁴¹ *Richard v. Lafrance*, [1942] C.S. 280.

⁴² POUPART, F., *Op. cit.*, note 13, p. 250.

⁴³ See in this regard the ruling *Gagnon v. Canadian Tire Corp. Ltd.*, [1979] C.P. 251.

⁴⁴ POUPART, F., *Op. cit.*, note 13, p. 251.

⁴⁵ *Gougeon v. Peugeot Canada Ltd. et al.*, [1973] C.A. 824.

⁴⁶ POUPART, F., *Op. cit.*, note 13, p. 254.

The Kravitz ruling (1979): upheaval of the principles of the Civil Code of Lower Canada

The most important principle stated in the *Kravitz* ruling⁴⁷ is the acquirer's subsequent right to sue a defective good's seller as well as its manufacturer for violating the legal warranty against hidden defects.

The facts of the *Kravitz* case are as follows. On November 8, 1967, a consumer, Kravitz, bought a new Oldsmobile car from the authorized dealer Plamondon. Upon delivery of the vehicle, Kravitz was confronted with defects which Plamondon, despite several attempts, was not able to correct. The manufacturer, GM, was informed of Kravitz's difficulties. In October 1968, still dissatisfied with the vehicle's performance, Kravitz returned it to the dealer and sued the dealer and the manufacturer for violating the warranty against hidden defects that was provided under the C.C.L.C. Kravitz's redhibitory action against the seller and the manufacturer was heard by the Superior Court, and the latter's decision was upheld by the Court of Appeal. The manufacturer GM appealed before the Supreme Court of Canada and raised the following question: what is the scope of a car manufacturer's liability toward a person who has purchased it from a dealer, in the event that the car had a hidden defect?

The Supreme Court considered the following three aspects relevant to its analysis: 1) the warranty disclaimer clause provided in the sales contract between the dealer and Kravitz, 2) the provisions of GM's conventional warranty, and 3) the legal warranty covering the good sold by the manufacturer to the dealer. Concluding that the manufacturer GM's warranty liability applied, the Court deemed it unnecessary to rule on the two other aspects.

The Supreme Court's reasoning may be summarized as follows: the contract privity principle recognized in C.C.L.C. article 1023 ("Contracts have effect only between the contracting parties; they cannot affect third persons, except in the cases provided in the articles of the fifth section of this chapter.") is itself relative, given that articles 1028 to 1031 (Section V: Of the effect of contracts with regard to third persons) provided different rules whether a right or an obligation was involved. Thus, "In light of this principle of the transfer of rights that are identified with the thing or accessories thereto, it must be said that the warranty against latent defects is owed not only to the immediate purchaser, but also to any subsequent purchaser of the thing⁴⁸."

For the first time, the Supreme Court of Canada was recognizing that the buyer has a legal warranty remedy directly against the manufacturer by the sole effect of the law, because the warranty was related to the good. Based on the presumption of knowledge in article 1527⁴⁹, the Court was also recognizing a certain primacy to the C.C.L.C.'s legal warranty, by establishing that neither the manufacturer nor the seller may invoke their conventional warranty's limitation of liability clauses in order to evade their obligation to guarantee a product against hidden defects. The Court went even further: it jointly and severally sentenced the manufacturer GM and the dealer Plamondon to pay damages and reimburse Kravitz.

⁴⁷ *General Motors Products of Canada Ltd. v. Kravitz*, [1979] 1 R.C.S. 790.

⁴⁸ *Ibid.*, pp. 813 to 814.

⁴⁹ *Ibid.* The Court explained: "*The Code does not specify to whom this presumption should apply. However, the jurists and the courts both agree that the professional seller dealing in similar goods and the seller-manufacturer both fall under the presumption. Neither one may be ignorant of the defects of the things they manufacture or in which they are dealing; because of their trade they are equated with the seller who is aware of the defects of the thing sold, and their liability is the same as his [...]*"

Unprecedented as this decision was, it had only a limited impact on consumer disputes, because the new *Consumer Protection Act*, adopted in 1978, came into effect in April 1980.

In concluding this brief analysis of case law, we quote Claude Masse's reminder of the problems of interpreting the legal warranty:

[...] les garanties légales du Code civil ne sont ni précises ni faciles d'application. En fait, un examen attentif des décisions rapportées depuis 20 ans en cette matière nous permet de croire que la majorité des poursuites intentées sur la base des seules garanties légales pour vices cachés du Code civil ont échoué en raison du caractère imprécis du principe que l'on retrouve à l'art. 1522 du Code civil et des nombreuses conditions de preuve imposées à l'acheteur⁵⁰.

It took almost 113 years for the courts to interpret the provisions of the *Civil Code of Lower Canada* in a manner favourable to consumers and protecting the weaker contractor by guaranteeing him a certain possibility to exercise his rights and recourses. To facilitate the implementation of the legal warranty plan according to court rulings, legislation was necessary specifically for legal warranties in consumer contracts.

The Quebec government's timid approach in its 1971 *Consumer Protection Act* barely regulated legal warranties. But the outcries of jurists, professors, stakeholders and consumer rights associations appear to have attracted the legislators' attention. So a new *Consumer Protection Act* was adopted. It provided not only new regulations for conventional warranties, but also a new legal warranty plan for consumer contracts. That plan aimed at eliminating application difficulties and clarifying the concepts of the C.C.L.C.'s legal warranty system.

Interventionist legislation

The first consumer protection law came into effect in Quebec in 1971. That law disappointed consumer associations because of its narrow application: it only covered credit agreements and sales made by itinerant merchants. A host of consumer problems denounced by those associations were thus unresolved⁵¹. Before passage of the law, a common front of three consumer associations had proposed 74 amendments to Bill 45, which instituted the new *Consumer Protection Act* and created the Office de la protection du consommateur⁵².

Despite the reproaches against it, the 1971 law contained several innovations: the right of revocation granted to consumers for certain contracts, regulation of door-to-door selling, and regulation – albeit minimal – of advertising. The legal warranty was nonexistent in the 1971 law, which regulated warranties only sporadically, by obliging merchants to honour the warranties they advertised⁵³, by regulating clauses disclaiming or limiting conventional warranties⁵⁴, and by regulating situations where a third party would apply the conventional warranty⁵⁵. Finally, the

⁵⁰ MASSE, C., *Op. cit.*, note 2, p. 482.

⁵¹ RADIO CANADA, *Consommateurs avertis!*, broadcast of December 10, 1970, [Online] http://archives.radio-canada.ca/c_est_arrive_le/07/14/4831/ (page consulted on May 3, 2012).

⁵² *Ibid.*

⁵³ Sec. 62, *Consumer Protection Act*, S.Q.1971, c. 74 [hereinafter the CPA of 1971].

⁵⁴ Sec. 63, CPA of 1971.

⁵⁵ Sec. 64, CPA of 1971.

1971 law required merchants to write in the sales contract the use that the consumer intended for the product, if he asked such a statement to appear in the contract⁵⁶. By writing that statement in the contract, the merchant was presumed to guarantee that the product could be used in the way intended by the consumer. To benefit from that warranty, the consumer still had to be aware of his right to have that mention written in the contract and to benefit from the mention.

Taking into account the many court decisions on legal warranties in Quebec, and the difficulties faced by consumers wanting the C.C.L.C.'s general regime of legal warranties against hidden defects to be applied, in 1977 the government of René Lévesque introduced Bill 72, which aimed to replace the entire 1971 *Consumer Protection Act*⁵⁷. That bill introduced almost all the provisions of the specific plan for legal warranties in consumer contracts that exists today in Quebec.

At the 1979 Henri Capitant Convention, Paul-André Crépeau, Director of McGill University's Institute of Comparative Law, described as follows the necessity of a statutory law, given that the old *Civil Code* could not deal with consumer problems arising in the era of industrialization and mass consumption:

Une loi dite statutaire veut, au contraire, répondre à un besoin particulier, régler une situation ponctuelle, combattre un mal aigu. Et cela souvent par des moyens draconiens, des mesures exceptionnelles qui, de ce fait, peuvent bouleverser le régime de droit commun sans que, pour autant, l'on s'en inquiète, et surtout lorsque le droit commun accuse un net retard par rapport aux politiques sociales dominantes.

Et c'est, je crois, dans cet esprit, que, face au Code civil plus que centenaire, l'on peut considérer la Loi de protection du consommateur de 1971, l'Avant-Projet de Loi sur la protection du consommateur de 1977 et la Loi no 72 sur la protection du consommateur de 1978⁵⁸.

The new provisions that came into effect in 1980 would transform the legal community's perception of consumer contracts, and establish more of a balance of power between consumer and merchant, by protecting the rights and recourses of the more vulnerable party, i.e., the consumer. Crucially, the legal warranty was provided by a law of public order, it could not be disclaimed contractually, and the consumer could not waive it. The law therefore infringed on key principles of civil law, notably contract privity and contractual freedom. Professor Claude Masse summarizes the warranty provisions as follows:

C'est en 1978, avec l'adoption d'une loi fort ambitieuse que le législateur québécois est entré de plain-pied dans le secteur des garanties légales et conventionnelles en matière de consommation. Cette loi traite de ces deux types de garanties. Dès la mise en vigueur du dispositif, le 30 avril 1980, l'Office de la protection du consommateur du

⁵⁶ Sec. 61, CPA of 1971.

⁵⁷ The *Draft Bill for the Consumer Protection Act* was tabled in the National Assembly by the ministre des Consommateurs, coopératives et institutions financières, Ms. Lise Payette, on December 21, 1977 (Journal des débats de l'Assemblée Nationale, 1977, p. 5107). *Draft bill Op. Cit., 72 on Consumer Protection*, Le Journal des débats de l'Assemblée Nationale, 1978, p. 2997.

⁵⁸ CRÉPEAU P.-A., *Le droit civil et le droit de la protection du consommateur*, REVUE GÉNÉRALE DE DROIT, 1979, p. 14.

Québec est devenu l'organisme le mieux outillé au Canada pour intervenir dans ce secteur. [...] Une première conclusion s'impose à l'examen des dispositions de la Loi sur la protection du consommateur portant sur les garanties légales : elles visent d'abord à clarifier les ambiguïtés soulevées par l'application de la garantie légale pour vices cachés de l'art. 1522 C.c. et à faciliter les conditions d'exercice de ce recours. Qu'on en juge :

1. La garantie légale reconnue au consommateur par la nouvelle loi est fondée sur le concept de vices cachés, le même que celui que l'on retrouve au Code civil, mais les conditions d'exercice du recours sont facilitées:
 - l'exigence de l'expert est écartée, seul un examen ordinaire suffit;
 - il y a une présomption d'antériorité du vice si le bien qui fait l'objet du contrat ne peut servir à l'usage auquel il est normalement destiné ou s'il ne peut servir à un usage normal pendant une durée raisonnable, compte tenu du prix, des dispositions du contrat et des conditions d'utilisation du bien;
 - le délai d'action est déterminé de façon précise : il est d'un an à partir de la naissance de la cause d'action pour vices cachés, en fait à partir de la découverte du vice.
2. La prédominance de la garantie légale sur la garantie conventionnelle est affirmée. La garantie légale possède un caractère d'ordre public.
3. La loi reconnaît le principe du recours direct du consommateur et de l'acquéreur subséquent contre le manufacturier du bien. [...]
4. Le commerçant et le manufacturier d'un bien sont présumés connaître le vice de ce bien. [...]
5. Le consommateur peut opter pour le recours de son choix et le recouvrement de dommages appropriés. [...]⁵⁹

We will further analyse below Quebec's current legal warranty plan. Meanwhile, the following is a brief analysis comparing the new regime introduced in 1978 with the general warranty regime found in the *Civil Code of Lower Canada* in effect since 1866.

We note first that the *Consumer Protection Act*, like the former Civil Code, includes and clarifies the warranty against eviction of a product:

36. *A merchant transferring the ownership of goods to a consumer by way of a contract must free such goods from every charge or encumbrance in favour of a third person, or declare the existence of such charge or encumbrance at the time of the sale. He is bound to discharge the goods of every surety-bond, even declared, unless the consumer has assumed the debt so secured.*

The changes introduced by the new law of 1978 are substantial. First, as mentioned above, the legal warranty is now governed by a law of public order.

⁵⁹ MASSE, C., *Op. cit.*, note 2, pp. 486-487.

The legal warranty plan of the 1978 *Consumer Protection Act* (CPA) provides:

1. general rules for legal warranties and conventional warranties (34 to 54 CPA);
2. specific laws for automobile and motorcycle sales (151 to 154, 159 and 166 CPA) and
3. rules for household appliance repairs (186 CPA)⁶⁰.

The most important novelty is that the legal warranty, in terms of consumer contracts, has a much broader scope: it is applicable to all sales and rental contracts, with cash or credit payment, that concern a good or service and are concluded between a merchant and a consumer (2 and 34 CPA). CPA section 35 specifies that the warranties provided by the Act constitute a minimal threshold. It is no longer possible to reduce or exclude the legal warranty by contractual means (35, 261 and 262 CPA).

Whereas the Civil Code only mentioned hidden defects making an item unfit for use or reducing its usefulness to the extent that had he known them, the acquirer would not have purchased the item or paid the requested price, the CPA requires that the item can serve for a reasonable period the purpose for which it is normally intended (37 and 38 CPA). A good or service must also comply with the contract and with any representation made by the merchant (seller, manufacturer, etc.) or in advertisements (40 to 42 CPA). Barring explicit mention by the merchant, spare or repair parts must be available for a reasonable period (39 CPA).

The CPA, without being encumbered by the reasoning that justified the court in the *Kravitz* decision (transfer of product-related rights to a subsequent acquirer), creates, for the exercise of a recourse based on warranties of use, durability, parts availability, or against hidden defects, an explicit legal bond between the manufacturer and a subsequent acquirer (53 and 54 CPA⁶¹).

A contracting consumer may, under those same provisions and for those same remedies, bring an action directly against the merchant or the manufacturer.

Rather than create a framework for the presumption that the merchant is aware of the defect, section 53 simply removes this issue from the equation: “53. [...] *The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.*” However, according to some authors, this clarification means that any merchant, expert or not, is presumed to be aware of the defect, so that the presumption would even be irrefragable⁶².

It is easy to conclude that the CPA attempted to explicitly include the necessary texts in order to avoid the difficulties encountered under the C.C.L.C.’s legal warranty system, thus enshrining in the legislation many case law developments: for example, section 54 mentions a possible “*recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination,*” thus removing any requirement to call upon an expert, or any defence that an expert could have detected the

⁶⁰ As mentioned in the introduction, particular legal warranty plans, i.e., rules for auto sales and household appliance repairs will not be examined in the present study.

⁶¹ Section 53 adds a clarification that appears taken directly from the conclusions of the ruling *Ross v. Dunstall and Emery* (summary on page 16, above), by explicitly including among hidden defects “a lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware.”

⁶² POUPART, F., *Op. cit.*, note 13, p. 263.

defect and advised the customer, or that a prudent customer would have called upon an expert...

Moreover, although the 1978 law affirmed the legal warranty's primacy, its section 35 specifies that "A warranty provided in this Act does not prevent the merchant or the manufacturer from offering a more advantageous warranty to the consumer"⁶³.

As we will see below, the warranty regime established in 1978 would receive a few modifications in the 1990s and 2000s, but it has remained essentially the same.

b) The Common Law and Legal Warranties

Under the common law, the legal system adopted in England during the Middle Ages, the legal warranty results from abundant case law. The common law's legal principles spread throughout the British Empire through colonialism, and it has since been the legal system in the United Kingdom and in a good number of former British colonies. Only in 1893 did England decide to enshrine – in the first *Sale of Goods Act*⁶⁴ – common law principles for sales and contracts. The objectives of that codification were to create uniformity among practices and contractual rules throughout the British Empire and to make contractual law more predictable.

Under the common law, two types of civil liability pertain to warranties: "law of tort" and "contractual law." Law of tort liability arises from negligence. It is applicable when the seller made a "negligent misrepresentation." The concept of "warranty" developed by the courts applied to declarations or other representations that constituted, according to the will of the parties, a commitment. The courts interpreted "warranties" as accessory to contracts⁶⁵. Some authors see in this an attempt by the courts to treat the content of contracts differently from sales arguments:

*to distinguish statements which could be constructed as contractual promises (for example, that particular horse, which the representor was selling, was sound) from others which were designed only to influence a purchaser towards buying, that is, non-contractual promises, or "mere" representations (for example, that there was already market for articles of the sort that the seller was selling)*⁶⁶.

In parallel, the courts also developed the concept of "condition", which refers to "requirements which had to be satisfied in order to produce a binding contract⁶⁷." As the author Fridman indicates:

[...] another use of the expression [condition] arose in and out of the cases on sale of goods which involved problems relating to the character or quality of goods, particularly cases involving the sale of goods by description. It emerged that a statement as to the

⁶³ This is what section 1508 C.C.L.C. also provided: "Nevertheless the parties may, by special agreement, add to the obligations of legal warranty," while adding, as we have seen, something now prohibited by the CPA: "or diminish its effect, or exclude it altogether."

⁶⁴ The Sale of Goods Act 1893 (56 & 57 Vict. c.71).

⁶⁵ *Oscar Chess Ltd. v. Williams*, [1957] All E.R. 325, par. 328 (C.A.).

⁶⁶ FRIDMAN, G., *The Sale of Goods in Canada*, p. 142.

⁶⁷ *Ibid.*, p. 143.

nature of the goods, by statement which made a contract of sale of goods a sale of goods by description, as a result of which a failure to deliver goods of such description was a breach of contract which entitled the buyer to reject the goods and regard the contract as repudiated by the seller⁶⁸.

There thus appeared, as it still exists in the common law, a recognition that, in the context of a sale by description, it was fundamental that the seller deliver a specific good, conforming with the various elements of that description, failing which the buyer either could refuse to pay or could be reimbursed if he had already paid, given that the contract was considered broken by the seller. The terms describing sales by description were henceforth considered a fundamental element of the contract, a “condition” for including all the essential elements of a contract – “terms of a valid contract which were regarded as so essential or fundamental as to entitle the buyer to treat the contract as repudiated if they were broken⁶⁹.”

To increase the predictability of contractual law and harmonize existing law throughout the British Empire, the first *Sale of Goods Act* was adopted, and was substantially introduced in Canada by statutory means.

To avoid redundancies, we will omit in the present section an exhaustive analysis of common law “warranties” and “conditions” enshrined in Sale of Goods Acts. We return to the subject in section 2.2 b).

⁶⁸ *Ibid.*, p. 144.

⁶⁹ *Ibid.*

2. Legal Warranty Plans in Canada

2.1 Canadian Plans: Scope, Content and Implementation

As a civil law matter, consumer contracts are constitutionally under exclusive provincial jurisdiction in Canada⁷⁰; the provisions of provincial laws will therefore be studied in the present section. However, it should be noted that federal laws provide warranties that benefit consumers in certain consumer transactions – warranties that mainly pertain to product safety⁷¹. Given that our study does not pertain to this type of warranties, we will not discuss them further.

All Canadian provinces except Quebec have almost uniform laws – Sale of Goods Acts – in ordinary sales law; those laws mirror the *Civil Code of Québec*'s Chapter I: *Sale*, of Title Two: *Nominate Contracts* (articles 1708 to 1805). It is interesting to note that internationally, several common law jurisdictions also use the British *Sale of Goods Act* as a model for governing sales law. Moreover, the majority of Canadian jurisdictions also have statutory laws, such as consumer protection laws, some of which regulate legal warranties. Given that certain legal warranty systems apply only to sales or rental contracts, services are in those cases subject to the provisions of the general plan found in the *Sale of Goods Act*. In addition, some provinces have not introduced legal warranties in their consumer protection laws. Certain provisions for commercial practices are still likely to apply; notably, provisions governing false representations.

In the following paragraphs, we will examine the legal warranty plan in the following three systems: civil law in the province of Quebec, and the common law and statutory law in the other Canadian provinces.

a) Quebec: Civil Law Plan and Progressive Measures

As described above, the history of warranty plans, both in the common law provinces and in Quebec's civil law, is a tortuous process that has advanced at times through the boldness of courts and at other times through the political will of governments. But it should be kept in mind that the *Consumer Protection Act* (CPA) is not the only law that applies to legal warranties in Quebec. In a suppletive⁷² or complementary manner, the provisions of the *Civil Code of Québec* (CCQ) concerning warranties continue to apply (to contracts not covered by the CPA, for example).

⁷⁰ Sec. 92(13), *Constitution Act, 1867*, 30 & 31 Victoria, c 3.

“92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, [...]”

13. *Property and Civil Rights in the Province.*”

⁷¹ For example, the *Motor Vehicle Safety Act*, S.C. 1993, c. 16, includes in section 10 an obligation that A company that manufactures, sells or imports any vehicle or equipment of a class for which standards are prescribed shall, on becoming aware of a defect in the design, construction or functioning of the vehicle or equipment that affects or is likely to affect the safety of any person, cause notice of the defect to be given in the prescribed manner to [...] the Minister.”

⁷² LAMONTAGNE, D.-C. and LAROCHELLE B., *Droit spécialisé des contrats*, vol. 1. Éditions Yvon Blais, Cowansville, 2000, p. 141. Among complementary CCQ provisions are sections on incomprehensible or illegible clauses and on unfair clauses (sec. 1435 and fol.).

In the following paragraphs, we will discuss applicable warranty law in Quebec. We will also conduct a cross analysis of the CCQ's general regime and the CPA's specific regime. Finally, we will examine the overlaps, similarities and differences between those two regimes.

The Civil Code of Québec and the Consumer Protection Act: Overlaps, Similarities and Differences

Adopted in 1991 and in effect since 1994, the *Civil Code of Québec*, which replaced the *Civil Code of Lower Canada* (C.C.L.C.) in effect in Quebec since 1866, contains similar provisions to those that existed in the C.C.L.C. Our objective is not an exhaustive comparative study, so we will discuss current legal warranty measures and related case law.

CCQ articles 1716 to 1733 and article 1739 are the main ones governing legal warranties. Many other related provisions may also be applicable in matters of legal warranty: for example, article 1379, which defines adhesion contracts; articles 1398 and following regarding the quality of the consent given by the consumer when a contract is entered into, as well as the circumstances under which his consent would be vitiated; article 1432, which states the principle of contract interpretation in favour of consumers or adherents; article 1435, which declares the nullity of illegible and incomprehensible clauses; article 1437, which declares the nullity of abusive clauses and defines what an abusive clause is; article 2925, which provides the prescriptive period for bringing actions.

As mentioned above, the majority of consumer contracts are specifically governed by the provisions of the *Consumer Protection Act*, whereas the CCQ governs all contracts, including consumer contracts (defined in article 1384). In the event that a consumer contract is not subject to the CPA, the CCQ's general regime is applicable. This overlapping between the two regimes, which can be confusing⁷³, will be addressed here specifically regarding legal warranties.

To present the two Quebec warranty regimes thoroughly, we will study them in tandem, while taking care to examine their scope, application and composition and to point out their differences.

Definition and scope of the legal warranty

The legal warranty provided by the *Civil Code of Québec* applies to all contracts, including consumer contracts.

CCQ article 1384 defines the consumer contract as:

“a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic

⁷³ NITU, C., *L'autonomie du droit de la consommation*, Master's of Laws dissertation, July 2009, Université du Québec à Montréal, p. 132.

purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.”

First we note that the CCQ’s definition of the consumer contract is more restrictive than the CPA’s, which includes “every contract for goods or services entered into between a consumer and a merchant in the course of his business⁷⁴,” and not only goods or services acquired “for personal, family or domestic purposes.” This question of definition will of course prove important when CCQ and CPA warranties differ, but also when they are similar: it should be recalled that CPA warranties are of public order⁷⁵ and that, as opposed to those of the CCQ, a contract cannot disclaim them and a consumer cannot waive them⁷⁶.

There is also a difference between the CCQ and the CPA in the types of goods and services to which, according to the definition, the consumer contract may apply. The reference that CCQ article 1384 makes to goods pertains to movables as well as immovables. For its part, the CPA refers only to movables⁷⁷ regarding application of Title I: *Contracts regarding Goods and Services*, which contains general provisions for warranties.

However, the CPA offers broader warranties and applications than the CCQ: the CPA adds to the basic warranty provisions regarding, for example, the availability of spare parts and repair services⁷⁸, and creates specific plans for used automobile and motorcycle sales⁷⁹ and household appliance repairs⁸⁰.

À l’intérieur du régime dualiste établi au Québec, la loi consumériste va donc plus loin que le Code civil avec la protection du consommateur et crée un système de mesures législatives, ponctuelles et dérogoires du droit commun qui considère les réalités du marché dans le secteur particulier de la consommation⁸¹.

In the CCQ as well as the CPA, the legal warranty plan applies beyond the context of contracts, through “exceptions qu’il crée au principe de la relativité du contrat⁸².” For example, CPA sections 53 and 54 allow a consumer to bring an action against both the merchant and the manufacturer on the basis of a hidden defect affecting the good that is the object of the contract, and for violation of the warranties provided in sections 37, 38 and 39 (normal use and durability warranties and the warranty regarding spare parts and repair services). Sections 53 and 54 also provide a recourse by the subsequent acquirer against the manufacturer, even in the absence of any contractual relationship.

As mentioned above, the CPA system is of public order⁸³ and the consumer cannot waive the rights conferred to him by the CPA⁸⁴. The legal warranty constitutes the mandatory minimal

⁷⁴ Sec. 2 CPA.

⁷⁵ Sec. 261 CPA.

⁷⁶ Sec. 262 CPA.

⁷⁷ Sec. 1, par. d) and 6.1 CPA.

⁷⁸ Sec. 39 CPA.

⁷⁹ Sec. 151 and fol. CPA.

⁸⁰ Sec. 186 CPA.

⁸¹ NITU, C., *L’autonomie du droit de la consommation*, p. 130.

⁸² MASSE, C., *Garanties conventionnelles et garanties légales – Une harmonisation difficile mais nécessaire*, p. 67.

⁸³ Sec. 261 CPA.

warranty, while the merchant is of course free to offer a more advantageous warranty⁸⁵. Under the CCQ system, article 1732 makes it allowable to add to the legal warranty, but also to limit or even exclude it. However, a professional seller can in no case evade liability for his personal actions⁸⁶. In addition, the seller cannot exclude or limit his liability if he has omitted to reveal a defect of which he was aware or could not have been unaware and that affects the right of ownership or the quality of the property⁸⁷.

The following further details the various types of legal warranty that are offered to consumers.

Warranty against eviction

The warranty against eviction, provided in CCQ article 1723 and in CPA section 36, is essentially the same under both regimes. CCQ article 1723 obliges the seller to guarantee to the buyer “that the good is free of all rights except those he has declared at the time of the sale.” The seller must also “discharge the property of all hypothecs, unless the buyer has assumed the debt so secured⁸⁸.”

The CPA also provides that “A merchant transferring the ownership of goods to a consumer by way of a contract must free such goods from every charge or encumbrance in favour of a third person, or declare the existence of such charge or encumbrance at the time of the sale⁸⁹.”

Property delivery warranty

When a consumer agrees to acquire a good or service, it is understandable that the good or service he receives correspond to the object of the contract. An obligation to deliver the good is found both in the CCQ and the CPA, but the two laws take different approaches.

CCQ article 1716 discusses two obligations binding the seller: to deliver and to warrant. Under articles 1717 and following, the obligation to deliver the good is fulfilled as soon as the seller puts the buyer in possession of the good, in the condition in which it was at the time of the sale, or agrees to the buyer taking possession of the good, without any obstacle. The seller must also, if applicable, transfer his titles and, in the case of immovables, the deed of acquisition, previous deeds and the location certificate (1719 CCQ).

In addition, the seller must “deliver the area, contents or quantity specified in the contract” (1720 CCQ). Thus, according to the doctrine : “Le vendeur ne peut pas faire une délivrance partielle ou d’un autre bien, même d’une plus grande valeur⁹⁰.”

The CPA goes further. The Act provides that the good or service must, first, conform with the description made of it in the contract, but also with a declaration or advertisement made by the

⁸⁴ Sec. 262 CPA.

⁸⁵ Sec. 35 CPA.

⁸⁶ Sec. 1732 CCQ.

⁸⁷ Sec. 1733 CCQ.

⁸⁸ LAMONTAGNE, D.-C. and LAROCHELLE B., *Droit spécialisé des contrats*, vol. 1, p. 142.

⁸⁹ Sec. 36 CPA.

⁹⁰ NITU, C., *L'autonomie du droit de la consommation*, p. 110.

merchant or manufacturer⁹¹. This is not simply a matter of content or quantity; the good must also have the characteristics provided in the contract or in an advertisement (colour, size, quantity, quantity, model of the product, etc.). Under section 42, any written or verbal declaration made by the merchant or manufacturer representative about a good or service binds that merchant or manufacturer. As opposed to other Canadian provinces, the CPA does not retain the application of the “reasonable reliance test,” according to which the statements made by the merchant or his representative bind them only if it would be reasonable for the consumer to believe them or if he has believed them⁹².

Warranty of quality: normal use, reasonable duration and hidden defects of the good

The warranty related to the capacity to use a good for its normal use (or for the use intended by the consumer) is crucial for the consumer, because it touches the very essence of the good or service he has acquired⁹³. The usefulness of the good or service also touches the very heart of the contract, since the buyer would not have consented had he known that the good or service for which he expects a certain use will have no such use or that more generally it will not meet his expectations.

As mentioned by authors Jobin and Cumyn, it is important to draw a clear distinction between the rules that apply to warranties of quality and warranties of safety⁹⁴. We expressed our position on the subject in the introduction to the present report. Some authors think that the safety obligation is contained in the second paragraph of CPA section 53. With all due respect for others' views, we think that product safety should not be viewed behind the veil of the legal warranty of quality. We think the two concepts are distinct. Moreover, we will not discuss applicable law regarding safety obligations binding the seller or the manufacturer⁹⁵.

We simply want to express the view of authors Jobin and Cumyn about the absence in the CPA of an equivalent to CCQ article 1468 regarding the safety obligation:

Malgré le développement, avant 1978, de la jurisprudence québécoise sur l'obligation du fabricant et du vendeur professionnel de garantir les acheteurs et sous-acquéreurs de tout vice dangereux, la Loi sur la protection du consommateur ne comporte pas de disposition particulière à ce sujet. À l'instar de ce qui se faisait et de ce qui se fait dans le cadre du Code civil encore aujourd'hui, entre vendeur et acheteur, c'est donc le régime de la garantie des vices qui sert à régler les problèmes de défectuosité ayant causé un dommage à la personne du consommateur ou à ses biens, autres que le produit vendu; vis-à-vis l'acheteur consommateur, le vendeur professionnel répond de ces dommages selon la responsabilité contractuelle, habituellement en vertu de l'article 53, alinéa 1 de la Loi⁹⁶.

A warranty of good operation is provided in both the CCQ and the CPA. According to some authors and the case law, the CPA's warranty of good operation is only a variation on the

⁹¹ Sec. 40 and 41 CPA.

⁹² See the previous section on the regulatory plan for legal warranties in New Brunswick.

⁹³ JOBIN, P.-G. and CUMYN M, *La vente*, 3rd edition, Cowansville, Éditions Yvon Blais, 2007, par. 142.

⁹⁴ *Ibid*, par. 142.

⁹⁵ Sec. 1468 CCQ.

⁹⁶ *Op. cit.*, note 93, JOBIN, P.-G. and CUMYN M, *La vente*, par.144.

CCQ's warranty against hidden defects⁹⁷. Apart from the mandatory nature of the CPA's provisions⁹⁸, the specific regime in fact contains striking similarities to CCQ provisions on hidden defects – provisions that, for their part, contain similarities with those of its ancestor, the *Civil Code of Lower Canada*⁹⁹. But the legislators' approach when the CPA was being developed indicates a significant difference, as we will see.

Our analysis of warranties of good operation will describe the elements of each regime, their interpretation and the marked differences between the two bodies of legislation.

Warranty against hidden defects

The CCQ section containing the warranty against hidden defects is titled *III. – Warranty of quality*, rather than *Warranty against hidden defects*, the terms that were used in the C.C.L.C. The main goal remains the same: to guarantee to the buyer that he can make adequate use of the good he acquires. The warranty exists of right¹⁰⁰ even if the contract does not mention it¹⁰¹ and it pertains to the good that is the object of the contract and to its accessories¹⁰².

The terms used in section 1726 mean that a buyer can invoke a violation of the warranty of quality only if defects make the good “*unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.*”

In this regard, the section's title, “Warranty of quality,” is misleading, because the provision does not discuss the quality of the good – a multi-dimensional concept – but rather only one of the characteristics affecting quality, i.e., adequate operation. The provision is so far removed from a concept of overall quality that it only covers the impossibility of use or a substantial limitation of such use.

The defect discussed by the provision is a defect that was unknown to the buyer or was not apparent; “apparent defect” means a defect “*that can be perceived by a prudent and diligent buyer without any need of expert assistance.*”

This provision thus reprises the same principles as those examined above, in our history of legal warranties under civil law¹⁰³; and the conditions of application are essentially the same. For the buyer to be able to avail himself of this warranty, all the following conditions must therefore be present: a) the defect must prevent or seriously limit the use of the good, b) the defect must therefore be somewhat serious, c) the defect must exist at the time of the sale, d) the buyer

⁹⁷ MASSE. C., *Loi sur la protection du consommateur : analyses et commentaires*, Éditions Yvon Blais, Cowansville, 1999, pages 259 and 364. But it should be noted that other Quebec court decisions are of the contrary view: *Gaudreault v. Les Foyers Econo Inc.*, C.Q. Québec City, No. 200-02-008235-881, May 8, 1991; *Létourneau v. Lafèche Auto Ltd.*, [1986] R.J.Q. 1956 (C.S.).

⁹⁸ Sec. 35 and 261 CPA and sections 1732 and 1733 CCQ.

⁹⁹ Sec. 37, 38, 53 and 54 CPA.

¹⁰⁰ Sec. 1716 CCQ.

¹⁰¹ Sec. 1726 CCQ.

¹⁰² Sec. 1726 CCQ.

¹⁰³ Articles 1522 and 1523 C.C.L.C.

must not be aware of the defect, which must also not be apparent, and e) the buyer must have reported the defect to the seller¹⁰⁴.

Our analysis of these elements in our history of civil law is applicable here again. So we will not repeat that analysis here, but we will nevertheless discuss some of the key elements of each of the above conditions.

The concept of hidden defect

The Civil Code defines the hidden defect as a “defect” that affects the use intended for the good. It may be a functional or a material defect. As Deslaurier explains, “La défectuosité peut être simplement matérielle, lorsque le bien est détérioré ou brisé, par exemple une automobile neuve dont la peinture est égratignée. La défectuosité peut être plutôt fonctionnelle, lorsque le bien ne peut servir à l’usage auquel il est destiné en raison notamment d’un défaut de conception ou de fabrication¹⁰⁵.” The defect will thus be characterized as functional if, due to a design or manufacturing defect, the good cannot serve the purpose for which it is normally intended¹⁰⁶.

Examples of functional defects are the poor operation of a car engine, but also a vehicle’s leaky roof¹⁰⁷. Case law has also established that the defect may be conventional¹⁰⁸: this is the case when the good is unfit for the specific use agreed to by the parties at the time when the contract was entered into¹⁰⁹. The law’s use of the terms “*the use for which it was intended*” indeed opens the door to consideration of a use that would not be the good’s normal or common use. The seller could not be bound to guarantee the good for an uncommon use unless he reassures the buyer that the good may be so used.

In practice, the industry rules and standards prevailing in a sector of activity will be those that apply in determining whether a defect is present¹¹⁰ and what may be considered normal use of a given product¹¹¹.

Finally, it is essential that the defect be hidden – i.e., unknown and not apparent. The defect must be “objectively hidden¹¹².” could a prudent and diligent buyer who had made a reasonable inspection of the good have detected the defect?

¹⁰⁴ Sec. 1739 CCQ.

¹⁰⁵ DESLAURIERS, J., *La vente dans le Code civil et la Loi sur la protection du consommateur*, in *Collection de droit 2011-2012, Vol 5- Obligations et contrats*, Barreau du Québec, Cowansville, Les Éditions Yvon Blais, 2011, p. 192.

¹⁰⁶ L’HEUREUX, N., *Droit de la consommation*, 5th ed., Cowansville, Les Éditions Yvon Blais, 2000, p. 69.

¹⁰⁷ *Bosa-Chatigny v. Roberge*, 1990 CanLII 3510 (QC CA), [1990] R.L. 1, EYB 1990-57305 (C.A.).

¹⁰⁸ *Amyot v. Denis Malo et Fils Inc.*, J.E. 98-730, REJB 1998-05816.

¹⁰⁹ An explicit rule of similar scope exists in New-Brunswick, where the particular use that a consumer intends for the good becomes a warranty, if he informs the seller of that use.

¹¹⁰ NITU, C., *L’autonomie du droit de la consommation*, p 111.

¹¹¹ DESLAURIERS, J., *La vente dans le Code civil et la Loi sur la protection du consommateur*, dans *Collection de droit 2011-2012, Vol 5- Obligations et contrats*, Barreau du Québec, Cowansville, Les Éditions Yvon Blais, 2011, p. 192.

¹¹² LAMONTAGNE, D.-C. and LAROCHELLE B., *Droit spécialisé des contrats*, vol. 1, par. 229.

The buyer is generally responsible for proving the existence of a defect and of other elements that constitute conditions for bringing an action based on the CCQ's warranty against hidden defects¹¹³.

Characteristics of the warranty of quality: defects impairing use, the defect's seriousness, the buyer's unawareness, and the defect's existence at the time of the sale

According to the first paragraph of article 1726, the defect against which there is a warranty is the one that affects use of the good. This impairment is appreciated subjectively or objectively. The appreciation will be subjective if the impairment is measured in relation to the use for which the good is intended, i.e., on the basis of the buyer's legitimate expectations or of those he has disclosed to the seller. The appreciation will be objective when measured according to the normal use of a good of the same type.

In addition, the defect must be serious to such an extent that, had the buyer been aware of it, he would not have acquired the good or would not have paid so high a price¹¹⁴. "Pour décider si un vice est assez grave pour donner ouverture à la garantie, on considère tous les aspects de la question (notamment les inconvénients du vice pour l'acheteur et le coût de sa réparation)¹¹⁵."

Among the conditions for the existence of the warranty against hidden defects is the defect's prior existence¹¹⁶: the good was already affected by the defect before or during the sale¹¹⁷. The defect that is latent before or at the time the contract is entered into and that manifests itself only after the sale or during use is also covered.

Proof of the defect's prior existence is of course incumbent on the buyer. Fortunately, the CCQ provides in favour of the buyer a presumption that the defect is prior if the contract was concluded by a professional seller and that the poor operation or the deterioration arises prematurely compared to other goods that are identical or of the same type, without the defect resulting from faulty use by the buyer¹¹⁸. While the Civil Code does not define the professional seller, the doctrine does: "le vendeur professionnel est celui qui vend des biens sur une base régulière et non pas celui qui, fût-il réputé être spécialisé dans son domaine, fait occasionnellement des ventes¹¹⁹."

The manufacturer, distributor, wholesaler and importer, notably, are also bound by the warranty against defects that is incumbent on the seller¹²⁰.

The CCQ's warranty of quality will apply in principle only if the defect is unknown to the buyer¹²¹: if the buyer has learned of the defect's existence, or if the defect was disclosed to him by the seller, or if he could have been aware of it given the apparent nature of the defect, the warranty

¹¹³ Sec. 2803 CCQ.

¹¹⁴ Sec. 1726, par. 1 CCQ.

¹¹⁵ DESLAURIERS, J., *La vente dans le Code civil et la Loi sur la protection du consommateur*, p. 192.

¹¹⁶ Sec. 1726, par. 1 CCQ.

¹¹⁷ LAMONTAGNE, D.-C. et LAROCHELLE B., *Droit spécialisé des contrats*, vol. 1, au para. 227.

¹¹⁸ Sec. 1729, par. 1.

¹¹⁹ DESLAURIERS, J., *La vente dans le Code civil et la Loi sur la protection du consommateur*, p. 197.

¹²⁰ Sec. 1730 CCQ.

¹²¹ Sec. 1726 CCQ.

against hidden defects will not be applicable. Article 1726 clarifies one of the elements of the *Civil Code of Lower Canada* that has sparked much commentary: the requirement of calling on an expert to examine the good is finally set aside. By defining the apparent defect, the legislation points out in the second paragraph of art. 1726 that this is a defect that can be noticed by a prudent and diligent buyer without the need to consult an expert. The buyer must therefore, ideally and whenever possible, make a normal examination of the good before acquiring it.

Obligation to disclose the defect

Abolition of the C.C.L.C.'s rule¹²² for the buyer to bring an action against the seller within a reasonable period was a significant step forward regarding the warranty against hidden defects. We mentioned above the harmful effects of that rule, which submitted consumers to such strict requirements for obtaining remedies that the latter had become ineffective.

The Civil Code of Québec nevertheless includes an obligation for the buyer to disclose the defect in writing to the seller within a reasonable period following its discovery¹²³. Even if the buyer is late in disclosing the defect, the seller is bound by the warranty if he was aware of the defect or could not have been unaware of it¹²⁴. Moreover, the disclosure offers the seller an opportunity to correct the good's defect.

Appreciation of the reasonable nature of the disclosure period is a question of fact that is left to the courts' appreciation. Among the facts taken into account to appreciate the reasonable nature of the disclosure period, we find "la nature du bien ou du vice - se manifestant à certaines époques seulement -, les pourparlers engagés en vue de régler le problème à l'amiable, etc."¹²⁵ We note finally that the doctrine and case law related to C.C.L.C. article 1530 will still be useful for interpreting the disclosure obligation henceforth found in the CCQ¹²⁶.

In short, to prove the merchant's liability in not meeting his quality obligation, the buyer must prove the following conditions: that the defect is serious, that he was unaware of its existence, that it was hidden, and that it existed prior to the sale. He must also disclose the defect to the seller within a reasonable period after discovering it¹²⁷. Although lighter than under the C.C.L.C., the burden of proof on the buyer invoking the good's defect is not as advantageous as that provided to the consumer in the CPA, wherein certain presumptions of the defect's existence lighten the burden of proof.

As mentioned above, the CCQ's warranty against hidden defects appears to combine the CPA's warranties of quality and the C.C.L.C.'s warranty against hidden defects.

The CPA's warranty of quality includes several distinct warranties, such as the warranty of use¹²⁸ and the warranty of reasonable duration¹²⁹. According to some authors, they adopt the

¹²² Sec. 1530 C.C.L.C.

¹²³ Sec. 1739 CCQ.

¹²⁴ Sec. 1739, par. 2 CCQ.

¹²⁵ LAMONTAGNE, D.-C. and LAROCHELLE B., *Droit spécialisé des contrats*, vol. 1, par. 239.

¹²⁶ *Op. cit.*, note 93, JOBIN, P.-G. and CUMYNN M, *La vente*, par. 146.

¹²⁷ Sec. 1726, 1426, 1453 and 1739 CPA.

¹²⁸ Sec. 37 CPA.

same principles as the CCQ's warranty, notably that against hidden defects, and actually constitute only the equivalent of the CCQ's warranty against hidden defects. This is further discussed below.

As we will see, the two systems display another striking difference: the Civil Code's warranty of quality traditionally protects the buyer against material defects, whereas the CPA's warranty of use pertains to the functional defect, which may include all possible anomalies (among others, deterioration, poor design and incorrect manufacturing)¹³⁰.

The warranty of fitness for normal use (CPA sec. 37)

Very frequently, authors on the CPA's legal warranty plan confuse section 37's warranty of fitness for normal use, section 38's warranty of durability, and section 53's warranty against hidden defects. Those authors¹³¹ think that the legal warranty is a warranty of quality that comprises many components and is merely equivalent to the warranty of quality in CCQ article 1726.

The author Deslauriers emphasizes that the CPA provides two distinct recourses, i.e., article 53 against hidden defects and article 54 for violations of the warranties found in CPA sections 37, 38 and 39, and that those warranties should therefore not be confused and discussed without the necessary distinctions¹³². Deslauriers continues as follows:

Aussi n'est-il pas étonnant que d'autres auteurs voient une certaine différence dans les concepts ou les régimes juridiques de ces deux garanties. En effet, si le législateur a adopté des dispositions différentes pour l'une et pour l'autre, c'est qu'il avait l'intention de créer des concepts ou des régimes juridiques distincts. Pour certains auteurs, la garantie d'aptitude de la Loi sur la protection du consommateur rendrait impossible la défense de défaut apparent ou de connaissance du défaut alors que, pour d'autres, cette défense demeure possible même si la vente est déjà régie par cette loi¹³³.

Author Fernand Poupart holds the same view. He explains the continuing debate as follows:

Des auteurs affirment que les articles 37, 38 et 53 de la L.p.c. traitent différemment d'un seul et même sujet, dans le premier cas au moyen d'une formule positive (le bien doit servir à un usage normal pendant une durée raisonnable), dans le deuxième cas au moyen d'une formule négative (le bien ne doit pas être affecté d'un défaut caché). Pour certains d'entre eux, le vice caché de l'article 53 de la L.p.c. est celui qui affecte le bien vendu de telle sorte que ce dernier ne peut servir pendant une durée raisonnable à l'usage auquel il est normalement destiné. Pour d'autres, les dispositions des articles 37 et 38 L.p.c. n'ont pour effet que de créer des présomptions légales applicables à un

¹²⁹ Sec. 38 CPA.

¹³⁰ NITU, C., *L'autonomie du droit de la consommation*, p. 128.

¹³¹ *Ibid*, p. 119; *Op. cit.*, note 93, JOBIN, P.-G. et CUMYNN M, *La vente*, par.189; BOURGOIGNIE, T. *Op. cit.*, note 1, p. 58; POUPART, F., *Op. cit.*, note 13, 17 R.J.T. n.s. 234 1982-1983, p. 260.

¹³² DESLAURIERS, J., *La vente dans le Code civil et la Loi sur la protection du consommateur*, p. 202.

¹³³ *Ibid*.

*recours fondés sur un vice caché, un tel recours ne pouvant être fondé que sur l'article 53 L.p.c*¹³⁴.

Although this author states his preference for the second position, he indicates that the matter is not settled. Indeed, why would the legislators have provided two distinct remedies? His hypothesis is that CPA sections 37 and 38 complement the concept of hidden defects that is mentioned in CPA section 53, and that sections 37 and 38 add a positive dimension, much broader, to the concept of hidden defects. He thinks it henceforth insufficient for the good to be free of defects; it must be of sufficient quality and durability¹³⁵.

These divergent views, echoed both in doctrine and case law, entail confusion as to the interpretation of those provisions and to their application.

While section 37 only discusses hidden defects, should not all the elements related to the concept of hidden defects not then be proven by the consumer attempting to avail himself of this section – should he not have to prove not only that the good cannot serve its intended purpose, but also that this is due to a defect, that the defect was hidden, prior to the sale, while applying the hidden defect principles developed under the CCQ? The authors Jobin and Cumyn are of this view:

*Malgré certaines hésitations (en particulier pour faire appel aux attentes du consommateur), cette garantie générale est habituellement considérée comme équivalant à la garantie contre les vices du Code civil — laquelle fait appel, elle aussi, au concept d'usage normal auquel le bien est destiné (article 1726, alinéa 1). Le consommateur est donc assujéti au régime général de la garantie de qualité (devant démontrer par exemple que le vice est caché), sous réserve seulement de quelques règles spécifiques*¹³⁶.

According to some authors, the warranties found in CPA sections 37, 38 and 53 are merely a formulation of the warranty against hidden defects that is found in the *Civil Code of Lower Canada*, and the major difference resides in the conditions for exercising the recourse, which have been loosened¹³⁷. According to others, the legal warranty of sections 37 and 38 adds to the C.C.L.C.'s concept of hidden defects "une dimension positive beaucoup plus étendue : il ne suffit plus qu'un bien soit exempt de vices cachés, il doit aussi posséder des qualités et une durabilité suffisante"¹³⁸.

Professor Thierry Bourgoignie explains that "la notion plus large de vice fonctionnel s'est progressivement imposée, couvrant tout type de défaut ayant un impact sur le fonctionnement du bien et son usage normal"¹³⁹. If section 37's warranty of normal use may be invoked when the good is affected by a defect, it may also be invoked even if a good is in perfect condition but is unfit for the use the consumer was entitled to expect.

¹³⁴ POUPART, F., *Op. cit.*, note 13, p. 261.

¹³⁵ POUPART, F., *Op. cit.*, note 13, p. 262.

¹³⁶ JOBIN, P.-G. and CUMYN M., *La vente*, par.189.

¹³⁷ MASSE, C., *Op. cit.*, note 2, p. 487.+

¹³⁸ POUPART, F., *Op. cit.*, note 13, pp. 261 and 262.

¹³⁹ BOURGOIGNIE, T., *Op. cit.*, note 1, p. 59.

We share this view. We think the warranty against hidden defects and the warranty of use must be treated distinctly, and that the conditions applicable to one should not be required for application of the other.

The key to this interminable debate probably resides, as Deslauriers suggests, in the legislators' choice to adopt two different remedies – one expressly mentioning hidden defects (section 53) and the other expressly designating CPA sections 37, 38 and 39, i.e., the warranties of use and durability and the warranty of available spare parts and repair services:

53. A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.

54. A consumer having entered into a contract with a merchant may take action directly against the merchant or the manufacturer to assert a claim based on an obligation resulting from section 37, 38 or 39.

It should be recalled that the *Civil Code of Lower Canada*, in effect when the CPA was being developed and adopted, provided in article 1522 that the seller was required “to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness...”

In developing the CPA, the Quebec legislature simply split, literally, the two conditions that the Civil Code required to be cumulated in order to open the door to a recourse. Accordingly, the CPA clearly describes on the one hand a recourse based on the defect itself (sec. 53), and on the other hand a recourse based on the effect – limited usefulness – that, according to the Civil Code, the defect must have in order to open the door to a remedy.

Given that legislators took care to split what were, for over a hundred years, two distinct elements that applied only when combined, we think it important to give full effect to this legislative choice.

Accordingly, like Bourgoignie we think the warranty of normal use should be able to be invoked in any event, whether the good is affected by a defect or whether, although in perfect condition, it is unfit for the use the consumer was entitled to expect. In our view, this conception of the warranty of use appears to be the only one that can be reconciled with the clear distinction drawn by the legislature between the recourse against hidden defects and the recourse related to use.

What does this mean for the recourse against hidden defects? It may be objected that the concept of hidden defects, implicitly, refers to that in the Civil Code, where it has always been interpreted as a serious defect affecting use of the good. We think this would be an unfortunate shortcut, as illustrated by the application, for over a century, of a single provision confusing two distinct concepts. If the hidden defect referred to by the Civil Code is a serious defect, it is only because the recourse is open only to this type of defect. In rereading the text of the Civil Code, we see that the hidden defect and its effect are put in relation: the recourse can be exercised only against hidden defects THAT make the thing unfit for use. So there would indeed exist, a *contrario*, hidden defects that would NOT make the thing unfit for use.

To interpret CPA section 53 on recourses against hidden defects as a carbon copy of the remedy provided in the Civil Code, one would have to add to the CPA terms that the legislators took care to withdraw in their attempt to break with a century-old tradition. Again, to require that the hidden defect, in order to open the door to a recourse, affects the usefulness of a good would be to omit the clear distinction between two provisions, CPA sections 53 and 54 – the former covering hidden defects, and the latter covering defects of use.

The simple fact that the first paragraphs of both sections are identical, except for the object of the recourses, appears to confirm this analysis. The CPA's recourse against hidden defects is therefore open as soon as a non-apparent or non-disclosed defect affects the good acquired by the consumer.

We also think that this very broad protection is perfectly justifiable in the context of a law aiming to establish a certain balance between two contractors of greatly unequal power, whereas it would likely seem exaggerated if it applied to all contracts pertaining to the acquisition of a good. This is why the legislators took care, when adopting the new Civil Code of Québec, to open the recourse against hidden defects only to those defects that, as intended in the civil law tradition, seriously affected the use of the good.

CPA section 37 does not discuss the defect's seriousness: the warranty thus applies not only when the good is unfit for use, but as soon as its usefulness is diminished.

We may of course consider as a defect the fact that a good cannot serve its intended purpose (or does not have a reasonable service life). But we should not confuse those concepts: the fact that a good's uselessness is a defect in itself does not mean that the consumer will have the additional burden of establishing the defect causing this poor operation; proving the poor operation should suffice because the latter constitutes a defect in itself.

Given that the CPA does not define what the legislation means by the term "use for which it is normally intended" (or by "normal use" in section 38), the appreciation of this criterion of normality is left to the discretion of the courts. The courts will take into account, among other things, the safety, quality and performance standards established by professionals, as well as the consumer's reasonable expectations in the light of the merchant's representations about the good, whether they are written, verbal or made through advertisements¹⁴⁰. In the event that the consumer wants to make specific use of a good, he will normally have to so inform the seller; the latter can hardly guarantee a use for which the good is not usually intended unless he has told the consumer that the good was fit for such use.

¹⁴⁰ BOURGOIGNIE, T., *Op. cit.*, note 1, p. 59.

Warranty of durability (CPA sec. 38)

The primary objective of the warranty of durability is to reassure the consumer that the good he has acquired will have a reasonable service life¹⁴¹. This warranty applies only to movables¹⁴², whether new or used¹⁴³. The good's reasonable durability is left to the courts to judge¹⁴⁴, but the Act takes care to mention the elements that must be taken into account: price, contract provisions, and the good's conditions of use¹⁴⁵. The courts have for example deemed unreasonable the fire destruction of a new vehicle 18 months after purchase¹⁴⁶ and engine failure or the appearance of within 24 months following purchase of a vehicle¹⁴⁷. This warranty protects not only the first user, but also any subsequent acquirer¹⁴⁸.

The author Fernand Poupart already expected in the early eighties serious difficulties of interpretation with regard to reasonable duration¹⁴⁹, although one may think that the Quebec legislature's intention, in choosing so vague a term, was to allow it to be adapted easily to various circumstances.

The limitative list of factors that must be taken into account is problematic in itself. The question of taking price into account, for example, raises serious logical problems, even if we can easily guess its usefulness when comparing the foreseeable service life of two entirely comparable items that would be sold at different prices – we could assume the lesser quality of the item that costs less... whereas several other factors than intrinsic quality could justify price differences. Will someone buying a good at half price benefit from a shorter warranty than someone who has acquired the same good at full price? Should we estimate that two identical goods, purchased two years apart and whose price has dropped, have a shorter predictable service life? We find it difficult to justify that a consumer who recently bought a product benefits from a shorter warranty of durability than a consumer who bought the same product a few months or even a few years beforehand, for the sole reason that the earlier purchaser paid a higher price.

Apart from the fact that this vagueness in the warranty of reasonable durability risks raising substantial barriers to the exercise of their rights by consumers, who will never know whether the legal warranty still covers the good, we think this warranty has a fundamental impact on other CPA provisions. For instance, section 35 of the Act provides that a merchant or manufacturer may offer a warranty more advantageous than the legal warranty. A warranty lasting longer than that provided by the Act would doubtless constitute a warranty more advantageous than the legal warranty. How to determine whether an addition or a subtraction is made compared to what the legal warranty offers, given that the latter's duration is so vague? We find the same issue for the application of CPA section 50, which stipulates that the duration of legal and conventional warranties is extended by a period equal to the period during which the merchant or manufacturer has had the good or part of it in his possession for the purpose of

¹⁴¹ Sec. 38 CPA.

¹⁴² Sec. 6.1 CPA.

¹⁴³ Sec. 1, par. d) CPA.

¹⁴⁴ *Thimouth v. General Motors of Canada*, 1995 J.E. 95-1388 (C.A.).

¹⁴⁵ Sec. 38 CPA.

¹⁴⁶ *Thimouth v. General Motors of Canada*, 1995 J.E. 95-1388 (C.A.).

¹⁴⁷ *Champagne v. Hyundai Auto Canada Inc.*, [1988] R.J.Q. 2317 (C.P.); *Desjardins v. Canadian Honda Motors Ltd.*, P.O. Hull, No. 550-32-000933-801, February 20, 1981.

¹⁴⁸ Sec. 54 CPA.

¹⁴⁹ POUPART, F., *Op. cit.*, note 13, p. 259.

executing the warranty or after the good or part of it is recalled by the manufacturer. Before being able to extend the legal warranty, must we not be able to determine its initial duration?

It should be noted that the courts have decided that the CPA's warranty of durability can find application even in cases where the CPA provides a specific warranty plan, such as the warranty of the good operation of used cars and motorcycles, for example¹⁵⁰. The warranty of durability applies if the good is affected by an unusual or serious defect¹⁵¹, after the end of the fixed term legal warranty of good operation that is provided in those exceptional plans, or in the event that the vehicle does not meet the necessary criteria for benefiting from this legal warranty of good operation.

The warranty against hidden defects (sec. 53 CPA)

This provision is thus often discussed as a corollary of the warranties found in CPA sections 37 and 38, which some call the warranty against hidden defects. This section states that:

53. A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination

As mentioned above, we would find it erroneous to impose on the application of this provisions the more restrictive conditions presented in the Civil Code, which, as opposed to the CPA, clearly states that a recourse is open only under those conditions.

That being said, the doctrine and case law that pertain strictly to the defect and its hidden nature (and not to its effects) must receive application as to the interpretation of these terms.

Under this provision, the consumer can bring an action against the merchant or manufacturer if a good has a defect of design or manufacturing, or any functional or material defect. As stated by the Act, the warranty will not apply if the consumer could have detected the defect by an ordinary examination. The notion of an ordinary examination may give rise to certain problems of interpretation raised by the C.C.L.C.; if the circumstances justify it, should the consumer call upon an expert? In our view, this possibility is excluded by the Act specifying that a defect will not be covered if it could have been "detected" by the consumer. The Act does not mention a defect that would have been disclosed by the seller; but such a defect, once disclosed, could hardly be considered hidden.

The same section provides the possibility for the consumer to bring an action against the manufacturer or merchant for not providing instructions necessary to protect the user against a danger of which the latter could not be aware on his own¹⁵². As mentioned above, we think that this is not a safety obligation, but rather an information obligation's means of sanctioning¹⁵³, which directly pertains to cases similar to the one that led to the Dunstall ruling¹⁵⁴.

¹⁵⁰ Sec. 151 and fol. CPA.

¹⁵¹ *Létourneau v. Laflèche Auto Ltd.*, [1986] R.J.Q. 1956 (C.S.); *Rocheport v. Automobiles A. Lavoie Inc.*, [1985] C.P. 246.

¹⁵² Sec. 53, par. 2 CPA.

¹⁵³ POUPART, F., *Les garanties relatives à la qualité d'un bien de consommation*, p. 263.

¹⁵⁴ See above, the Dunstall case, cited in note 33 and summarized on page 15.

In its fourth paragraph, section 53 definitively withdraws from the merchant and manufacturer the possibility to use as a defence the fact that they were unaware of the defect. This paragraph has the effect, according to some authors, of creating a presumption that “reçoit une application stricte par les tribunaux : la présomption s’applique à tout commerçant, spécialisé ou non, comme au manufacturier, non réfragable, elle ne peut être renversée par la preuve du contraire¹⁵⁵.” This presumption constitutes a clear difference with the CCQ’s plan, which establishes a refragable presumption only regarding the professional seller and does not apply to the defect’s existence at the time of the sale.

Finally, this provision also allows a subsequent acquirer to bring an action based on a hidden defect, but only against the manufacturer.

The warranty of available spare parts and repair services

Section 39 provides a warranty that spare parts and repair services will be available to the consumer for a reasonable period following the conclusion of a contract pertaining to a good likely to require maintenance work. This is a protection measure that is not found in the CCQ. Rather than being forced to dispose of the good, due to a lack of parts and service required for repairing it, the consumer is offered an additional recourse, to the extent that he can establish that the availability period was unreasonably short. Professor Claude Masse opines that this period corresponds to that provided in CPA section 38, which pertains to the warranty of durability¹⁵⁶ – which seems perfectly logical, since a shorter duration would impair that warranty of durability.

As opposed to the other elements of the legal warranty, this obligation of available spare parts and repair services is not imperative. To set aside the application of this warranty, the merchant or manufacturer must notify the consumer, before the contract is entered into, that he does not provide spare parts or repair services¹⁵⁷.

Remedies in matters of legal warranty

Quebec consumers have a panoply of recourses in matters of legal warranty. Those found in the *Civil Code of Québec* and those in the *Consumer Protection Act* are essentially the same.

¹⁵⁵ BOURGOIGNIE, T., *Op. cit.*, note 1, p. 61.

¹⁵⁶ MASSE.C., *Loi sur la protection du consommateur. Analyse et commentaires*, Cowansville, Éditions Yvon Blais, 1999, p. 316.

¹⁵⁷ Sec. 39, par. 2.

Consumer Protection Act

CPA section 272 provides recourses available to the consumer in the event that a merchant or manufacturer defaults on an obligation imposed by the Act. In terms of warranty, the consumer could then require: compelled execution of the warranty obligation; authorization to have the warranty obligation executed at the expense of the merchant or manufacturer; reduction of the consumer's obligation (i.e., a price reduction or partial reimbursement); termination, discharge or invalidity of the contract entered into by the parties.

This provision also stipulates that a consumer may request damages in all cases and also request punitive damages. Although the choice of remedy belongs to the consumer, actions – except for actions for damages and punitive damages – cannot be brought concurrently. Moreover, Professor Claude Masse explains that, should the court disagree with the sanction requested by the consumer, it may at its discretion grant any other remedy it deems appropriate¹⁵⁸.

Creating an impairment to the privity of contracts, the legislature has chosen to hold both the merchant and the manufacturer liable for violations of legal warranties¹⁵⁹. Another impairment to the principle of the privity of contracts: section 53(4) allows a subsequent acquirer to bring against the manufacturer an action arising from a hidden defect affecting the good. Similarly, section 54(2) gives a subsequent acquirer the right to bring against the product's manufacturer an action based on CPA sections 37 and 38. The good's subsequent acquirer and the user are both covered. As mentioned above, the Supreme Court, in the *Kravitz* case, also recognized in 1979 this right of action against the manufacturer under the warranty against hidden defects that was provided in the Civil Code. This remedy available to the subsequent acquirer is henceforth enshrined in the CPA¹⁶⁰.

In terms of punitive damages, the CPA differs from the CCQ. Whereas under the *Civil Code*, a consumer must, to be entitled to punitive damages, prove that the merchant was of bad faith, under the CPA's regime it is sufficient for the consumer to prove that the merchant was careless with regard to the law¹⁶¹. Other factors are also taken into account – notably, the merchant's attitude toward the consumer's complaint. The CPA plan is thus clearly more advantageous to the consumer. The possibility of being sentenced to punitive damages may, in theory, have the effect of preventing behaviours similar to those that have been the object of sanctions. So the possible deterrent effect of this provision is likely to increase the effectiveness of the CPA's legal warranty.

The CPA also differs from the general civil law plan in terms of the admissibility of testimonial evidence¹⁶²: indeed, CPA section 263 allows a consumer to submit testimonial evidence against a text in order to exercise a legal right or prove that CPA provisions were not observed.

The possibility of criminal sanctions, under CPA section 277, adds another incentive that could be serious. However, the severity of fines has often been considered clearly insufficient for that

¹⁵⁸ MASSE.C., *Loi sur la protection du consommateur. Analyse et commentaires*, Cowansville, p. 999.

¹⁵⁹ TETLEY, W., *The Recourse in Warranty (1979)*, *Revue générale de droit*, 1979, p. 204.

¹⁶⁰ Sec. 1, 2, 6.1, 38 and 54 CPA.

¹⁶¹ MASSE. C., *Loi sur la protection du consommateur. Analyse et commentaires*, Cowansville, p. 1000-1001.

¹⁶² Sec. 2863 CCQ.

deterrent effect to be real. For example, the maximum fine under the CPA is \$80,000 if a corporation re-offends¹⁶³, whereas Manitoba law, for example, imposes much more severe sanctions: a violation may lead to a maximum fine of either \$300,000 or three times the amount collected by the offender after the infraction, if the latter proves greater than \$300,000, or to imprisonment for up to 3 years¹⁶⁴.

It is possible for the consumer to choose between the CCQ and the CPA regime, depending on the one that appears more advantageous to him (CCQ art. 270).

In 2006, CPA section 274, which provided a limitation period of one year for remedies in matters of warranty, was abrogated. Those remedies are henceforth submitted to the ordinary law limitation period of 3 years¹⁶⁵.

Civil Code of Québec

Under the CCQ, the buyer benefits from common law remedies.

The seller will also be required to reimburse the buyer for the price paid and all damages suffered by the buyer¹⁶⁶. We mentioned above the buyer's obligation to disclose the defect to the merchant¹⁶⁷: this obligation complies with rules of ordinary law requiring that someone who wants to bring an action must first put the other party on notice to meet legal requirements or correct a defect¹⁶⁸.

According to rules of ordinary law¹⁶⁹, the buyer's remedies in matters of legal warranty are prescribed for three years following the date when the cause of action was discovered.

Limitation, extension or exclusion of the legal warranty

Liability limitation or exclusion clauses are prohibited under the CPA. Section 261 prescribes the imperative nature of the Act and the prohibition against excluding its provisions. Moreover, the CPA provides in section 262 that a consumer cannot waive his rights under the Act. We also recall that the CPA allows the merchant and manufacturer to free themselves from their obligation, stipulated in section 39, to guarantee the availability of spare parts and repair services, by announcing this unavailability to the consumer before the contract is entered into. For its part, the CCQ provides that regarding the warranty against hidden defects, the professional seller cannot exclude his liability when he is presumed to know the defect's existence or did not reveal it to the buyer¹⁷⁰.

¹⁶³ Sec. 278, par. 2 CPA.

¹⁶⁴ Sec. 94, *Consumer Protection Act*, C.C.S.M., c. C200.

¹⁶⁵ Sec. 7, Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts, Bill 48, 2006.

¹⁶⁶ Sec. 1728 CCQ.

¹⁶⁷ Sec. 1739 CCQ.

¹⁶⁸ Sec. 1594 and fol. CCQ.

¹⁶⁹ Sec. 2925 CCQ.

¹⁷⁰ Sec. 1729 and 1733 CCQ.

Other measures to improve the legal warranty plan

In the CPA, other provisions to protect Quebec consumers effectively may facilitate application of the legal warranty plan.

Under CPA section 17, the contract, in case of doubt or ambiguity, is interpreted in favour of the consumer. But this provision is not unique to the CPA: section 1432 of the *Civil Code* also contains, for consumer contracts, an interpretation favourable to consumers in case of doubt. We mentioned above CPA section 50, which extends the duration of the legal or conventional warranty by a period equivalent to the period during which the merchant or manufacturer had possession of the good or part of it; this in order to execute the warranty or following the manufacturer's recall of the good or part of it. Despite the reservations we raised above about its application to the legal warranty, this provision aims to increase the protection given to consumers under the CPA plan.

New provisions related directly or indirectly to warranties were introduced in the CPA in 2010 by Bill 60¹⁷¹: CPA sections 52.1, 214.5 and 228.1, which we will discuss very briefly.

Section 52.1 prohibits the merchant and manufacturer from requiring the consumer to prove that the owner or tenant who previously had the good met certain conditions of the warranty. Section 214.5, which applies to contracts involving sequential performance for a service provided at a distance, states that merchants "may not demand payment for services of which the consumer was deprived during the repair of goods supplied free of charge or sold to the consumer on the making of the contract or during the term of the contract" and that are necessary for the services in question. This prohibition will be lifted if a replacement good is provided free of charge.

Finally, section 228.1, paragraph 1 states that a merchant proposing an extended warranty must inform the consumer in writing and verbally of the existence and content of the legal warranty stated in CPA sections 37 and 38. A merchant who defaults on this obligation will be presumed to conceal an important fact – a practice prohibited by section 228¹⁷².

This provision was adopted in order to resolve certain issues raised by the sale of extended warranties¹⁷³, notably the issue of consumers' ignorance of legal warranties – an ignorance that appears crucial in the under-use and thus ineffectiveness of the CPA's legal warranty plan. Unfortunately, merchants reportedly violate this provision frequently, while those who mention the legal warranty use dishonest methods, denigrating the scope and effectiveness of the legal warranty¹⁷⁴.

¹⁷¹ Bill 60, *Act to amend the Consumer Protection Act and other legislative provisions*, 2009, c. 51 [hereinafter Bill 60].

¹⁷² Sec. 228.1, par. 3 CPA.

¹⁷³ For an overview of these issues, see our organization's study: *Garanties prolongées, le consommateur en a-t-il pour son argent?*, June 2007, p. 71. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/Garanties_prol.pdf.

¹⁷⁴ RENNO, K., *L'épineuse question de la garantie légale*, Droit Inc., January 31, 2012. [Online] <http://www.droit-inc.com/article6969-L-epineuse-question-de-la-garantie-legale> (page consulted on January 1, 2012); GRAMMOND S., *Qu'est ce qui vous a fait enrager en 2011 ?* La Presse, December 21, 2011. [Online] <http://affaires.lapresse.ca/finances-personnelles/consommation/2011/12/20/01-4479798-quest-ce-qui-vous-a-fait-enrager-en-2011.php> (page consulted on December 21, 2011).

The initial Bill was intended also to impose on the merchant the obligation to inform the consumer of the existence, scope and duration of the manufacturer's conventional warranty. The merchants opposed the adoption of such a measure: they pleaded, with reason, that the obligation to know the scope of the manufacturer's warranty for each product sold represented an excessive burden. When the Bill was studied by the Committee on Citizen Relations, the Justice Minister withdrew that requirement; she explained that a new provision would, however, grant consumers the right to cancel the extended warranty after a certain period that would enable them to learn about the manufacturer's warranty and to deem, in an informed manner, whether it is necessary to pay for an extended warranty. Despite the Minister's announcement, this measure has never been proposed to the Commission and has thus not been integrated with the CPA, unfortunately.

Some improvements could of course be made to the CPA. Other than the one we just mentioned, the legislators should, in our view, explicitly provide that merchants bear the costs of implementing legal warranties, as is provided for conventional warranties (CPA sec. 48 and 49). The Office de la protection du consommateur indicates on its website that the legal warranty should be implemented at no charge¹⁷⁵. We might think it obvious that the legal warranty cannot be implemented at the consumer's expense, since it involves obligations on the merchant or manufacturer; a clarification of the Act could avoid any eventual problem of interpretation.

B) The Common Law and the Sale of Goods Act

The province of Quebec differs from the other Canadian provinces in that its private law is not governed by the common law, but rather by a civil code, which provides specific legal rules. Under common law, court decisions play a primary role in developing and interpreting legal principles and rules. To facilitate the application of legal rules and make it more predictable, the United Kingdom undertook in 1893 to codify contractual rules. A detailed study of the case law development of common law contractual rules would be a colossal task, which we do not pretend to undertake in the present report, which rather will discuss the common law's legal warranty plan as enshrined in the Sale of Goods Act.

The common law and the Sale of Goods Act: concepts, interpretation and application

First it should be noted that all the provinces except Quebec have a law titled the *Sale of Goods Act* [hereinafter the *SGA*] or *Loi sur la vente d'objets*, inspired by the British *Sale of Goods Act*, first codified in 1893¹⁷⁶. The United Kingdom wanted to extend the *SGA* throughout the British Empire, not only to ground existing commercial practices, but also to increase the predictability of rules developed under common law. In Canada, integration with statutory law was done

¹⁷⁵ OFFICE DE LA PROTECTION DU CONSOMMATEUR, *Garanties*, Québec City, [Online] <http://www.opc.gouv.qc.ca/webforms/SujetsConsommation/InformatiqueElectronique/OrdinateursPeripheriques/Garanties.aspx#GarantieLegale> (page consulted on May 25, 2012).

¹⁷⁶ First consolidation of common law rules: *Sale of Goods Act 1893*, 56 & 57 Vict., c. 71 (UK); the version currently in effect in the UK is: *Sale of Goods Act.*, 1979, ch. 54.

through provincial laws modelled after the *Uniform Sale of Goods Act*¹⁷⁷, a model law proposed by the Uniform Law Conference of Canada¹⁷⁸ and inspired by the British SGA.

Belonging to the common law and applicable to all types of contracts, the SGAs also apply suppletively to consumer contracts. Those laws would regulate consumer contracts in the absence of specific statutory provisions. The SGA would also apply where provincial statutory laws refer to SGA provisions¹⁷⁹. Of all the provinces and territories, it should be noted that only New Brunswick, Saskatchewan and Manitoba have adopted specific laws containing legal warranties and setting aside many SGA principles. For its part, Ontario has included section 9 in its *Consumer Protection Act, 2002*, which assumes that the service provider guarantees that the services are of reasonably acceptable quality¹⁸⁰. The second paragraph of that provision is content to refer to the Ontario SGA. Prince Edward Island and British Columbia have not adopted a statutory law for legal warranties other than those stated in the SGAs. Other laws, such as those governing commercial practices, may find application in matters of warranty. This is notably the case for Alberta's *Fair Trading Act*¹⁸¹.

The SGAs contain statutory guarantees (such as “*implied warranties*”) for the sale of goods and services. Those guarantees are either “warranties” or “conditions”. So what is the difference between a “condition” and a “warranty”? Both are obligations imposed on the seller during the sale of items; the main difference is in the possible actions and remedies in the event of a violation (a “breach,” in the case of a warranty) or a default (on a condition)¹⁸². In the case of default on a condition, the buyer may refuse the product that is the object of the contract, and the contract is then terminated. This is justified by the fact that a condition, as opposed to a warranty, is considered to be at the very source of the contract¹⁸³. If a warranty is breached, the buyer does not benefit from the right of refusal, and the contract cannot be terminated. The buyer may bring an action against the seller to demand a price reduction or annulment, in addition to damages¹⁸⁴.

An analysis of the SGAs in effect in each Canadian province¹⁸⁵ yields a distinction between two categories of statutory guarantees under the seller's responsibility. All the SGAs contain the same warranties and conditions.

¹⁷⁷ *Uniform Sale of Goods Act*, [Online] <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1s2> (page consulted on June 1, 2012).

¹⁷⁸ UNIFORM LAW CONFERENCE OF CANADA, *What we do*, Barrhaven, Ontario. [Online] <http://www.ulcc.ca/en/about/index.cfm?> (page consulted on June 4, 2012).

¹⁷⁹ Ontario's *Consumer Protection Act, S.O. 2002*, c. 30, Annex A provides such a referral in its section 9, par. 2.

¹⁸⁰ Sec. 9(1), *Consumer Protection Act, S.O. 2002*, c. 30, Annex A.

¹⁸¹ See, for example, sec. 4 par. a) to g), *Fair Trading Act, RSA, 2000 v. F-2*, regarding supplier representations that might influence the consumer to his disadvantage, as well as supplier representations on the quality of goods and services.

¹⁸² For more details on “warranties” and “conditions,” see *Common Law and Legal Warranties*, in section 1.1 b) of the present report.

¹⁸³ Similarly in New Brunswick, CPA, pp. 143 to 145.

¹⁸⁴ Sec. 60, *Sale of Goods Act, RSNWT*, (Nu) 1988, c. S-2.

¹⁸⁵ *Sale of Goods Act*, S.R.O. 1990, c. S.1 (Ontario), *Sale of Goods Act*, CCSM, c. S10 (Manitoba), *Sale of Goods Act*, RSS, 1978, c. S-1 (Saskatchewan), *Sale of Goods Act*, RSA, 2000, c. S-2 (Alberta), *Sale of Goods Act*, R.S.B.C., 1996, c. 410 (British Columbia), *Sale of Goods Act*, RSNB, 1873, c. S-1 (New Brunswick), *Sale of Goods Act*, RSNS, 1989, c. 408 (Nova Scotia), *Sale of Goods Act*, RSPEI, 1988, c. S-

First there are statutory guarantees (“conditions”) related to the property right and mainly aiming to protect the buyer against illicit sales of goods and to provide compensation in the event of a breach of warranties under law (i.e., the equivalent of the warranty against eviction). Generally, the SGAs stipulate that the seller must have the right to sell the object¹⁸⁶, that the buyer has and retains peaceful enjoyment of the good¹⁸⁷, and that the good that is the object of the contract is free from any charge or encumbrance in favour of a third party, except for those that were declared to the buyer before the contract was entered into¹⁸⁸.

The second category groups the seller’s obligations regarding the quality of the good and its fitness to serve its intended purpose (*quality and fitness*¹⁸⁹). The writing of the *Sale of Goods Act* is at times perplexing. In principle, the *Sale of Goods Act* provides that there are no guarantees concerning the quality or the fitness of the good’s specific use as intended by the buyer and differing from the normal or announced use. Nevertheless there are exceptions that, albeit not very numerous, remain sufficiently broad to cover a great many situations. The most important of those exceptions is the following:

*a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for the purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose*¹⁹⁰.

We thus see that the exception itself involves conditions of application: the buyer’s communication of his intentions and his confidence in the seller’s judgment or expertise. The conditions we find in this category apply to certain types of sales in particular. We conclude that, in the case of a sale of objects purchased by description, the SGAs already contain a condition that the good corresponds to the seller’s description. This guarantee of course covers all representations common to all consumers, but also representations made, as the case may be, to each consumer. However, we can assume that the seller will not make representations on specific uses without the latter being communicated to him beforehand. If the buyer acquires a good for specific purposes and so informs the seller, implicitly or explicitly, there will be an implicit condition to the sale to the effect that the good will be reasonably fit for that particular use¹⁹¹.

Generally, the SGAs provide that during an object’s sale by description between a buyer and a seller who trades in goods conforming with the description, there is a condition that the good is of merchantable quality¹⁹². As in civil law, we can easily imagine the problems of interpretation that can follow from the concepts and terms used.

1 (Prince Edward Island), *Sale of Goods Act.*, RSNL, 1980, c. S-6 (Newfoundland and Labrador), *Sale of Goods Act*, RSNWT, (Nu) 1988, c. S-2 (Nunavut), *Sale of Goods Act*, RSNWT, (Nu) 1988, c. S-2.

¹⁸⁶ For example, see section 13(1)a of the Ontario *Sale of Goods Act*.

¹⁸⁷ For example, see section 14(b) of the Alberta *Sale of Goods Act*.

¹⁸⁸ For example, see section 14(c) of the Alberta *Sale of Goods Act*.

¹⁸⁹ For example, see section 18 of the British Columbia *Sale of Goods Act*.

¹⁹⁰ For example, see section 16a) of the Manitoba *Sale of Goods Act*.

¹⁹¹ For example, see section 18 of the Nunavut *Sale of Goods Act*.

¹⁹² For example, see section 15 of the Ontario *Sale of Goods Act*.

The concepts of “*merchantable quality*,” “*sale by description*,” or “*warranty*” as opposed to “*condition*” have generated much commentary in British and Canadian courts. Despite the good intentions that led to codification of common law rules governing contracts, it is essential, to understand adequately the operation and application of SGA provisions, to know the principles developed by abundant case law. Given that the common law is not built exclusively by national court decisions, reference will also be made to case law produced by British courts and other Commonwealth jurisdictions¹⁹³.

The concept of merchantable quality

One of the key concepts of the legal warranty plan under the common law is that of “*merchantable quality*.” The uniform law provides the following:

- 44(1) In this section, "merchantable quality" means*
- (a) that the goods, whether new or used, are*
 - (i) as fit for the one or more purposes for which goods of that kind are commonly bought or used,*
 - (ii) of such quality, and in such condition, as is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances;*
 - (b) without limiting the generality of clause (a), that the goods*
 - (i) are goods that pass without objection in the trade under the contract description,*
 - (ii) in the case of fungible goods, are of fair or average quality within the description,*
 - (iii) within the variations permitted by the agreement, are of the same kind, quality and quantity within each unit and among all units involved,*
 - (iv) are adequately contained, packaged and labeled as the nature of the goods or the agreement require, and*
 - (v) will remain fit, perform satisfactorily and continue to be of such quality and in such condition for any length of time that is reasonable having regard to all the circumstances, and*
 - (c) in the case of a new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a reasonable period of time.*

A good of merchantable quality will therefore be fit for the use(s) normally expected for this type of good; will be of a quality and condition that will meet legitimate expectations, given the description, price and other relevant elements (which create expectations); complies with the standards and what is stated in the contract as to quantity and quality; and will retain its quality and usefulness for a reasonable period, all circumstances taken into account. In addition, if necessary, parts and services will be available for a reasonable period.

These elements of definition do not, of course, constitute a full and exhaustive interpretation. As Professor Atiyah points out so well, regarding the definition of “*merchantable quality*” in the British SGA, it remains necessary to consult the court’s interpretation, since the non-definition leaves large grey areas (notably by using terms referring to what is reasonable and relevant):

It will be apparent that the concept of merchantability is an extremely flexible one, and this flexibility is in no way restricted by the new statutory definition. It does not seem to

¹⁹³ FRIDMAN, G., *The Sale of Goods in Canada*, p. 3.

*be going too far to say that, in effect, the concept merely requires the goods to be of the sort of quality reasonably to be expected having regard to all the circumstances of the case. The new definition, far from being, as some definitions are, a straight jacket, turns out to be largely a non-definition; it delegates to the Court the task of deciding what is reasonable and the circumstances of each particular case guided no doubt by general acceptance of what reasonableness requires in various classes of cases*¹⁹⁴.

What is a warranty under the SGA?

Although neither the provincial SGAs nor the model law of Uniform Law Conference of Canada define the term “*warranty*,” it is understood as “*an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not the right to reject the goods and to treat the contract as repudiated*”¹⁹⁵. The doctrine thus considers the warranty as part of the contractual content, but without constituting a determining condition of it. Complying with the warranty is mandatory, but the warranty is not at the essence of the contract¹⁹⁶.

The term “condition” under the SGA

As mentioned above, the term “*condition*” taken in this sense in the context of legal warranties results from a development of case law. In the SGA, *conditions* will be constituted by certain elements that must necessarily exist for the contract to be considered valid. We have seen, the SGAs provide several such *conditions*, which allow refusal of the good and constitute the seller’s repudiation of the contract (as opposed to breaches of *warranties*).

Definition of “express warranty”

The model law presents a definition of “express warranties” that is also found in the statutory laws of common-law provinces:

“express warranty” means

(i) a term of the contract,

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

(iii) a statement described in section 42(5), (6), or (7), or

*(iv) an express warranty described in section 42(9)*¹⁹⁷.

¹⁹⁴ ATIYAH, P.S., *The Sale of Goods*, 5th ed., London, Pitman Publishing Ltd. (1975).

¹⁹⁵ Sec. 1(1), *Sale of Goods Act*, UK.

¹⁹⁶ ACCESS PRO BONO, *Law Student Legal Advice Program (LSLAP), Chapter Nine: Consumer Protection*, p. 13 [Online] http://www.lslap.bc.ca/main/?Manual_download (page consulted on June 1, 2012).

¹⁹⁷ Sec. 1p), *Uniform Sale of Goods Act*.

The term “*express warranty*” naturally contrasts with “*implied warranty*” – the latter term designating warranties that will be considered included in the contract or accessory to it although the contract and the seller are silent on the subject.

While contractual provisions are automatically part of express warranties, the seller’s written or verbal declarations will constitute such warranties under the law only if the consumer relied on them and if it was reasonable for him to do so. The uniform law thus retains the principle of a “*reasonable reliance test*,” which allows an express warranty to be set aside if the seller demonstrates that the buyer did not rely on his statements of that it was unreasonable to do so. As we will see, some provinces have chosen to withdraw the “*reasonable reliance test*” for certain types of warranty.

“Innominate terms”

This is a concept not found in provincial SGAs but is generated by the common law. The concept of “*innominate terms*” was developed in the case of *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*¹⁹⁸ in 1962. *Innominate terms* are characterized as uncertain declarations assimilated by the judge to a *condition* or a *warranty* depending on the consequences of non-observance¹⁹⁹, with the available remedy following upon this characterization.

Concept of fundamental breach

Under the common law, although the principles of contractual primacy and freedom are predominant, case law mitigates this somewhat, particularly regarding the criterion of “*fundamental breach*.” The parties are free, when contracting, to exclude the warranties or parts thereof. Exclusion clauses nevertheless cannot free the contractor if the good that was the object of the contract has a fundamental defect. The application of this principle is explained in decisions cited notably in the case of *Briglio v. Paccar of Canada Ltd.*:

[22] *In considering the warranty disclaimer clause in R.G. McLean Ltd. V. Canadian Vickers Ltd. et al., [1971]1 O.R. 207, Arnup, J.J.A., stated:*

“In short, cl. 12 does not exclude liability for a fundamental breach of contract resulting in performance totally different from what the parties had in contemplation. The clause can be given business efficacy if its operation is limited to identifiable defects due to faulty workmanship or use of defective material, which defects can be rectified, and which do not prevent performance of the contract as contemplated by the parties.”

[23] *In Harbutt’s “Plasticine” Ltd. V. Wayne Tank and Pump Co. Ltd., [1970] 1 All E.R. 225, Lord Denning, M.R., stated at p. 235:*

¹⁹⁸ *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2Q.B.26 (C.A.).

¹⁹⁹ ACCESS PRO BONO, *Law Student Legal Advice Program (LSLAP), Chapter Nine: Consumer Protection*, p. 13. “*may be either treated as conditions or warranties depending on how severe the consequences of a breach may turn out to be. Whether an innominate term is a condition or a warranty is for a judge to decide.*”

“Manifestly, the courts should not be too ready to find a fundamental breach. The operation of an exemption claim is limited, so as to exclude fundamental breaches, only to give the clause business efficacy- so that the seller’s promises will not be held to be meaningless. But if relatively minor breaches by a seller are held to be fundamental, the clause would have no meaning at all, and that is contrary to all rules for the construction of documents. The result of the breach or breaches by the seller must be that performance of the contract by the seller is ‘totally different from what the parties had in contemplation’.”

The principle of “*fundamental breach*” can therefore apply only when the seller’s obligations, such as the service to be rendered or the good to be delivered, are completely different from what the parties agreed to. Consumer protection laws, as we will see below in discussing applicable warranty laws in the province of New Brunswick, have aimed to make the principle’s application more flexible.

Limitation and exclusion clauses

All the SGAs of Canadian provinces expressly provide that warranties offered by the *Sale of Goods Act* are not imperative²⁰⁰: contractual clauses can thus reduce the scope of warranties provided by the SGAs or even exclude them. But this is not always allowed for consumer contracts: in the majority of Canadian provinces, statutory laws state that consumer protection laws, and thus applicable legal warranties under those laws, are of public order. Whenever possible, warranty limitation or exclusion clauses must, to be judged applicable by the courts, meet two criteria: 1) the clauses must be express and have a sufficiently clear scope – they will be interpreted restrictively and in favour of the weaker party, i.e., the consumer; 2) it is important that the buyer discover the existence of that limitation or exclusion clause. The seller must therefore ensure that the buyer has seen the clause²⁰¹.

Sale of Goods Act: recourses

As mentioned above, depending on whether there is a breach of *warranty* or a default on a *condition*, the recourses available to the buyer are different. If the buyer complains about a breach of *warranty*, he does not have the right to refuse the good that was the object of the contract or consider that the contract was repudiated by the seller²⁰² – but those remedies are available if a *condition* is violated. If a *warranty* is breached, the buyer may require a price reduction or annulment or bring an action for damages against the seller.

To conclude our analysis of the common law plan and the *Sale of Goods Acts*, we are reminded that the interpretation of the SGAs’ terms and their application are not limited to what is provided by the *Uniform Sale of Goods Act* or by the provincial SGAs. The applicable case law must also be taken into account.

²⁰⁰ For example, see section 16 of the Saskatchewan *Sale of Goods Act*, (*Sale of Goods Act*, RSS, 1979, c. S-1 (Northwest Territory), *Sale of Goods Act*, RSY, 2002, c. 198 (Yukon).

²⁰¹ FRIDMAN, G., *The Sale of Goods in Canada*, pp. 101 and 102.

²⁰² Given that the provisions are essentially the same from one province to another, we refer here to the provisions of the Ontario SGA, sec. 51.

The fact that SGA warranties are not of public order, and the possibility of limiting or reducing the warranties offered, result in this plan not being as advantageous to the consumer as it could be; it does not correct the existing imbalance or consumers' inferior position in relation to merchants. As we will see below, many of the principles found in the *Sale of Goods Act* or under the common law are also found in the statutory laws of common-law provinces; those principles are interpreted more clearly in those laws and their application is facilitated by legal provisions.

As we will see, some provincial legislatures, to better protect consumers and attempt to establish a better balance of power, have simply decided to adopt provisions contrary to common law principles and usual SGA provisions. We will examine those legislations.

c) Legal Warranty Plans under Provincial Laws

In contrast to the *Sale of Goods Act*, Canadian consumer protection laws have not been harmonized according to a model law such as the *Uniform Sale of Goods Act*, created by the Uniform Law Conference of Canada. As mentioned above, only New Brunswick, Saskatchewan and Manitoba have adopted additional legal warranties in consumer protection laws. Some provinces and territories have no legislation other than the SGA: this is the case for Alberta, British Columbia, Newfoundland and Prince Edward Island. Other provinces repeat, in their consumer protection law, the same principles as the SGA's, while adding a few components at times²⁰³.

We have already mentioned Ontario's *Consumer Protection Act, 2002*, which applies the warranties of the *Sale of Goods Act* to consumer contracts regarding goods, adds a warranty of quality to service contracts, and does not allow those warranties to be set aside.

Quality of services

9. (1) *The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality. 2002, c. 30, Sched. A, s. 9 (1).*

Quality of goods

(2) *The implied conditions and warranties applying to the sale of goods by virtue of the Sale of Goods Act are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement. 2002, c. 30, Sched. A, s. 9 (2).*

Same

(3) *If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing an intent that the deemed or implied warranty or condition does not apply. 2002, c. 30, Sched. A, s. 9 (4).*

²⁰³ This is the case for Nova Scotia (*Consumer Protection Act*, RSNS, 1989, c.92), Nunavut, whose *Consumer Protection Act*, as opposed to the SGA, states that legal warranty provisions are public (sec. 18, *Consumer Protection Act*, RSNWT (Nu), 1988, c.C-17). Nunavut recopies the Northwest Territory Act (*Consumer Protection Act*, RSNWT, 1988, c.C-17) and the situation is the same for Yukon (*Consumer Protection Act*, RSY, 2002, c.40.).

There are major differences between provincial legal warranty plans in Canada. For example, Quebec favours a general legal warranty plan for transactions between consumer and merchant, whereas New Brunswick's legal warranty plan is more broadly applied. The *Consumer Product Warranty and Liability Act* states in section 2(1) that "Subject to subsection (2), this Act applies to every sale or supply of a consumer product²⁰⁴." Accordingly, this law governs purchases made by consumers who are natural persons acquiring goods for personal or commercial use, as well as purchases made by corporations and other companies, whatever their status. In contrast to the Quebec regime, the buyer's status (consumer, merchant, professional) or the use he intends for the good does not make the law applicable, but rather the nature of the product, which must usually be used for personal, family or domestic purposes²⁰⁵.

According to the author Fridman, the three Canadian provinces, other than Quebec, that have adopted statutory laws regarding additional legal warranties have legislated more broadly: "while preserving the existing common law, [they] appear to have broadened the scope and effect of statement relating to consumer goods sold by a retail seller, as defined by those Acts, to a consumer²⁰⁶."

Our study of the plans in common law provinces will comprise 3 sections: a study of New Brunswick's law, which is older, will serve as a basis for a better understanding of the applicable concepts and their interpretation. Finally, we will compare the laws of Saskatchewan and Manitoba with those of New Brunswick, while pointing out the divergences.

Generally, we will not consider provisions dealing with procedures (limitation periods, competent courts, etc. etc.) for applying the legal warranty, but will focus on the available rights and the recourses in case those rights are violated. Nor will we concentrate on provisions for prohibited commercial practices, even if they may be applicable to warranties (prohibition against false representations, for example).

New Brunswick: a broad framework of application

The New Brunswick law governing warranties also covers the product liability framework. As mentioned above, this is a major difference from other Canadian plans; but it has some similarities with foreign jurisdictions that have grouped warranty with product liability regulations²⁰⁷. Given that New Brunswick was one of the first provinces to adopt a warranty law, this warranty plan must be analysed and will constitute the reference framework for our analysis of common law provincial legislations. The scope of the New Brunswick law, the types of warranty and the regulation of warranty exclusion and limitation clauses merit study in the present section, in order to fairly assess the warranty plans prevailing in Canada.

²⁰⁴ Sec. 2(2), *Consumer Product Warranty and Liability Act*, SNB, 1978, c. C-18.1.

²⁰⁵ We will further discuss New Brunswick's legal warranty plan in the following section.

²⁰⁶ FRIDMAN, G., *The Sale of Goods in Canada*, Toronto Carswell, 5th ed., 2004, p. 152.

²⁰⁷ As stated above, the law's section on product liability will not be analysed in the present study; when necessary, it will be mentioned in a complementary manner.

The *Consumer Product Warranty and Liability Act*²⁰⁸ [CPWLA] establishes rules for warranties in New Brunswick. This law, in effect since January 1, 1980, has had major effects on the regulation of warranties in that province. It introduces new principles, such as the buyer's right to refuse the good and the seller's right to have a reasonable opportunity to correct a breach of any warranty under the Act, and distances itself from certain key principles of the common law. As the author Karl Dore points out, this Act has considerably reformed and modernized the Consumer Product Warranty and Liability Act, not only from the consumer's viewpoint, but also from the viewpoint of the buyer in business activities²⁰⁹. The CPAWLA's provisions cover all sales or provisions of consumer products²¹⁰, with no specific restriction on the buyer, nor any requirement that the latter be a natural person. The legal text thus does not refer to the consumer, but to the buyer²¹¹.

Rules regarding the good's intended purpose are found in the very definition of the goods covered by the Act. A consumer product under the Act is "any tangible personal property, new or used, of a kind that is commonly used for personal, family or household purposes"²¹².

To clarify what a consumer product is, the New Brunswick Department of Justice and Consumer Affairs, in its Consumer Guide, gives the example that a family car or household appliance is a consumer product, but a transport truck or heavy machinery is not²¹³. The test for determining whether a transaction entails application of the warranty is not whether the product is acquired for personal, family or household use; but whether the product itself is of a type usually used in that way²¹⁴.

Services are therefore excluded from application of the law; according to the latter's definition, the consumer product covered is a personal and material good²¹⁵. In addition, section 1(1) defines the sale or provision to include sales, such as conditional sales, barter, rentals and others, and includes "a contract for services or for labour and materials if a consumer product is supplied along with the services or labour"²¹⁶, not to guarantee the service, but to include the consumer product involved as part of such a contract. This exclusion of services may be considered an important omission, given the market share of service contracts; but we are reminded that the model that guided the development of warranties in common law statutory plans has always been the *Sale of Goods Act*...

²⁰⁸ *Consumer Product Warranty and Liability Act*, SNB, 1978, c. C-18.1.

²⁰⁹ DORE, K.J. *The Consumer Product Warranty and Liability Act*, 31 U.N.B.L.J. 161 1982, p. 161. It should be noted that Karl Doré played an important role in establishing the CPWLA. Professor Karl J. Dore participated as project director for the warranty study and oversaw the legislative processes leading to the implementation of the Act in his then capacity as Director of Consumer and Corporate Affairs." In the First Report of the Consumer Protection Project, Part I: Consumer Guarantees in the Sale or Supply of Goods, Part II: Progress Report on Remaining Parts of Consumer Protection Project (Fredericton, Department of Justice, Law Reform Division, 1974)". (*René's Service & Trailer Ltd. v. Savoie*, 2009 NBCA 15., par. 11.)

²¹⁰ Sec. 2(1) CPWLA.

²¹¹ "Buyer" means a person who is supplied under a contract for the sale or supply of a consumer product; Sec. 1(1) CPWLA.

²¹² Sec. 1(1) CPWLA.

²¹³ JUSTICE NEW BRUNSWICK, *Consumer Product Warranty and Liability Act – Consumer Guide*, 3rd ed., 1983, p. 1.

²¹⁴ DORE, K.J. *The Consumer Product Warranty and Liability Act*, p. 162.

²¹⁵ Sec. 1(1) CPWLA.

²¹⁶ Sec. 1(1), subsection 4, par. d) CPWLA.

The Act's field of application is again extended by the broad definition of "distributor" to mean "a person who supplies consumer products as part of his regular business and, without limiting the generality of the foregoing, includes a producer, processor, manufacturer, importer, wholesaler, retailer or dealer²¹⁷." Moreover, the government is also subject to this Act of public order²¹⁸ that has primacy in the event of a conflict with another law²¹⁹. The term "commercial activity" includes a profession and the activity of a government Department or organization, a municipality or municipal organization, a rural committee or rural, or a Crown corporation²²⁰. And like a good number of Canadian laws, New Brunswick's does not apply to transactions between individuals or with a "seller or supplier who is not a distributor of consumer products of that kind and does not hold himself out as such, (...) other than liability under section 8 [which concerns implied warranties] (...) [or] liability because of that person's fraud²²¹."

New Brunswick has also adopted a singular definition of warranties. The Act defines a warranty as "a term of the contract that is a promise²²²," while establishing two types of warranty: express warranties and implied warranties. Express warranties are rights resulting from promises and indications made by the seller, and implied warranties are those that do not depend on the seller's representations²²³. While the definition of the term "warranty" refers to a contractual clause, the warranties found in the CPWLA are not limited to ensuring the good's conformity with what appears in the contract, but rather incorporates in the contract the seller's representation as well as the warranties resulting from the Act. As Karl Dore points out:

It should be noted that "warranty" is used in the Act in the wide sense as meaning simply a term of a contract rather than the narrow sense meaning a term of the contract that is less important than a condition, so that the warranty-condition dichotomy of the Sale of Goods Act, has been avoided.²²⁴

New Brunswick appears to have chosen a simpler route for defining the term "warranty" than that found in the common law, and has thus avoided the distinction between "warranties" and "conditions," which, as we have seen, opened the door to distinct remedies.

Express warranties

New Brunswick's express warranties concern verbal and written warranties given to the buyer, as well as any statement made to all or some of the public about a consumer product. For a verbal promise or declaration to bind the buyer in terms of an express warranty, it is necessary that the consumer make his purchase on the basis of those statements and that it be reasonable for him to do so²²⁵. To determine whether the seller will be liable for a breach of an express warranty resulting from a verbal statement made to the consumer, the Act avoids the

²¹⁷ Sec. 1(1) CPWLA.

²¹⁸ Sec. 2(3) CPWLA.

²¹⁹ Sec. 2(4) CPWLA.

²²⁰ Sec. 1(1) CPWLA.

²²¹ Sec. 3 CPWLA.

²²² Sec. 1(5) CPWLA.

²²³ DORE, K.J. *The Consumer Product Warranty and Liability Act*, p. 164.

²²⁴ *Ibid.*, p. 168.

²²⁵ JUSTICE NEW BRUNSWICK, *Consumer Product Warranty and Liability Act – Consumer Guide*, p. 2.

test, found in many Canadian laws, that verifies the seller's intention, and it adopts rather the "reasonable reliance test"²²⁶.

The Act's section 4, which states that the seller's verbal and written statements about a product are express warranties, mitigates that statement: the verbal statements made to a buyer are warranties, unless the buyer did not rely on the seller's statements or unless the circumstances show that it would be unreasonable for the buyer to rely on such representations.

It should also be noted that the test of intention does not apply if the seller's verbal statements are made to all or part of the public about a consumer product, or in the case of any written representation: unless the circumstances show that it would be unreasonable for the buyer to rely on the seller's statements, the warranty will apply, whether or not the buyer has believed those representations²²⁷.

Before discussing the CPWLA's various types of implied warranties, it should be mentioned that the seller is bound in principle by the statement of his representative or employee, but that he benefits from a line of defence: a statement made by the seller's representative or employee will not be attributable to him if the seller demonstrates that the person "was not acting within the scope of his actual, usual or apparent authority"²²⁸. Similarly, an express warranty will be constituted by a statement "made in writing on the product or its container or in a label, tag, sign or document attached to, in close proximity to, or accompanying the product, unless he proves that the statement was made by another person who was not a distributor of the product and that he neither knew nor ought to have known that the statement was made"²²⁹.

*"Where a statement was made in a manner or circumstances that it appears that the statement was made by the seller, it shall be presumed that the statement was made by the seller unless he proves that it was not his statement"*²³⁰.

Any promise or statement of fact or intention made before or during entry into the contract constitutes a "statement"²³¹.

Implied warranties

As mentioned above, "implied" warranties are not related to statements made by the seller. In reading the CPWLA provisions, we count several implied warranties, such as: the warranty concerning the title of ownership, the warranty of quality, the warranty of a product's fitness for a given use, the warranty that the product is new, and the warranty of compliance with standards²³². As Karl Dore points out, "The purpose of the implied warranties is to protect the

²²⁶ DORE, K.J. *The Consumer Product Warranty and Liability Act*, p. 165.

²²⁷ Sec. 4(1)b) and c) CPWLA.

²²⁸ Sec. 4(2)a) CPWLA.

²²⁹ Sec. 4(2)b) CPWLA.

²³⁰ Sec. 4(3) CPWLA.

²³¹ Sec. 4(4)b) CPWLA.

²³² Sec. 8-12 CPWLA.

*reasonable expectations that a buyer would have about the goods considering all the circumstances of the sale*²³³.”

So because they meet the consumer’s reasonable expectations, those warranties are considered part of the contract, without the merchant having to make any mention of the warranties.

Title of ownership

The seller warrants three elements to the buyer: that the seller is entitled to sell the product, that the latter is not encumbered by any right or privilege of which the buyer is unaware, and that the buyer will benefit from peaceful enjoyment of the product²³⁴. These are therefore basic warranties related to the warranty against eviction.

The New Brunswick Act contains a specific provision for consumer product lease or rental agreements without an option to buy: “the buyer will enjoy quiet possession of the product except so far as it may be disturbed by any person entitled to any interest, lien, charge or encumbrance actually known to the buyer before the contract is made²³⁵.”

The New Brunswick Department of Justice and Consumer Affairs mentions, to illustrate the title of ownership, the case of a person who buys a used car without he or the seller knowing that the previous owner had mortgaged it. The seller will be held liable for this defect, which affects the car’s right of ownership²³⁶.

Warranties of product quality and fitness

Section 9 states the existence of a warranty that the consumer product is new; this warranty does not apply if the seller tells the buyer that the good is used or if the buyer was aware or should have been aware that the product was not new or that it was unlikely to be so. In addition, the Act also provides that a product that was tested, commissioned, prepared or delivered – to the extent that the use was reasonable – is still considered new.²³⁷

The Act also provides an implied warranty said to be a warranty of product quality and fitness:

*[The product] is of such quality, in such state or condition, and as fit for the purpose or purposes for which products of that kind are normally used as it is reasonable to expect having regard to the seller’s description of the product, if any, the price, when relevant, and all other relevant circumstances*²³⁸.

²³³ DORE, K. *New Brunswick’s Consumer Products Warranty Legislation*, put online in 1998, p. 34.

[Online] <http://dspace.hil.unb.ca:8080/bitstream/handle/1882/68/cpwala.pdf?sequence=1> (page consulted on May 2, 2012).

²³⁴ Sec. 8(1) CPWLA.

²³⁵ Sec. 8(2) CPWLA.

²³⁶ JUSTICE NEW BRUNSWICK, *Consumer Product Warranty and Liability Act – Consumer Guide*, p. 3.

²³⁷ Sec. 9(2) CPWLA.

²³⁸ Sec. 10(1) CPWLA.

A consumer product must also, of course, comply with mandatory federal and provincial standards regarding health, safety and quality²³⁹.

However, the second paragraph of section 10 imposes certain limits, similar to elements for determining a defect's hidden nature, which, in Quebec, can open the door to bringing an action under the Civil Code. There are four specific circumstances under which the buyer cannot avail himself of the warranty:

- a) *as regards any defect that is known to the buyer before the contract is made;*
- b) *as regards any defect that the seller has reason to believe exists and that he discloses to the buyer before the contract is made;*
- c) *if the product is a used product and the buyer examines it before the contract is made, as regards any defect that that examination ought to reveal; or*
- d) *if there is a sale or supply by sample, as regards any defect that a reasonable examination of the sample ought to reveal.*

If the buyer tells the seller, implicitly or explicitly, before entry into the contract, the specific use he intends for the product, the merchant's acquiescence will create an implied warranty that the product is reasonably fit for that use, "whether or not that is a purpose for which such a product is normally used." But that warranty will not be created if "the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment²⁴⁰." In New Brunswick, it is not necessary for the seller be an expert on the product for that warranty to apply.

Finally, there is an implied warranty concerning the good's durability. The Act creates an implied warranty that "the product and any components thereof will be durable for a reasonable period of time²⁴¹." Like the CPA²⁴², the CPWLA lists factors that may be taken into account to determine whether a product's durability is reasonable: "all relevant circumstances, including the nature of the product, whether it was new or used, its use as contemplated by the seller and buyer at the time of the contract, its actual use and whether it was properly maintained²⁴³."

Remedies and legal principles

In the event of a breach of warranty, the buyer has several remedies available to him under the CPWLA.

Although New Brunswick's Act applies to all buyers – natural or moral persons, who contract for personal as well as commercial purposes – it provides different remedies according to the type of buyer: "unlike the warranties, the remedies for breach of a warranty differ depending on whether the buyer is a consumer buyer or a business buyer²⁴⁴." The Act provides specific

²³⁹ Sec. 10(1) CPWLA.

²⁴⁰ Sec. 11 CPWLA.

²⁴¹ Sec. 12(1) CPWLA.

²⁴² Sec. 38, *Consumer Protection Act*, R.S.Q., c. P-40.1.

²⁴³ Sec. 12(2) CPWLA.

²⁴⁴ DORE, K.J. *The Consumer Product Warranty and Liability Act*, p 167.

remedies for a buyer who is also a consumer. In fact, the remedies stated in sections 14 to 22 of the Act cannot be invoked in the case where:

*there is a contract for the sale or supply of a consumer product and the buyer makes or holds himself out as making the contract in the course of a business; or
there is a contract for services or for labour and materials and a consumer product is supplied along with the services or labour*²⁴⁵.

“Business” consumers nevertheless have the usual remedies in the event of a breach of warranty, i.e., those found in the *Sale of Goods Act*. In addition, given subsection b) of section 13, paragraph 1 of the Act, consumer contracts that are service contracts are thus subject to the *Sale of Goods Act*, which we discussed in the preceding section.

A buyer who discovers a breach of one of the CPWLA’s warranties must give the seller a reasonable opportunity to correct the breach, unless it is a major one or the seller cannot do so without serious inconvenience²⁴⁶. We will discuss below the characterization of “major breach,” also found in sections 16 and 17, which pertain to possible remedies.

If the seller requires the buyer to return the product to correct the breach of warranty, the seller must pay reasonable expenses for the product to be returned²⁴⁷. The buyer is not obliged to return the product if that would entail serious inconvenience due to the size, weight, or means of fastening or installing the product concerned. The very nature of the breach may also constitute a valid reason for refusal²⁴⁸.

Only after giving the seller a reasonable opportunity to correct the breach will the buyer be entitled to refuse the good and require termination of the contract between the parties²⁴⁹. We will further elaborate below on this possibility of refusal, which was first offered to Canadian consumers in the province of New Brunswick.²⁵⁰

If a seller breaches a warranty under the Act and does not correct the breach although the consumer gives him a reasonable opportunity to do so, or if the breach is considered major, the buyer may refuse the product within a reasonable period following his discovery of the breach²⁵¹.

In addition, the buyer may request that the court order reparations for any harm he has suffered following a breach of any warranty under the Act if the harm was a predictable result of the breach at the time when the contract was entered into²⁵².

²⁴⁵ Sec. 13(1) CPWLA.

²⁴⁶ Sec. 14(1) CPWLA.

²⁴⁷ Sec. 14, subsections 2 and 4 CPWLA.

²⁴⁸ Sec. 14(3) CPWLA.

²⁴⁹ See: *Audet v. Central Motors Ltd.* (1981), 35 N.B.R. (2e) 143 (C.B.R.), [1981] N.B.J. Op. Cit., 147 (QL).

²⁵⁰ This measure is also provided in section 57(1)b) of Saskatchewan’s *Consumer Protection Act*, S.S. 1996, c. 30.1. However, as we will see below, Saskatchewan advocates a different approach from that of “major breach.”

²⁵¹ Sec. 16 CPWLA.

²⁵² Sec. 15 CPWLA.

The buyer cannot refuse the good if he cannot return to the vendor the product free of any charge granted to a third party, except for a security interest²⁵³.

The definition of a *major breach*, enabling the consumer to terminate the contract by refusing the consumer product, even if he does not give the seller an opportunity to correct the breach of warranty, has generated much commentary in New Brunswick. Is a major breach under the CPWLA identical to “*fundamental breach*” under common law?

A New Brunswick Court of Appeal decision rendered in 2009 in the case of *René’s Service and Trailer Sales Ltd. v. Savoie*²⁵⁴ is indicative. Two days after taking possession of their new recreational trailer, rain caused water infiltrations in the extensible portion of the trailer. The buyers allowed the seller to make necessary repairs, i.e., applying a caulking product and installing rubber. Once the repairs were completed, the seller verified the watertightness by pouring water on the extensible portion. A small water infiltration resulted, but the seller estimated it normal since the water had been thrown directly on the trailer with a hose. A few days later, the buyers, who had retaken possession of the vehicle, observed new water infiltrations, elsewhere in the trailer, that were also caused by rain. The vehicle was towed to the seller’s premises, and the buyers asked him to terminate the contract because of a major breach of warranty under CPWLA sections 10 and 12, and demanded reimbursement of the amounts they had paid the seller. The seller appealed in the Court of Appeal the Queen’s Bench decision that a major breach had occurred justifying the consumers in terminating the contract and refusing the good.

After an exhaustive summary of the case law of that province’s courts, the Court of Appeal proposed a reasoned definition of the term “major breach.” The key decisions offered two different interpretations of the concept of “major breach,” which of course entailed different applications of the right to terminate a contract due to a major breach. Some think that the concept of “*major breach*” is equivalent to the common law concept of “*fundamental breach*”: the breach must affect the very essence of the contract²⁵⁵.

Others think the two concepts distinct: an accumulation of breaches, which taken separately would not constitute a major breach, may, for example, constitute a “major breach” and result in the contract being terminated by the consumer. Certain factors should be taken into account to determine whether the seller has committed a major breach: “the price of this contract, the credible criticism of the workmanship under oath of various witnesses, the numbers of unsuccessful attempts by the seller’s agents in *correcting* the outstanding deficiencies, and the fact that the purchasers finally ran out of patience²⁵⁶.” The Court of Appeal had already taken this path, by declaring that a major breach requires less than a “fundamental breach”: “the intent of the phrase is a breach that would lead an ordinary person to say, under all of the circumstances, ‘that’s very serious’²⁵⁷.”

²⁵³ Sec. 21(1) CPWLA.

²⁵⁴ *René’s Service & Trailer Ltd. v. Savoie*, 2009 NBCA 15.

²⁵⁵ See: *Gauvin and LeBlanc v. Dryden Motors Limited* (1981), 34 N.B.R. (2e) 143 (C.B.R.), [1981] N.B.J. No. 74 (QL) and *Beaulieu v. Leisure Time Sales Ltd. et al.* (1993), 138 N.B.R. (2d) 215 (Q.B.), [1993] N.B.J. No. 347 (QL).

²⁵⁶ *Medjuck & Budovitch Ltd. v. Young* (1988), 86 N.B.R. (2e) 386 (C.B.R.), [1988] N.B.J. No. 48 (QL), p. 396.

²⁵⁷ *Sirois v. Centennial Pontiac Buick GMC Ltd. and General Motors of Canada* (1988), 89 N.B.R. (2e) 244 (C.A.), [1988] N.B.J. No. 407 (QL), p. 248.

Professor Ivan F. Ivankovich supported this approach, and opined that assimilating the two concepts to one another would deny consumers the immediate right to refuse a consumer product²⁵⁸.

In the *Savoie* decision, the Court of Appeal estimated that the second approach was more appropriate: the CPWLA was adopted to replace the previous regime, i.e., that of the *Sale of Goods Act*, which contained the principle of “*fundamental breach*,” with a new, fairer and more flexible plan. The CPWLA should be interpreted so as to meet those objectives.

Moreover, the judges also answered the questions raised by the seller’s defence: can a breach of warranty that can easily be corrected be characterized as a major breach? The Court answered yes: if the legislature had not intended this result, it would have retained, as Saskatchewan had done with a similar provision²⁵⁹, the concept of fundamental breach, which it is impossible to correct. The Court defined the criteria according to which a breach may be considered major:

- a) The ease with which the breach may be corrected;
- b) The consequences of the breach;
- c) The impact of the breach on the product’s residual value (on the expectation of the product’s duration and on the value of the good when it is returned);
- d) Other factors, such as the product’s price, nature, etc.

It should be emphasized that the question of the nature of a breach is, according to the judges, a mixed question of fact and law, and that the Court of Appeal judges show restraint in reviewing decisions rendered by judges of the first instance²⁶⁰.

The consumer’s exercise of the right of refusal means that the seller is bound to reimburse the consumer for all payments made and free him from his contractual obligations. The buyer also has the right, as the case may be, to damages for other harm resulting from the breach²⁶¹. In addition, New Brunswick grants the buyer a right of retention until he is fully reimbursed for payments made for the product²⁶².

It should be noted that this remedy can be exercised only against the seller and not against other stakeholders in the distribution chain (manufacturer, distributor, etc.).

A seller who accedes to the buyer’s right to refuse the product has the right to deduct from the reimbursement either a reasonable amount representing the profit made by the buyer while he had the product in his possession or, if the product was damaged beyond normal wear, a reasonable amount to compensate for the damage²⁶³.

²⁵⁸ IVANKOVICH, I.F. *Consumer Products in New Brunswick*, (1984), 33 R.D.U.N.-B. 60, p. 16.

²⁵⁹ This is section 57(1)b) of the *Consumer Protection Act*, S.S. 1996, ch. C-30.1. We will discuss this in our analysis of provincial legislation.

²⁶⁰ *Housen v. Nikolaisen*, [2002] 2 R.C.S. 235, [2002] A.C.S. No. 31 (QL).

²⁶¹ Sec. 17(1), CPWLA.

²⁶² Sec. 18(1), CPWLA.

²⁶³ Sec. 17, par. 2 and 3 CPWLA.

To increase the level of protection benefited by buyers who are also consumers, the CPWLA prohibits warranty limitation and exclusion clauses. But it authorizes a reasonable limitation or exclusion of remedies following a breach of an express warranty²⁶⁴. Moreover, the seller cannot use an express warranty to exclude an implied warranty.

As for the remedies, the CPWLA restricts the fundamental principle of “*privity of contract*,” particular the “*vertical privity rule*.” Under section 23 of the Act:

Where the seller is in breach of a warranty provided by this Act, any person who is not a party to the contract but who suffers a consumer loss because of the breach may recover damages against the seller for the loss if it was reasonably foreseeable at the time of the contract as liable to result from the breach.

Karl Dore specified the parameters that should be kept in mind to clearly understand the meaning of section 23:

In order to understand the scope of section 23, bear in mind that the CPWALA warranties apply to any sale or supply of a consumer product to anyone by anyone who is a distributor of consumer products of that kind. Forgetting this is a common mistake -- and a big one, because it results in failing to see how section 23 applies throughout the entire distribution chain, from the manufacturer right down to the ultimate consumer, and outside the distribution chain as well²⁶⁵.

Any subsequent acquirer who suffers a loss that could foreseeably result from the seller's violation of a warranty may therefore require compensation, so long as a consumer loss is involved²⁶⁶. Since the Act applies to any buyer, if, for example, the manufacturer sells a product to the distributor, who in turn sells it the consumer, and if the manufacturer breaches one of the warranties under the Act, the consumer may bring an action directly against the manufacturer for any consumer loss he suffers. In addition, the manufacturer cannot invoke the liability exclusion or limitation clause that might exist in the contract between him and the distributor, because he cannot free himself from his liability where a consumer loss is involved²⁶⁷.

Despite the substantial protection measures found in the CPWLA, notably the buyer's right to refuse the good or his right of retention, the fact that the Act applies to all types of consumer products, whoever the buyer is, unfortunately diminishes the effects. Indeed, the majority of measures contain significant mitigations, particularly through the possibility of excluding certain warranties if the circumstances show that the buyer does not rely on the seller's statements, or if it would be unreasonable for the buyer to rely on them (*reasonable reliance test*). Evidently, this is not an Act that aims, a priori, to establish a balance between two parties – since the Act applies to everyone, some buyers may have equal power (“*business buyers*,” for example).

²⁶⁴ Sec. 24 and 25(1), CPWLA.

²⁶⁵ DORE, K. *New Brunswick's Consumer Products Warranty Legislation*, put online in 1998, p. 267. [Online] <http://dspace.hil.unb.ca:8080/bitstream/handle/1882/68/cpwala.pdf?sequence=1> (page consulted on May 2, 2012).

²⁶⁶ The term “consumer loss” is defined in section 1(1) of the Act as: a) a loss that a person does not suffer in a business capacity; or b) a loss that a person suffers in a business capacity to the extent that it consists of liability that he or another person incurs for a loss that is not suffered in a business capacity.

²⁶⁷ Sec. 24 and 26 CPWLA.

Nevertheless we retain that the Act attempts to establish a balance between consumer and merchant by means of specific recourses available to the consumer. As Karl Dore states:

The balance struck by CPWALA between the parties' conflicting interests regarding remedies for breach is, on the one hand, to give sellers greater opportunities to cure their breaches than they have under general sales law and, on the other hand, to give consumers greater opportunities to reject the goods failing cure²⁶⁸.

In addition, we deplore the fact that only contracts involving consumer products are covered and that services do not benefit from the same warranties, but are subject only to the regime of the *Sale of Goods Act*, an archaic and much less flexible regime.

The Saskatchewan law

The *Consumer Product Warranties Act*, in effect in Saskatchewan since 1978²⁶⁹, was abrogated in 1996 and replaced by the *Consumer Protection Act*²⁷⁰ [CPA]. The Saskatchewan law borrows many concepts and provisions from the New Brunswick law. All the common law and legal interpretations and principles we discussed in the section on New Brunswick are also applicable to this jurisdiction.

Tabling of the bill that led to the CPA greatly surprised Saskatchewan's legal community. As pointed out by Professor Buckwold, this law replaces a law adopted while the Canadian consumer movement was in full flight. Given that, in 1996, the movement seemed out of steam, the new CPA surprised many²⁷¹. The CPA is comprised of several sections: commercial practices, remote contracts, prepaid business cards – one of those parts (Part III) pertaining specifically to consumer goods. Part III deals with express warranties (sections 45 to 47) and statutory warranties (sections 48 to 52). The 1978 Act made no mention of legal warranties, so the SGA applied by default.

CPA conditions of application

The CPA's warranty regime applies to consumers acquiring consumer goods. Section 39 d) defines as a consumer any person, including non-profit organizations, who acquires a product from a retailer, except for resale or use in a business.

This definition of "consumer," which closely resembles the definition found in the Quebec Act (which, however, only covers natural persons), thus distances itself from New Brunswick's approach (any buyer).

²⁶⁸ DORE, K. *New Brunswick's Consumer Products Warranty Legislation*, put online in 1998, p. 284. [Online] <http://dspace.hil.unb.ca:8080/bitstream/handle/1882/68/cpwala.pdf?sequence=1> (page consulted on May 2, 2012).

²⁶⁹ *Consumer Product Warranties Act*, RSS1978, c. C-30.

²⁷⁰ *Consumer Protection Act*, S.S. 1996, c. C-30.1.

²⁷¹ BUCKWOLD, T., "Statutory Regulation of Unfair Business Practices in Saskatchewan: Possibilities and Pitfalls," 62 Sask. L. Rev. 45 1999, p. 46.

For this plan to find application, the contract must pertain to a consumer good. The term is defined in section 39 e) of the Act and essentially adopts the same approach as that of New Brunswick (“any goods ordinarily used for personal, family or household purposes”), by specifying that consumer products are goods “*ordinarily used for such purposes designed to be attached to, or installed in any real or personal property.*” Finally, the CPA’s warranty plan applies both to new and used consumer products²⁷².

As in the other Canadian jurisdictions, the CPA complements other provincial legislations and prohibits any clause excluding or limiting the provisions of section III²⁷³. As in New Brunswick, Saskatchewan’s CPA also protects the subsequent acquirer, who benefits from the same statutory warranties as the product’s initial consumer buyer²⁷⁴. This provision is even more specific than New Brunswick’s: it specifies that the term “acquirer” means not only a person who buys the product from the initial buyer, but also a person who receives it as a donation or gift or acquires it as a result of the law or otherwise.

As mentioned above, the CPA covers two categories of warranty: express and statutory.

Express warranties

Express warranties are:

45(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 quality, quantity, condition, performance or efficacy of a consumer product or relating to its use or maintenance is 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.

(2) Subsection (1) applies to a promise, representation, affirmation of fact or expression of opinion made verbally or in writing directly to a consumer or through advertising by a retail seller or manufacturer, or his or her agent or employee who has actual, ostensible or usual authority to act on his or her behalf.

We note that this provision is very broad and that, as opposed to the New Brunswick Act, it does not establish different measures for an express warranty resulting from a verbal or a written representation or from advertising. As in New Brunswick, those express warranty obligations bind the seller and the manufacturer, whether the representations are their own or those made by their agent or employee, unless evidence shows that the agent or employee had no authority to act on behalf of the seller or manufacturer.

This definition of express warranties greatly broadens the effects of representations made by sellers and manufacturers. The seller is also bound by express warranties found on the labels or packaging of consumer products²⁷⁵, unless the seller informs the consumer before the sale that he does not adopt the warranty found on the label or packaging. Although the definition of “retail

²⁷² Sec. 42, CPA.

²⁷³ Sec. 40 and 44(1), CPA.

²⁷⁴ Sec. 41(1)a), CPA.

²⁷⁵ Sec. 47 CPA.

seller” stated in section 39 does not include the manufacturer, under section (3) a consumer product manufacturer is liable for any express warranties made to the consumer. However, in the case of a sale by description, the express warranty found on a product’s label or packaging is presumed to be part of the product description.

For a representation to be considered an express warranty, the applicable test is whether, under the usual circumstances, the representation could induce a reasonable consumer to buy the product, whether or not the buyer relied on that representation²⁷⁶. Finally, express warranties cannot exclude or limit the scope of warranties belonging to the second category, that of statutory warranties²⁷⁷.

Statutory warranties

As in New Brunswick, Saskatchewan’s CPA contains statutory warranties, i.e., the minimal warranties to which consumers are entitled, under sections 48 to 52 of the Act. There are several types of statutory warranties. Although section 48 indicates that this provision applies when a consumer product is sold by a retailer, it should be kept in mind that section 50 includes in the term “*retail seller*,” for the purposes of section 48 (statutory warranties), the manufacturer, who is thus bound by the same statutory warranties as the seller (except the warranty that he has the right to sell the good).

The following further analyses the CPA’s statutory warranties.

First, those warranties are essentially the same as in the New Brunswick law and in Quebec’s legal warranty plans. The seller must give the consumer the following statutory warranties: the consumer has the right to sell the good, the latter is free from any charge in favour of a third party, except charges declared prior to the sale, and the buyer will have quiet enjoyment of the good²⁷⁸. In addition, the seller must warrant to the consumer, during a sale by description, that the product corresponds to the description made by the seller²⁷⁹. The consumer also benefits from a statutory warranty that the good is of acceptable quality, except when a defect is brought to his attention before entry into the contract or when an apparent defect is involved that should have been detected in an examination of the product²⁸⁰. To avoid problems of interpretation that often arise due to ambiguous terms used in legal warranty legislation, the Act takes care to mention what is meant by the term “acceptable quality,” which the Act associates with the consumer’s reasonable expectations and with merchantable quality. Subsection a) of section 39 states the following:

“acceptable quality” means the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have, having regard to all the relevant circumstances of the sale of the product, including:

- (i) the description of the product;*
- (ii) its purchase price; and*
- (iii) the express warranties of the retail seller or manufacturer of the product;*

²⁷⁶ FRIDMAN, G., *The Sale of Goods in Canada*, p.152.

²⁷⁷ Sec. 45(3), CPA.

²⁷⁸ Sec. 48, par. a and b CPA.

²⁷⁹ Sec. 48c), CPA.

²⁸⁰ Sec. 48d), CPA.

and includes merchantable quality within the meaning of The Sale of Goods Act;

Although this provision attempts to clarify the term “acceptable quality,” it creates some confusion by referring to the concept of merchantable quality found in Saskatchewan’s SGA²⁸¹ – a term that is not defined there and whose scope can be determined only by an exhaustive study of court decisions. We doubt that an ordinary consumer who wants to have the CPA warranty applied is able or should have to submit to such an exercise in order to learn about his rights and avail himself of them...

The seller also implicitly provides the consumer with a warranty of use if the consumer has informed the seller, implicitly or explicitly, of the use he intends for the product, whether or not that is the latter’s usual use. However, as opposed to the express warranty, the legislature decided to apply here the “reasonable reliance test”: if the circumstances of the sale demonstrate that the consumer did not rely on the seller’s competence and judgment, or that it would have been unreasonable to rely on it, that warranty will not be applicable.

For a sale by sample, the CPA also provides a warranty that the product has the same quality as the sample, that the consumer will have a reasonable opportunity to compare the product with the sample, and that the product is free of any non-apparent defect likely to give the product an unacceptable quality²⁸². The CPA also provides a warranty of durability: subsection g) of section 48 states that the seller warrants to the consumer that the product and all its components will have reasonable durability according to the description and nature of the good, the price, the express warranties of the seller or manufacturer, the product’s necessary normal maintenance and conditions of use²⁸³.

Finally, the Saskatchewan legislature provided a warranty not found in the New Brunswick Act, but found in Quebec’s CPA: subsection 48 states that the seller must warrant to the consumer that if the product normally needs to be repaired, spare parts and repair services will be reasonably available for a reasonable period after the product is sold. As opposed to the Quebec provision, section 48h) does not give the seller the right to exclude that warranty by informing the consumer before entry into the contract that he does not provide the warranty.

Given that the CPA provides specific statutory warranties for sales by description, the legislature took care to mention in section 49 that no sale of consumer products is excluded from the definition of sales by description simply because the sale is of a specific consumer product or because the products displayed for sale by the seller were chosen by the consumer.

²⁸¹ Section 16 of the SGA provides that when goods are bought by description, the buyer benefits from an implied warranty that they are of merchantable quality.

²⁸² Sec. 48h), CPA.

²⁸³ It should be noted that the criteria taken into account in Saskatchewan’s law differ from those in section 12(2) of New Brunswick’s CPWLA.

Recourses under the CPA

This Act allows three types of recourses and actions: an administrative recourse that can be undertaken by the Director responsible for administering the Act, the private recourse available to consumers, and a criminal recourse. Professor Buckwold defines as follows the objectives of this triple-recourse plan²⁸⁴:

These [the administrative powers and remedies, the private consumer remedies and the quasi-criminal sanctions] are apparently intended to serve a threefold purpose: to prevent the occurrence or continuation of unfair practices; to compensate consumers injured by such practices; and to penalize their perpetrators, presumably as an inducement to the adoption of virtuous business practices²⁸⁵.

Like New Brunswick, Saskatchewan has decided to avoid the confusion and problems of interpretation that can arise from the terms “warranty” and “condition” and from the distinct treatment of these two types of guarantee under the *Sale of Goods Act*. What differentiates Saskatchewan from New Brunswick is the factor that must be taken into account to define the type of recourse applicable to a given situation. In New Brunswick, the buyer’s status will determine the applicable type of recourse. Whether an express or a statutory warranty is breached, Saskatchewan’s recourses are different if the breach is substantial and non-remediable or if it is non-substantial and remediable²⁸⁶. To avoid difficulties of interpretation, the CPA defines the substantial character.

Subsection c) of section 39 states the following:

breach of a “substantial character” means:

(i) that a consumer product, or the level of performance of the retail seller or manufacturer of a consumer product, departs substantially from what consumers can reasonably expect, having regard to all the relevant circumstances of the sale of the product, including:

(A) the description of the product;

(B) its purchase price;

(C) the statutory warranties and express warranties of the retail seller or the manufacturer of the product; or

(ii) that a consumer product is totally or substantially unfit for all the usual purposes of such product or for any particular purpose for which, to the knowledge of the retail seller, the product is being bought;

²⁸⁴ Although this is an analysis of Part II of the Act, which pertains to commercial practices, it also applies to Part III of the Act.

²⁸⁵ BUCKWOLD, T., “*Statutory Regulation of Unfair Business Practices in Saskatchewan: Possibilities and Pitfalls*,” p. 47.

²⁸⁶ Sec. 57 al, 1 CPA.

Determining the substantial character of a breach remains a question of fact²⁸⁷.

Faced with a substantial and non-remediable breach of an express or statutory warranty, the consumer has the following recourses available to him: he may refuse the consumer product, and thus be entitled to be reimbursed for the price paid and for damages²⁸⁸, and he may also choose remedies provided for non-substantial and remediable breaches, i.e., that the seller or manufacturer correct the breach at no expense, thus allowing the consumer to keep the good²⁸⁹.

If the breach of an express or statutory warranty is remediable and non-substantial, the consumer may also obtain compensation for damages suffered²⁹⁰. The Act specifies that the person liable for breaching the warranty is bound to correct the situation within a reasonable period, at no charge to the consumer. In the event that the manufacturer or seller do not act within a reasonable period, the consumer is entitled to have the warranty applied elsewhere and to obtain reimbursement from the seller or manufacturer²⁹¹. That reasonable period begins from the moment they have the good in their possession²⁹².

The fact that the consumer may exercise his right of refusal only in cases of non-remediable breaches of warranty is a notable difference with the rights granted by the New Brunswick Act. The Saskatchewan legislators may have wanted to avoid what some consider a shortcoming of New Brunswick's plan, which allows a good to be refused by the consumer despite the breach's remediable character.

Moreover, the consumer's exercise of his right of refusal is regulated by the second subsection of CPA section 57: he must act within a reasonable period, i.e., a sufficient period to allow tests and other verifications of the consumer product, as required by the product's consumers and as appropriate according to the nature of the product, to verify the product's compliance with the obligations imposed by the Act²⁹³.

In Saskatchewan, the consumer is also entitled to exemplary damages under section 65 of the Act, if it is established that the merchant knowingly violated the law²⁹⁴. In addition, the consumer may claim compensation for any bodily damages suffered²⁹⁵.

Saskatchewan provides that the consumer cannot be charged for any recourse pertaining to warranties (unless the court finds the action frivolous or vexatious):

66(1) No cost shall be awarded against a consumer [...] who

(a) brings an action against a manufacturer, retail seller or warrantor for breach of a warranty pursuant to this Part; or

²⁸⁷ *Cash v. Gross (c.o.b.J.G. Construction)* (2003), 21 A.C.W.S. (3d) 846, [2003] SKQB 97.

²⁸⁸ Sec. 579b), CPA.

²⁸⁹ Sec. 57(1), CPA.

²⁹⁰ Sec. 57(1)a), CPA.

²⁹¹ Sec. 57(1)a), CPA"

²⁹² Sec. 59(4), CPA.

²⁹³ Sec. 57, par. 2 and 3, CPA.

²⁹⁴ Sec. 28.1, CPA.

²⁹⁵ Sec. 64, CPA.

(b) in an action brought by a manufacturer, retail seller or warrantor, defends or counterclaims on the grounds that the manufacturer, retail seller or warrantor has been guilty of a breach of warranty pursuant to this Part.

2) Subsection (1) applies regardless of whether the consumer or other person is successful in his or her action, defence or counterclaim unless, in the opinion of the court, the action, defence or counterclaim was frivolous or vexatious.

Like the Quebec and New Brunswick legislations, the CPA admits oral evidence as proof of the existence of an express warranty, even if that proof increases, modifies or contradicts the content of a written contract²⁹⁶. The Act also provides, in some cases, a refragable presumption that a manufacturer has breached warranties: in an action based on the warranty of quality or of use, any proof of poor quality, poor operation or breakdown of the consumer product will prove the breach of warranty, without the necessity of establishing the exact cause of the complaint²⁹⁷. The manufacturer may counter that presumption by proving that the poor quality, poor operation or breakdown of the product is not his fault or that when it was under his control, the product was of acceptable quality and fit for its normally intended use²⁹⁸.

The CPA does not neglect recourses available to subsequent acquirers: section 41(1) clearly states that, whatever their position in the sequence of transactions, subsequent acquirers (except the retailer) are considered to receive from the sellers and manufacturers the same statutory warranties, additional written warranties and remedies as those granted to the initial buyer.

Manitoba

The third common-law province to provide additional legal warranties in a law other than the SGA, Manitoba provides warranties and conditions in its *Consumer Protection Act*²⁹⁹ [hereinafter the CPA-MB]. Legal warranties are stipulated in Part VI, titled "Statutory Warranties on Legal Sales." That part of the Act discusses implied warranties (sec. 58(1)) and express warranties (sec. 58(8)). The distinction between the two is essentially the same as in the other common law jurisdictions.

Application conditions under the warranty plan of Manitoba's Consumer Protection Act

Succinctly, it may be said that the Manitoba law's legal warranty plan applies to each retail sale or sales-type lease³⁰⁰. The warranty or condition provisions apply according to the type of sale and method of payment or financing. Under the CPA-MB, all the objects concerned must be of merchantable quality, conform with their description and be fit for their intended use.

²⁹⁶ Sec. 46, CPA.

²⁹⁷ Sec. 51, CPA.

²⁹⁸ Sec. 51(2) of the CPA.

²⁹⁹ *Consumer Protection Act*, C.C.S.M., c. C200.

³⁰⁰ Sec. 58(1) of the CPA., C.C.S.M., c. C200.

Like the other legal warranty plans studied in the present report, Manitoba's regime is of public order³⁰¹ and cannot be waived or set aside:

96. *Every agreement or bargain, oral or written, expressed or implied, that any provision of this Act or the regulations does not apply, or that a benefit or remedy under this Act or the regulations is not available, or that in any way limits or abrogates, or in effect limits, modifies, or abrogates, a benefit or remedy under this Act or the regulations, is void.[...]*

Implied warranties

Implied warranties are provided in section 58(1) of the Act. They find application “notwithstanding any agreement to the contrary³⁰².” Following the current approach in common law, some guaranties are conditions and others are warranties. The CPA-MB does not define what a “condition” is, although the term is used in section 58(1). We may conclude that it is interpreted in the usual way under common law, i.e., as a determining element of the contract.

CPA-MB subsections a) and b) of section 58(1) state that in the case of an immediate sale, there is a many-sided guarantee against eviction, i.e., a condition to the effect that the seller is entitled to sell the object and a warranty that the buyer will have peaceful enjoyment of it. The Act also provides a warranty that all the goods concerned in the transactions covered are free of any charge, except transactions to which the buyer has agreed in writing³⁰³. As for the product's state, the Act contains a condition to the effect that the object is new, and provides a variation of that condition for cars³⁰⁴. In addition, subsection e) of section 58(1) contains a condition that the objects are of merchantable quality, except for defects indicated by the seller. If the latter states that the object is used, the Act provides criteria that must be taken into account to determine whether the object is of merchantable quality: the fact that the object is used, and its age as indicated by the seller or, failing that, as understood by the consumer³⁰⁵. The Act also contains a condition that the object conforms with the description according to which it is sold³⁰⁶.

During a sale by sample, the Act provides three warranties in subsection g) of section 58(1): the objects' mass will conform with the sample's, the objects will not present defects making their quality non-merchantable, and the buyer will have a reasonable opportunity to compare the object with the sample. The warranty that the object is free of defects will open the door to an action only if the defect was not detectable by a reasonable examination of the sample.

The CPA-MB also imposes the condition that an object is reasonably fit for a particular use intended by the buyer, to the extent that the buyer indicates to the seller, expressly or tacitly, the particular use he intends, that the buyer expressed his reliance on the seller's competence or judgment, and that he truly did rely on it. This condition will apply only if the object corresponds to the description of objects offered by the seller as part of his business³⁰⁷.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ Sec. 58(1)c) of the CPA, C.C.S.M., c. C200.

³⁰⁴ Sec. 58(1)d) of the CPA, C.C.S.M., c. C200.

³⁰⁵ Sec. 58(5) of the CPA, C.C.S.M., c. C200.

³⁰⁶ Sec. 58(1)f) of the CPA, C.C.S.M., c. C200.

³⁰⁷ Sec. 58(1)h) of the CPA, C.C.S.M., c. C200.

Finally, the CPA-MB contains an implied condition that a retail service will be performed satisfactorily³⁰⁸. But this guarantee is not imperative, because it can be waived in an express agreement signed by the buyer.

Express warranties

Section 51(8) contains a presumption that verbal and written representations made by the seller or a third party on his behalf through advertising, or made directly to the buyer, about the object's quality, condition, operation or effectiveness, are express warranties.

Manitoba recourses

As mentioned above, the recourses under the Manitoba Act are threefold: private recourses granted to the buyer, administrative recourses, and criminal recourses.

The buyer benefits from several recourses under the Manitoba Act: one of the protection measures is that, during the application of a warranty provided in section 58 of the Act, the seller is obliged to give the buyer a document listing the items and services used and provided in order to correct the defect or shortcoming of the object or service, each time it is necessary to make such a correction³⁰⁹. Section 58.1 provides that the seller is personally liable for all the obligations, responsibilities and warranties applicable to the sale or sales-type lease not only under the Act, but also under the contract. The seller is also liable for maintenance expenses according to a warranty given not only by the seller himself, but also by a third party or by the manufacturer. Through the CPA-MB's provisions, the buyer may obtain the good's repair or replacement, or reimbursement of the price he paid.

Manitoba is the only province that grants in its law the possibility for either party to the contract, or to two parties disputing over a condition or a warranty, to submit the dispute to a mediation service, which is offered by the Consumers' Bureau³¹⁰.

If a consumer services officer or any other person so authorized by the Minister thinks a person has violated a CPA-MB provision, he may issue a notice in writing to him that indicates the violation³¹¹. Administrative penalties cannot exceed \$5,000³¹².

Finally, the Act also provides that criminal proceedings may be undertaken for any violation of the CPA-MB³¹³. A person found guilty may face severe sanctions: a maximum fine of \$300,000, a fine of triple the amount obtained by the offender if that amount is greater than \$300,000, and imprisonment of up to three years. Section 94(1) specifies that those penalties may be imposed concurrently. If a person has suffered material damages due to the offence, the seller may be obliged to compensate him³¹⁴.

³⁰⁸ Sec. 58(6) of the CPA, C.C.S.M., c. C200.

³⁰⁹ Sec. 58(9) of the CPA, C.C.S.M., c. C200.

³¹⁰ Sec. 58(10) of the CPA, C.C.S.M., c. C200.

³¹¹ Sec. 136 of the CPA, C.C.S.M., c. C200.

³¹² *Ibid.*

³¹³ Sec. 94 of the CPA, C.C.S.M., c. C200.

³¹⁴ Sec. 94(2) of the CPA, C.C.S.M., c. C200.

2.2 Legal Warranty Plans under Statutory Laws: A Better Solution than the Common Law?

Although statutory laws containing legal warranties adding to provincial SGAs at times adopt common law principles, generally those laws clearly favour consumers in comparison with the SGA regimes. Although the interpretation of certain terms and concepts can prove difficult for consumers, it remains that those laws are clearer as to the various types of warranties benefiting buyers, and that some provinces have attempted to clarify the more problematic terms and definitions. Other provinces have adopted provisions to facilitate warranty application by providing an automatic right to refuse products if certain types of warranties are breached.

In our view, the legal warranty plans found in the statutory laws of New Brunswick, Saskatchewan and Manitoba are a step in the right direction. The other common law provinces should follow that example.

As mentioned above, the legal warranties contained in SGAs have certain aspects that do not take into account the specific circumstances of consumer contracts and may unfortunately contribute to maintaining, if not aggravating, the imbalance between merchants and consumers. The fact that SGA provisions are not of public order is an indication.

Nevertheless, the problems of interpretation posed by terms and concepts used in the legal warranty plans of common law provinces, and the problems of application of legal warranties, appear to be the same as in Quebec's civil code system. Without a conciliatory approach taken by merchants, the large space left to case-by-case interpretation almost necessarily requires that a consumer go to court when requiring a legal warranty to be respected. The courts are likely, given the broad discretion implied by the interpretation of legal warranty plans, to render contradictory decisions. In addition, there are in Canada many problems of access to justice, and questions of warranty, except when the good involved is of great value, are not worth overcoming those problems, in the eyes of consumers. This is all the more so because consumers do not know their rights precisely and are uncertain as to their scope and the outcome of eventual legal actions.

3. The Perception of Consumers

To examine consumers' knowledge of legal warranties, we prepared a Canada-wide poll and conducted group interviews in Montreal and Toronto. This chapter presents the highlights of those two activities.

3.1 Results of a Canada-Wide Poll

A poll was conducted of 1,020 Canadians on their knowledge and use of legal warranties.

a) Methodology

The online poll, containing 22 questions, was conducted by Passages Marketing among 1,020 Canadians in Quebec (42%), Ontario (22%), British Columbia (15%), Saskatchewan (6%) and Alberta (15%), between December 27, 2011 and January 3, 2012.

The majority of respondents were between 25 and 54 years of age (63.5%), distributed almost evenly by gender (49.7% men and 50.3% women). The respondents' level of education was quite evenly distributed (university 36.4%, college 28.6%, high school 32.2%) and the majority were employed (full or part time: 59.4%).

b) Highlights³¹⁵

According to the poll, only about one out of 10 people believes that merchants or manufacturers rarely offer a warranty on the goods and services they offer (Q.1). However, over 20% of respondents admit that the duration of that warranty is rarely or never known to them (Q.2), and almost 40% of respondents admit to rarely or never knowing the scope of the warranty (what it covers) (Q.3).

Almost one third of respondents (31%) had, at the time of the poll, never heard of legal warranties, even after being summarily told that the merchant was thereby required by law to guarantee the good operation of what he was selling (Q.4 and 5). While 44% of respondents stated that they had heard of legal warranties before that additional explanation, another 25%, once informed of what it meant, reported having heard of legal warranties.

It should be noted that Quebec is distinct here: the percentage of respondents who reported, before and after the explanation, having heard of legal warranties was 62.4% in the Western provinces and 65.2 % in Ontario, but 84.4% in Quebec.

³¹⁵ The full report of the survey produced by Passages Marketing is reproduced in Annex 1.

About half of those who reported having heard of legal warranties still admitted a somewhat low or very low level of knowledge of those warranties: 50% in Quebec, 44% in Ontario and 54% in the Western provinces (Q.6).

We asked the respondents to detail the protections they thought were offered by legal warranties. Over one out of five respondents (21.7%) admitted knowing nothing on the subject. Among the most frequent answers: warranty of good operation - quality (15.8%); repairs and/or exchange free of charge / warranty of replacement (15.4%); warranty against manufacturing defects (11.4%). Only 1.3% of respondents believed that legal warranties cover parts and labour (Q.7).

Then, when asked what they thought was covered by legal warranties, by suggesting multiple-choice answers, the respondents were more eloquent: obligation to replace a defective good: 64.5%; compliance with what was announced (the seller's documentation, advertising, representations): 51.2%; cost of repair parts: 40.9%; meeting the consumer's reasonable expectations: 40.5%; labour costs for repairs: 32.1% (Q.9).

About one quarter of the respondents who had reported having heard of legal warranties admitted not knowing if the legal warranty offers less, equal or more protection compared to the manufacturer's or merchant's warranty. 17.5% of all respondents (21.9% in Ontario) think the legal warranty offers less protection than that of the manufacturer and 16.4% (18.3% in Ontario) think that the legal warranty offers less protection than that of the merchant (Q.8).

We tried to determine whether the respondents who had heard of legal warranties had opinions about the duration of the protection offered by those warranties. First, 59% of those respondents thought that the legal warranty has a fixed duration (Q.10). But only 44.4% of Quebec respondents believed this, as opposed to 65.2% and 66.3% of Ontario and Western respondents, respectively. When asked what that fixed duration was, 28.5% of respondents answered it was less than one year (24.8% in Quebec, 45.4% in Ontario and 29.8% in the Western provinces) and 47.8% between 1 and 2 years (50.7% in Quebec, 41.3% in Ontario and 55.2% in the Western provinces) (Q.11).

According to those who thought the legal warranty has a variable duration, the latter depends on several non-exclusive factors. Of the answers suggested, the respondents chose: conditions of use (55.2%); the good purchased being new or used (49.2%); the value of the good or service (35.2%). Some respondents estimated that the brand of the good or service (17.3%) or the fact that an item is sold at a reduced price (18%) has an effect on the legal warranty's duration (Q.12).

We asked all the respondents the following questions, after summarizing the legal warranty in effect in their respective provinces.

For example, here is the summary presented to participants regarding the province of Quebec:

Here is a summary of what Quebec's Consumer Protection Act says about the legal warranty of general application:

Goods forming the object of a contract must be fit for the purposes for which goods of that kind are ordinarily used.

Goods forming the object of a contract must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use.

The goods or services provided must conform to the description made of them in the contract.

The goods or services provided must conform to the statements or advertisements regarding them made by the merchant or the manufacturer.

On the basis of that summary adapted to the appropriate provincial plan, we asked all the respondents if they thought the legal warranty offered adequate protection. Only 15.5% of them did not think so (Q.14).

As for the law's level of precision, on the basis of the summary we presented to them, the respondents estimated, according to the multiple-choice answers we gave them, that the warranty is sufficiently precise: on the protections it offers (55%); on the duration of the protections it offers (36.9%); on the merchant's obligations (55.9%); on the way of having those protections respected (38.3%); and on the recourses should the merchant not comply (33.5%) (Q.15). (It should be noted that neither the way of having the obligations met nor the available recourses were part of the summary presented to respondents.)

We insisted, asking respondents if certain elements seemed ambiguous to them. Almost three out of four respondents thought so (72.5%). When asked what elements seemed ambiguous, 15.9% of respondents thought they all were, while 20% said they were incapable of identifying them (Q.16).

We tried to see whether the respondents thought it easy to have a merchant honour the legal warranty. In total, almost 58% of respondents thought not, and almost 10% admitted not knowing (Q.17).

We asked respondents if, should a merchant firmly refuse to honour the legal warranty, they would be prepared to sue him to have it honoured, and we asked them to re-evaluate their answer in terms of the good's value. On average, 31.8% of respondents would not be prepared to sue if the dispute concerned a value less than \$100. 60.1% of respondents would bring an action for a value of \$100 to \$500, 79.9% for a value of \$500 to \$1,000, and 90.3% for a value greater than \$1,000 (Q.18).

We tried to determine what would be likely, other than the value of the good, to encourage respondents to assert their rights, by suggesting certain multiple-choice answers to them. Each of the suggested answers resulted in 46% to 58% of positive answers, while only 5.9% of respondents estimated that none of those factors would likely encourage them (Q.19):

- Help from a governmental consumer protection organization 58.1%
- Better knowledge of your rights 57.5%
- Better knowledge of procedures 56.5%
- The possibility of asserting your rights at low cost 54.9%
- The possibility of asserting your rights without a lawyer 54.2%

- Better knowledge of available recourses 53.8%
- The possibility of obtaining a judgment quickly 52.4%
- Simplified recourses (without expert evidence, for example) 46.9%
- Help from a non-governmental consumer protection organization 46.1%

Only 14.7% of respondents stated that they have already tried to have a legal warranty honoured (Q.20), i.e., for 57.8% and 24.1% respectively, by approaching the merchant and manufacturer directly. A very low percentage went to court (5.3%) or approached governmental consumer protection organizations (5.4%) or non-governmental organizations (4%) (Q.21). In 58% of cases, respondents reported a positive outcome (Q.22). Costs were charged by the merchant or manufacturer in 22.5% of cases (Q.23).

3.2 Group Discussion: Consumers and Legal Warranty

The poll was preceded by discussion groups aiming to measure the legal warranty's notoriety, but also how well the warranty is known and the potential sources of confusion about it.

a) Methodology

The discussion groups were directed by Substance stratégies on the basis of the discussion guide prepared by Union des consommateurs.

Three discussion groups were organized: two in Montreal and one in Toronto. The target groups were comprised of eight or nine adults aged 25 to 44 – one of the two Montreal groups was formed by participants aged 25 to 34, and the other by participants aged 35 to 44. The Toronto group included both age groups. The discussion groups, lasting about 120 minutes, were held on November 21 and 24, 2011.

b) Highlights³¹⁶

First, the participants, who had not been informed on the subject of their discussions or on the discussion group's sponsor, seemed taken aback when hearing about their consumer rights: they referred notably to price accuracy policies and return policies. Only one participant, in Montreal, spontaneously talked about the legal warranty.

The Consumer Protection Act is known to a majority of Montrealers, but they demonstrate limited knowledge of it. Equivalent Ontario laws find very little echo in Toronto, where only a few participants had heard about them.

Asked about consumer protection organizations, the Montreal participants mentioned the Office de la protection du consommateur, but particularly television shows on consumer issues (J.E., La Facture). The Ontario participants had no reference, however vague.

³¹⁶ The discussion groups' full report produced by Substance stratégies is reproduced in Annex 2.

There is manifest confusion between the manufacturer's warranty and stores' return policies. According to the participants, the manufacturer's warranty, when it exists, covers labour and ensures the good operation of the purchased item for a certain period, which varies depending on the nature of the product. They think a good sold "as is," for example, does not involve this warranty.

The mention of warranties automatically launched the participants on critical discussions about "extended warranties."

Generally, the legal warranty was shown to be relatively little known. Most Montrealers aged 25-34 know those terms (by remembering having heard them in the news or a televised consumer program), but that notoriety fades among those aged 35-44 and among Torontonians: none of the latter had heard, directly or indirectly, about the legal warranty. The exercise during which the legal text was disclosed to them did not refresh the memory of any participant.

Summaries of what the law provides on legal warranties were submitted to the participants and raised a lot of doubts and questions.

For Quebec:

Here is a summary of what Quebec's Consumer Protection Act says about the legal warranty of general application:

Goods forming the object of a contract must be fit for the purposes for which goods of that kind are ordinarily used.

Goods forming the object of a contract must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use.

The goods or services provided must conform to the description made of them in the contract.

The goods or services provided must conform to the statements or advertisements regarding them made by the merchant or the manufacturer.

For Ontario:

Here is a summary of what the Sale of Goods Act and the Consumer Protection Act say about the legal warranty of general application:

The goods purchased must be new and unused, barring mention to the contrary by the seller

The goods purchased must be in a condition fit to be sold.

The goods purchased must conform to the description made of it.

The goods purchased must reasonably fit for the specific use that the buyer had disclosed to the seller.

The service obtained by the consumer must be rendered in a reasonably satisfactory manner.

In Quebec, for example, the fact that the texts systematically refer to the contract led to the observation that the concept of contract itself generates a lot of confusion: while the

respondents automatically made the link with contracts, i.e., documents given as part of transactions involving a high price, the fact that the transaction itself constitutes a contract escaped them.

While, on the whole, the participants consider that the texts presented to them appear to favour consumers, the perceived advantages are slightly lessened by the vagueness of those texts, which leave too much room for interpretation.

In Quebec, reference to the contract (mentioned above), reasonable duration, and conformity with the statements or advertisements appear as elements making it difficult to understand and appreciate the warranty. In Ontario, references to reasonable character (*reasonable customer, reasonably satisfactory*) or adequate character (*adequate working condition*) make the same reservations. Given the very brief descriptions given by merchants about the goods they sell, Ontarians also question the effectiveness of a warranty of conformity with such a description.

Questions were also raised about the interaction and priority of the various warranties (legal, conventional, extended).

When informed that, absent the merchant's cooperation, applying the legal warranty involved going to court, most participants estimated that they would not consider, in that event, to try having the warranty honoured, if only because of the time required and the interruption of their professional activities in order to appear in court.

A majority of participants also expressed scepticism about the likelihood that their word would prevail over that of a merchant in a dispute to have the legal warranty apply. But they were less reticent when the possibility of being defended by a third party was mentioned.

The fact that the legal warranty is created by government provokes a certain cynicism, in suggesting red tape. Moreover, one participant pointed out that most individuals have a dispute with a company at one time or another. Thus, asserting her rights regarding the legal warranty would entail a long wait before she obtained satisfaction.

In addition, two Torontonians wondered about the consequences for businesses when a consumer asserts his rights. In their view, settling the dispute involves a fine levied on the merchant rather than reimbursement of the consumer.

Generally, consumers estimate that the legal warranty's protection is sufficient, even if they are not sure of clearly understanding the latter's scope. So they believe the legal text can be improved more by clarifying it than by adding to it. According to the Quebec participants, the manufacturer's indication of his product's life expectancy would, however, be an effective way to precisely establish the legal warranty's duration (as opposed to its "reasonable duration"), which would surely be longer than that of the manufacturer's warranty.

4. Agencies and Organizations: Survey Results

Results of a survey of consumer associations and provincial and territorial agencies responsible for applying consumer protection laws

Among the questions our study attempted to answer, several concerned the ease with which consumers succeed in using legal warranties. Do legal warranties protect consumers sufficiently? Are they easy to have applied, or is their applicability illusory or too complicated? Is it possible to define the legal warranty objectively?

We sent a questionnaire to those responsible for applying consumer protection laws in all the Canadian provinces and territories, and to Quebec consumer protection organizations, in order to verify how applicable laws are interpreted and used by their services, and to know, on the basis of information they receive, the types of questions asked by consumers about legal warranties. We also sent a summary of data collected through the poll and discussion groups we conducted, to obtain the opinion of governmental agencies and of consumer associations that are members of Union des consommateurs about the adequacy of legal warranty plans and the exact content of legal texts.

4.1 Methodology

Letters of invitation were sent in November and December 2011 to provincial and territorial Departments or organizations responsible for applying consumer protection laws, to explain to them the subject of our study and invite them to participate in our investigation and give us the name and coordinates of a person within their organization who could fill out our questionnaire.

In March 2012, we sent the contacts given to us a questionnaire accompanied by summarized results of the poll and discussion groups. We sent those same documents to the eleven (11) consumer protection organizations that are members of Union des consommateurs.

The response rate was high among institutional organizations; only Prince Edward Island, the Northwest Territories and Yukon neglected to return the completed form³¹⁷. The respondents were: Service Alberta; Consumer Protection BC for British Columbia; Office de la protection du consommateur (Consumer Protection Office) for Manitoba; Direction des services à la consommation (Consumer Affairs (Branch)) for New Brunswick; Consumer and Business Programs - Service Nova Scotia and Municipal Relations; Government of Nunavut; Ministry of Consumer Services, Consumer Protection Branch (ministère des Services aux consommateurs,

³¹⁷ The questionnaire sent to Service Alberta's consumer protection agency (to which the respondent to our first mailing had referred us) was filled out by that agency, which informed us... that it was not involved in warranties. In additional comments (Question 13), the organization indicated: "*As Service Alberta does not regulate warranties we would refer the caller/complainant to the Superintendent of Insurance - I trust you consulted with the Superintendent of Insurance in Alberta as they would be the appropriate office to contact with regard to legal warranties which would fall under insurance in Alberta.*" Unfortunately, we did not have time to do so. This explains Alberta's absence in the summary of several of the answers.

Direction de la protection du consommateur) for Ontario; Office de la protection du consommateur for Quebec; Consumer Protection Division, Saskatchewan; and Consumer Affairs Division for Newfoundland.

Curiously, the rate of participation was lower among our member organizations: we only received four (4) answers from them, despite our follow-up in April.

The relationship between governmental organizations and community organizations on one hand, and consumers on the other hand, is very different. Governmental organizations are most often identified as the ones where consumers can lodge official complaints, and as those most often able to influence and even coerce merchants. Accordingly, we will discuss separately the answers obtained from governmental organizations and those obtained from community organizations. Then we will compare the results.

The consultation of community organizations, as opposed to that of governmental organizations, obviously did not claim to be exhaustive, as demonstrated by the choice of approaching only our member organizations. Still, we hoped to obtain some indication of the problems reported by consumers to those organizations, and of the latter's perspective on our study's main issue.

4.2 Analysis

a) Institutional Organizations

Questions 2 and 3 – number and types of complaints and information requests³¹⁸

The first questions pertained to the number of complaints and information requests received during the last five years, and to the type of requests that institutional organizations receive from consumers about the legal warranty.

We quickly noticed that the answer on the number of requests was related to the method of organization of each organization's records of complaints or information requests. For example, Alberta answered that their database search, using the keyword "warranty," indicated that 1,000 calls had been received, whereas a search using "legal warranty" indicated none. The respondent explained that many calls may have pertained to the legal warranty, but that their filing system does not provide those details.

In New Brunswick, consumer calls are filed in databases according to the product concerned by the request, not to the object of the request, so it was impossible to answer the question.

British Columbia reported 792 requests for information, Saskatchewan 98 (without specifying whether complaints or information requests were involved), Ontario over 8,000 (1,580 written complaints and 6,558 verbal requests), while specifying that those complaints and requests may pertain to all types of warranties, including extended conventional warranties. Nunavut reported a single relevant request, and Nova Scotia less than ten.

³¹⁸ Question 1 pertained to the organization's identification.

Manitoba indicated that 60% of the 15,000 requests annually received by the organization concerns warranties one way or another. Quebec indicated that it could not count the requests for information, but that the number of complaints totalled 3,167, or 13% of all complaints recorded.

As for the types of complaints, our questionnaire suggested multiple-choice answers, including the option "Other." The suggested answers were (In French and English): Existence de la garantie légale ; Portée de la garantie légale ; Durée de la garantie légale ; Limites de la garantie légale ; Obligations du fabricant / vendeur / commerçant ; Recours disponibles ; Autre (Spécifier) / Existence of the legal warranty; The coverage of the legal warranty; The duration of the legal warranty; The limitations of the legal warranty; The obligations of the manufacturer/the vendor/ the merchant; The judicial recourses; Other (specify).

Four provinces (Manitoba, New Brunswick, Ontario and Saskatchewan) chose all the suggested answers; Ontario and Saskatchewan specified, as "Other," requests about who is responsible for applying a warranty after closure of the company that was offering the warranty (Ontario³¹⁹) and requests about whether the merchant can contractually diminish or set aside the legal warranty.

The six other provinces chose between one (Alberta: Limitations of the legal warranty; Newfoundland: The judicial recourses) and three options: requests concerning existence and scope are the options most often chosen (three times) in those 6 provinces. The duration and limitations of legal warranties were only mentioned twice, and the recourses once.

It should be noted that the duration of the legal warranty, and the recourses available to consumers to have that warranty honoured, are the subjects that were mentioned least often (only 5 mentions) by the institutional organizations as being of concern to consumers.

Table 1
Types of requests and complaints received by institutional organizations

| Province or territory | Existence | Scope | Duration | Limitations | Obligations | Remedies |
|-----------------------|-----------|-------|----------|-------------|-------------|----------|
| Manitoba | X | X | X | X | X | X |
| New Brunswick | X | X | X | X | X | X |
| Ontario | X | X | X | X | X | X |
| Saskatchewan | X | X | X | X | X | X |
| Nunavut | X | X | | | X | |
| Quebec | X | X | X | | | |
| Nova Scotia | X | | | | X | |
| British Columbia | | X | | X | | |
| Alberta | | | | X | | |
| Newfoundland | | | | | | X |

³¹⁹ Accordingly, we think this pertains to a conventional warranty.

Question 4 - specifics

Question 4 invited respondents, to give, if applicable, more-specific examples of consumers' requests for information. Some respondents already had provided examples in the preceding questions; we will group those examples here.

British Columbia specified on this point that most (about 90%) of calls received about the legal warranty pertained to retail sales and automobile warranties.

Manitoba also mentioned the subjects on which the organization is most solicited (they do not all concern the legal warranty; some concern conventional warranties, as we will see):

vehicle warranties - difficulties understanding whether a particular problem is covered under a specific warranty, businesses not honoring a warranty, problems cancelling extended warranties even if within consumer rights, service warranties for vehicle repairs, warranty issues regarding the purchase of specific products i.e. all types of electronic devices including cell phones, home furnishings including appliances and furniture, services rendered regarding home renovation projects. Most of these complaints are about the quality and operation of a product or the quality and expectation/satisfaction of a service rendered as outlined in a contract.

New Brunswick also gave a list of goods covered by contracts about which consumers communicate with the organization: vehicles (new and used), furniture, electronics and household appliances.

Nova Scotia indicated that most of the complaints received come from consumers who think the product or service does not conform to its description or does not have the expected value.

Quebec gives a specific example: *"My refrigerator had a conventional warranty of 1 year. Is it normal that I have to pay \$500 to repair it? Is that normal, after 15 months of use³²⁰?"*

Saskatchewan explained the types of requests received: Who is responsible for the cost of repairs? Can the merchant limit the legal warranty? Can the product be returned rather than repaired? What is the period allowed for bringing an action? The organization specified that many requests pertain to automobiles.

Newfoundland also specified that many consumers would prefer to return the product rather than benefit only from a right of exchange or repair.

³²⁰ In 2011, the director of the Montreal regional office of the Office de la protection du consommateur expressed fear that the concept of "normal duration" was becoming more and more problematic, given the increase in consumers' requests for information on the subject. Reported in: GRAMMOND S., *Qu'est-ce qui vous a fait enrager en 2011 ?* La presse, December 21, 2011. [Online] <http://affaires.lapresse.ca/finances-personnelles/consommation/201112/20/01-4479798-quest-ce-qui-vous-a-fait-enrager-en-2011.php> (page consulted on December 21, 2011).

Manitoba's answer provides a lot of detail:

Some examples of specific warranty complaints are: vehicle warranties - difficulties understanding whether a particular problem is covered under a specific warranty, businesses not honoring a warranty, problems cancelling extended warranties even if within consumer rights, service warranties for vehicle repairs, warranty issues regarding the purchase of specific products i.e. all types of electronic devices including cell phones, home furnishings including appliances and furniture, services rendered regarding home renovation projects. Most of these complaints are about the quality and operation of a product or the quality and expectation/satisfaction of a service rendered as outlined in a contract. In Manitoba, our warranty laws are between the buyer and the seller, however not all consumers or businesses are aware of this and sometimes consumers are referred to the manufacturer for resolution of a warranty issue when in fact, it is the seller that is liable.

Question 5 – consumer information

Question 5 was formulated as follows: What types of information do you offer consumers who attempt to have the legal warranty applied, or who have difficulty doing so (possible approaches, available legal recourses, applicable law and procedures, etc.)?

The Alberta respondent, *Service Alberta*, answered that it does not regulate warranties and that consumers are thus referred to the *Superintendent of Insurance*. In British Columbia, the respondent, *Consumer Protection*, also told us that the law administered by the organization, i.e., the *Business Practices and Consumer Protection Act*, does not cover legal warranties and that consumers are thus referred to other organizations – the *Better Business Bureau* (~40%) or the *Motor Vehicle Sales Authority* (~12%) – or informed about the possible application of the *BC Sale of Goods Act* (10%), in which case they should consider obtaining legal advice, while others (7%) are invited to try to settle the problem with the merchant.

The Manitoba *Consumer Protection Office* told us that consumers who consult the Office are informed that the warranty provided by the *Consumer Protection Act* binds the merchant (“as per our *Consumer Protection Act*, warranty issues are between the buyer and seller”), and that the consumer is entitled to expect that a product or service is satisfactory; if there is a defect, the product or service must be repaired, replaced or refunded. The organization added that it offers a mediation service, in cases where consumers cannot settle a dispute directly with the merchant.

Nunavut also indicated that it can intervene as a “liaison” between consumer and merchant and request, if applicable, “copies of the warranty.”

Newfoundland's *Consumer Affairs Division* offers to act as a mediator between consumer and merchant and, if mediation is not appropriate or fails, the organization informs the consumers about legal remedies and suggests seeking legal advice.

In New Brunswick, the *Consumer Affairs Branch* answered as follows:

When consumers contact our office with warranty related problem we provide them with an overview of the Consumer Product Warranty and Liability Act which includes:

- *The scope of the Act, including a definition of a "consumer product"*
- *Information on the types of transaction covered by the Act*
- *Explanation of express vs. implied warranties*
- *Implied warranties afforded to consumers by the Act*
- *Remedies afforded to consumers by the Act*

Consumers are provided with our pamphlet on the Act and are advised that they can either use the information to negotiate with the vendor or go through the small claims process in order to enforce Act.

In Nova Scotia, the *Consumer and Business Programs - Service Nova Scotia and Municipal Relations* informs consumers of their rights under the *Consumer Protection Act* and suggests trying to settle the dispute directly with the merchant. If that fails, the organization suggests seeking legal advice or going to court.

In Ontario, the *Ministry of Consumer Services, Consumer Protection Branch* told us that the organization considers warranty disputes as civil disputes, and that consumers are invited to seek legal advice or go to court. Saskatchewan's *Consumer Protection Division* gives information on the law's application and on how to prepare a court action.

In Quebec, the Office de la protection du consommateur offers consumers an "information kit containing everything needed to help settle a dispute with a merchant" (formal demand form, sections of the law, support organizations).

Table 2
Consumer information or advice

| Province or territory | Information | Mediation | Suggestion to seek legal advice | Suggestion to go to court | Reference to another organization | Invitation To settle with the merchant |
|-------------------------|-------------|-----------|---------------------------------|---------------------------|-----------------------------------|--|
| Alberta | | | | | X | |
| British Columbia | | | X | | X | X |
| Manitoba | X | X | | | | X |
| New Brunswick | X | | | X | | X |
| Nova Scotia | X | | X | X | | X |
| Nunavut | | X | | | | |
| Ontario | | | X | X | | |
| Quebec | X | | | | X | |
| Saskatchewan | X | | | X | | |
| Newfoundland | | X | X | | | |

Questions 6 and 7 – interpretation

Given the problems that the consumers who participated in our discussion groups and survey had regarding certain terms, expressions or concepts used in the various Canadian laws, we asked the organizations to give us their own interpretation of those terms in the context of legal warranties, and to tell us whether the case law confirmed their interpretation.

Common law provinces

We submitted the following terms to the common law provinces: “purpose for which the good is ordinarily used”; “durable in normal use”; “for a reasonable length of time”; “reasonable consumer”; “reasonably satisfactory”; “merchantable quality”; “adequate working condition”; i.e., a series of terms used in the SGAs and consumer protection laws.

Service Alberta and Consumer protection BC told us again that they do not regulate warranties and thus have no interpretation of those terms to give us.

Nova Scotia’s answer was similar: *“Our Department does not provide legal advice or interpret terms, unless the term is defined by legislation. We do not interpret the terms in (a-g).”*

The respondents from Nunavut and Newfoundland left this question unanswered.

For each of the terms, New Brunswick told us that the terms are “to be determined by a judge.”

The table below reproduces in full the answers from Manitoba, Ontario and Saskatchewan to that question.

**Table 3-a
Interpretation**

| Province or territory | a) Purpose for which the good is ordinarily used |
|-----------------------|---|
| Manitoba | That the goods will perform as the purpose they were purchased for. |
| Ontario | The warranty covering the good may be invalidated if the good is inappropriately used or used for a purpose other than that for which it is intended. |
| Saskatchewan | The purpose must be specified or a reasonable consumer must be able to conclude its ordinary purpose. |

We note a subtle variation between the proposed interpretations: between the buyer’s intention (the purpose they were purchased for) and the assumption of a reasonable consumer (able to conclude its ordinary purpose), along with a use specified by the merchant.

**Table 3-b
Interpretation**

| Province or territory | b) Durable in normal use |
|-----------------------|---|
| Manitoba | That the goods are free of any defects when used for the intended purpose |
| Ontario | The warranty covering the good may be invalidated if the good is inappropriately used or used for a purpose other than that for which it is intended. |
| Saskatchewan | Usable for a reasonable time but dependent on age, price and prior usage |

It is surprising that only one interpretation mentions use for a reasonable time, whereas the others refer to a hidden defect or to limitations to the warranty, i.e., inappropriate use.

**Table 3-c
Interpretation**

| Province or territory | c) For a reasonable length of time |
|-----------------------|--|
| Manitoba | Our Act is silent regarding an implied warranty length of time. |
| Ontario | No comment |
| Saskatchewan | Based on a knowledgeable consumer's conclusion after taking into account age, nature of the product, proposed usage and price paid |

The comment from Saskatchewan seems to indicate that the warranty's duration depends on a subjective criterion, i.e., the conclusions of a reasonable consumer.

**Table 3-d
Interpretation**

| Province or territory | d) Reasonable consumer |
|-----------------------|--|
| Manitoba | Term not within our legislation |
| Ontario | Consumer that understands and accepts the limitations of a warranty as they apply to a particular product when the product is used as intended |
| Saskatchewan | An average consumer |

While one respondent tells us that the average consumer is the reasonable consumer, the other seems to say that the consumer will be considered reasonable only if he understands and accepts the legal warranty's limitations as they apply on a case-by-case basis, depending on the products.

**Table 3-e
Interpretation**

| Province or territory | e) Reasonably satisfactory |
|-----------------------|---|
| Manitoba | Reasonably fit for the purpose intended |
| Ontario | Product generally performs as marketed |
| Saskatchewan | N/A |

Both respondents thus tell us that the satisfaction criterion is related to the good — the good is reasonably fit for the purpose intended or the performance advertised — and not to its user's satisfaction.

**Table 3-f
Interpretation**

| Province or territory | f) Merchantable quality |
|-----------------------|--|
| Manitoba | Usable/fit for the purpose it was made except in the case of used items where such defects are described |
| Ontario | Fit for the purpose intended. |
| Saskatchewan | Usable for its purpose |

The three respondents thus associate merchantable quality only with the possibility of using the good for the purpose intended, rather than seeing in those terms a normative criterion of quality or performance.

**Table 3-g
Interpretation**

| Province or territory | g) Adequate working condition |
|-----------------------|--|
| Manitoba | Term not within our legislation |
| Ontario | The condition of the product enables it to perform its normal working functions to a reasonable (average) standard |
| Saskatchewan | Durable |

One respondent saw here a warranty of durability rather than good operation.

Manitoba told us that case law confirms its interpretation in some cases, whereas “*in others it is based on historic experience of our interpretation of the legislation.*” Ontario said it had no direct experience of the courts’ interpretation. Saskatchewan explained that the courts do not directly confirm the interpretation given, but “*seem to reach a conclusion based on reasonableness after hearing the evidence.*”

Quebec

We submitted the following terms to Quebec’s Office de protection du consommateur: “Usage auquel il est normalement destiné”; “Servir à un usage normal”; “Durée raisonnable”; the term “raisonnable” was generally taken from the Consumer Protection Act.

The respondent entered N/A for the last four terms and gave the following interpretation for the first three terms:

Usage auquel il est normalement destiné : “*Ce pour quoi le bien doit normalement servir. Le bien doit pouvoir satisfaire aux attentes raisonnables du consommateur, dans les circonstances. Ces termes s’interprètent dans leur sens courant.*”

Servir à un usage normal : “*Ces termes s’interprètent dans leur sens courant.*”

Durée raisonnable : “*Ces termes s’interprètent dans leur sens courant, en tenant compte des critères d’appréciation contenus dans l’article 38 de la LPC: le prix du bien; les dispositions du contrat; les conditions d’utilisation du bien.*”

So the Quebec respondent insists that the terms used in the province's law only pertain to their common meaning. Still, we note that the terms "l'usage auquel il est normalement destiné" includes, other than the use intended by the merchant, the consumer's "reasonable" expectations.

As for case law confirmation, the respondent indicated, again insisting on the terms' clarity *in the legal sense*:

La doctrine et la jurisprudence ne semblent pas s'être véritablement prononcées sur le sens des termes mentionnés en a, b et c, qui sont clairs d'un point de vue juridique. Les tribunaux se sont par ailleurs maintes fois prononcés sur leur application à des cas d'espèce. En langage vernaculaire, on peut dire que l'interprétation de ces termes, ou plutôt leur application, relève du gros bon sens et de l'honnêteté intellectuelle.

Questions 8 and 9 – awareness-raising

We asked the respondents whether their respective jurisdictions had taken some measure to raise consumers' awareness of their rights and recourses regarding legal warranties, and to raise merchants' awareness of their obligations.

The most common measures mentioned by the organizations to raise consumers' awareness are the leaflets they can produce and distribute, and the information available on their respective websites. Some also mention media interventions that may have raised public awareness. Some organizations mention more-targeted measures: presentations to consumer groups, and kiosks containing information on legal warranties (Manitoba), participation in awareness-raising events (Nova Scotia).

Measures taken to raise merchants' awareness are rarer and, when they exist or the organizations mention them, are generally much more diffuse: while the organizations' intervention through mediation can raise merchants' awareness, we would think it exaggerated to consider those *per se* as tools to raise merchants' awareness (Manitoba, Ontario). The same applied to information provided to consumers — if merchants are made more aware by this means, the effect is at best an indirect effect of consumer information and awareness-raising measures (British Columbia). Only Quebec and Ontario thus appear to have specific awareness-raising measures addressed to merchants (targeted presentations, documents specifically designed for merchants, available online).

The table below reproduces (except for Quebec – see the note in the table) the full answers to those questions.

Table 4
Measures to raise the awareness of consumers and merchants

| Province or territory | Consumers | Merchants |
|-------------------------|--|---|
| British Columbia | CPBC's website contains useful information for consumer re legal warranties. | Generally, CPBC deals with consumer complaints related to legal warranties. In these situations, inquiry staff educates consumers (in general terms) about their legal rights (i.e. under the Sale of Goods Act, the Motor Dealer Act). The Act we administer doesn't apply however, strictly speaking. |
| Manitoba | We provide leaflets on warranties, put out regular news releases and have given TV and radio interviews when warranty issues surface in the marketplace. Our staff also give regular presentations to many different consumer groups and set up kiosks at various events which all include information on warranty laws. | Their awareness would stem from news and radio reports as well as direct contact from our office when issues are brought to our attention from consumers. |
| New Brunswick | Our department has produced a pamphlet which explains the Act to consumers. | No |
| Nova Scotia | Yes we have information for consumers on our website, and staff participate in consumer awareness events. | No |
| Nunavut | Distribution of Consumer Handbooks | No |
| Ontario | Warranty information is posted on our website. | Public outreach in handling consumer complaints, in-field presentations and in material posted on our website. |
| Quebec | De façon large : site web, médias, trousse d'information concernant la durée normale d'un bien ³²¹ . | De façon large : Conférences dans des colloques tenus par des associations de commerçants, lettre d'affaires sur la garantie légale, destinée aux commerçants, est disponible sur le site Web de l'Office, information web dans la section "Interventions de l'Office auprès des commerçants". |
| Saskatchewan | Information bulletins, website | Website |
| Newfoundland | No | No |

³²¹ The Office de la protection du consommateur gave to these two questions a long answer, notably mentioning: the awareness-raising effect of the adoption, on his recommendation, and the application of CPA section 228.1, which obliges merchants offering an extended conventional warranty to give the consumer an information card on the existence and scope of the legal warranty; and the communication activities that followed.

Question 10 – Facilitation

Question 10 asked respondents “*What are the measures and steps taken by your organizations in order to facilitate the application of legal warranties in your jurisdiction?*”

The organizations that are so empowered under their Incorporating Act facilitate through mediation or conciliation the application of legal warranties. Some organizations, whether or not they have the power to intervene directly, make available to consumers information kits on small claims court procedures and direct them to the appropriate references.

Table 5
Measures to facilitate the application of legal warranties

| Province or territory | Measures |
|-------------------------|--|
| British Columbia | n/a |
| Manitoba | The Consumer Protection Act gives us authority through mediation only |
| New Brunswick | The Consumer Product Warranty and Liability Act is enforced through the courts. Our Branch is not mandated to offer mediation or conciliation services between consumers and merchants. Consumers are provided with an information package that gives detailed information on the small claims process and are referred to their local Court of Queen’s Bench should they have any questions specific to the small claims process. |
| Nova Scotia | Consumer information and referral to appropriate resources |
| Nunavut | Mediation |
| Ontario | Where appropriate MCS may intercede on behalf of consumers in making sure consumers get access to warranties as set out in our legislation |
| Quebec | Information collective; communiqués de presse; trousse d’information |
| Saskatchewan | Conciliation |
| Newfoundland | Our Consumer Affairs Officer encourages mediation in all consumer compliant and inquires |

Question 11 – recourses

Question 11 asked the organizations whether they had ever brought actions against merchants in relation to legal warranties and, in that event, on what aspects of legal warranties they had brought those actions.

All the organizations answered in the negative.

As mentioned in our detailed analysis of Canadian legal warranty plans, only the provinces of Manitoba, New Brunswick and Saskatchewan have adopted statutory laws for legal warranties in addition to the warranties found in their *Sale of Goods Act*. The SGA concerns contractual relations between the parties and is not overseen by any government body assigned to see to its application. No criminal remedy is provided in the provincial SGAs, so many governmental organizations lack the authority to bring criminal actions.

In Ontario, the CPA of 2002 contains only one additional warranty, of performance for services; for the rest of legal warranties, it refers to the SGA.

In Manitoba, only merchants are bound by the implied warranties provided by the Consumer Protection Act. Manitoba’s Consumers’ Bureau can sue only the seller, because the CPA does

not contain any warranty obligation applicable to the manufacturer. Still, the Act states that “A person who contravenes or fails to comply with a provision of this Act or the regulations is guilty of an offence³²²” and is subject to fines or imprisonment.

Although Quebec, New Brunswick and Saskatchewan also have regulations for legal warranties under statutory laws, not all government bodies have the authority to bring criminal actions. Quebec allows the Office de la protection du consommateur to bring criminal actions and fine anyone who violates the CPA³²³. Unfortunately, no criminal action is provided in Saskatchewan or New Brunswick for warranty infractions.

Question 12 – pros and cons of the legal warranty plan in effect

Finally, we asked respondents to list the pros and cons of the legal warranty plan in effect in their jurisdiction.

Among the positive aspects pointed out by respondents was the very existence of that warranty, of public order, at no charge, that covers in most jurisdictions all consumer goods and services and gives consumers, if the merchant does not honour the warranty, the possibility of going to court to assert their rights.

However, among the negative aspects, that necessity of going to court is identified; the time and money required for bringing actions with an uncertain outcome, along with consumers' ignorance of rights and procedures, pose serious obstacles. Respondents also mentioned the problems of interpretation. Some respondents deplored that institutional organizations do not have broader powers to have merchants honour legal warranties.

³²² Sec. 94 of the CPA-MB.

³²³ Sec. 277 and fol. of the CPA.

The table below reproduces in full the answers to this question.

Table 6
Pros and cons of the legal warranty plan in effect

| Province or territory | Pros and cons |
|-----------------------|---|
| British Columbia | Unable to comment |
| Manitoba | <p>Pros - 1)The fact that there is an implied warranty on the part of the seller in every retail sale of goods or services regardless of cost. 2) That the responsibility falls to the seller and consumers don't have to incur costs returning items to manufacturers that are often out of province.</p> <p>Cons: 1) No specific definitions of terms to assist with interpretation i.e. merchantable quality, reasonably fit, satisfactory manner 2)No authority to impose penalties or pursue breaches further under CPA if mediation is unsuccessful 3) No specific time limits imposed on implied warranties 4) Legislation open to challenge our interpretation.</p> |
| New Brunswick | <p>The Consumer Product Warranty and Liability Act offers consumers a valuable tool to use when negotiating with vendors, however, should the consumer not be able to reach a resolution with the vendor, the consumer must then go through small claims court for resolution.</p> <p>Unfortunately, many consumers are not aware of how the small claims process operates and feel that the time and cost of filing a claim far outweigh the possible benefits.</p> |
| Nova Scotia | <p>Pros: Gives consumers and businesses written rights and obligations under provincial legislation, and provides them opportunity to seek redress in Small Claims courts.</p> <p>Cons: Little opportunity for government to take direct action against companies, self-help through courts is difficult for more vulnerable consumers.</p> |
| Nunavut | <p>The cost of transporting goods in Nunavut is very expensive due to the large mass, distance from southern placed Manufacturers. Legal Warranties ensure that consumers have the right to a refund or return of very expensive goods (considering the mailing/handling/air freight costs incurred which can amount up to 1/2 the cost of goods purchased). Unfortunately unilingual speaking Inuit (particularly elders) do not realize that the business/merchant has a legal obligation to provide the goods/service to benefit the consumers...and there is opportunity for the abuse or taking advantage of elders' financial situation.</p> |
| Ontario | <p>Pro - Under the Consumer Protection Act, 2002 (CPA, 2002) in Ontario, the supplier is deemed to warrant that the services supplied under the consumer agreement are of a reasonably acceptable quality. The implied conditions and warranties applying to the sale of goods by virtue of the Sale of Goods Act are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.</p> |

| Province or territory | Pros and cons |
|-----------------------|---|
| Quebec | <p>Bien que les sondages effectués pour le compte de l'Union des consommateurs laissent croire que les termes utilisés par les dispositions portant sur la garantie légale laissent place à interprétation, nous sommes d'avis qu'ils sont suffisamment clairs et permettent de fournir un cadre de protection efficace pour tous les biens de consommation.</p> <p>Évidemment, les consommateurs, habitués aux termes précis des garanties conventionnelles, peuvent être insécurisés devant des dispositions qui demandent l'exercice d'un jugement adapté au cas d'espèce. Mais nous croyons qu'il s'agit néanmoins d'un avantage de la garantie légale, qui s'applique à toutes les situations dans le cadre de la tradition du droit civiliste et ne demande pas la lecture d'interminables conditions et exclusions.</p> <p>Une autre solution, qui consiste à utiliser un terme défini à l'avance, a été utilisée pour certains biens, particulièrement pour les automobiles d'occasion. Mais nous croyons que cette solution est plus utile lorsqu'elle s'ajoute aux termes généraux de la garantie légale "de base" et non si elle s'y substitue. C'est d'ailleurs cette première solution qui a été retenue par le législateur québécois.</p> |
| Saskatchewan | <p>con - because consumer is required to seek recourse in the courts they are often at a disadvantage; legal concepts not easily understood</p> <p>Pro - most suppliers accept and respect their responsibilities; consumers can transact with confidence knowing that statutory warranties cannot be waived</p> |
| Newfoundland | <p>In my opinion we only have one area which has a specific legal warranty component, the Direct Sellers Contract. We feel the legislation is very effective for High Pressure sale situations. However, most consumers don't contact the company within the legislated 10 day period. We find most consumer don't decide to attempt any action, until 2 to 3 weeks after the purchase, - unless the product doesn't work properly. All other legislation/ and situation would need to be of an extreme nature before either the regulator or the courts would take any legal action.</p> |

Question 13 – other comments

We gave respondents the opportunity to make any other relevant comments. Only Quebec and Newfoundland took advantage of that opportunity.

The following are the full answers to that question.

Quebec:

Nous ne qualifierions pas les termes de la garantie légale d'équivoque comme certains le font. Elle nous apparaît plutôt flexible et adaptée aux diverses situations qui peuvent se présenter. Évidemment, chaque cas est un cas d'espèce mais c'est aussi ce qui fait de la garantie légale une mesure de protection efficace. S'il est vrai que le respect de la garantie légale nécessite parfois des démarches répétées et musclées de la part du

consommateur, allant jusqu'à s'adresser à la Cour (généralement la division des petites créances), c'est aussi parfois le cas pour les garanties conventionnelles et supplémentaires, l'interprétation des clauses d'exclusions faisant souvent l'objet de litiges devant les tribunaux.

Par ailleurs, certains commerçants et fabricants vont accepter d'emblée de réparer ou de remplacer un bien, ou encore d'indemniser le consommateur, lorsque le bien en question n'a pas offert une durée raisonnable, par exemple. Malheureusement, il arrive que les consommateurs ne font pas respecter leurs droits, ne serait-ce qu'en s'adressant verbalement aux représentants de l'entreprise pour leur faire part de la problématique.

Bien que la vulgarisation du droit soit un objectif louable, le fait pour le législateur d'énoncer un principe clair et répondant à toute la problématique prendra parfois le pas. Le respect de la garantie légale nous semble donc passer par une meilleure connaissance de cette dernière par le public en général.

Newfoundland:

Our office relies on The Consumer Protection and Business Practices Act for most consumers complaints. However, by using a mediation approach to consumer complaints, the Act rarely needs to be quoted. Most parties want to reach a reasonable solution to faulty products. I think the definition of legal warranty is very important, however its practical use is limited to situations where consumers were misled in some way, but the situation falls short of fraud.

b) Community Organizations

Given that only four UC member organizations answered our questionnaire, i.e., the ACEFs of Montérégie East, Lanaudière, Montreal East and Estrie, we will only mention the highlights as an indication.

Questions 2 and 3 – number and types of requests and complaints³²⁴

The first pertained to the number of complaints or information requests received in the last five years, and to the type of requests that those community organizations receive from consumers about legal warranties.

The number of information requests about legal warranties is extremely variable, according to the organizations: “one or two, no more” in Montérégie East, to “a hundred of information requests annually on the subject” in Lanaudière (The Montreal East ACEF says 40). Estrie tells us that its complaints register does classify which requests pertain specifically to legal warranties.

Among the multiple-choice answers offered for the types of questions most often asked (existence of the legal warranty; scope of the legal warranty; duration of the legal warranty; limitations of the legal warranty; the manufacturer's / seller's / merchant's obligations; available

³²⁴ Question 1 pertained to the organization's identification.

remedies), only the multiple-choice answer “existence of the legal warranty” was not mentioned. All the other choices were mentioned three times, except the “limitations of the legal warranty,” which was mentioned twice (once by Montérégie East, its only mention, which is explained by the number — one or two — of complaints received).

Table 7
Types of complaints received by the organizations

| Organizations | Existence | Scope | Duration | Limitations | Obligations | Remedies |
|-----------------|-----------|-------|----------|-------------|-------------|----------|
| Montérégie East | | | | X | | |
| Montreal East | | X | X | | X | X |
| Lanaudière | | X | X | X | X | X |
| Etrie | | X | X | | X | X |

Question 5 – consumer information

Question 5 was formulated as follows: What advice do you offer consumers who try to have the legal warranty applied or who experience difficulties doing so (possible approaches, available remedies, applicable laws and procedures, etc.)?

The ACEFs indicate that they generally provide information on the law, on approaches to the merchant and on possible remedies, or that they refer consumers to the. Some ACEFs offer to act as mediators. As the Etrie ACEF explains, “*Nous tentons parfois une médiation auprès d'un directeur du commerce, en jouant sur le fait que si ça va en cour, ça leur coûtera plus cher puisqu'ils devront rembourser les frais de cour en plus de rembourser le prix payé plutôt que de redonner un bien pour lequel eux ne paient que le prix coûtant.*”

Table 8
Advice to consumers

| Organizations | Information | Mediation | Suggestion to obtain legal advice | Suggestion to bring legal action | Reference To another organization | Invitation to settle with the merchant |
|-----------------|-------------|-----------|-----------------------------------|----------------------------------|-----------------------------------|--|
| Montérégie East | X | | | X | | X |
| Montreal East | X | X | | X | | X |
| Lanaudière | X (OPC) | | | | X (OPC) | |
| Etrie | | X | | | | |

Question 6

Given the problems that consumers who participated in our discussion groups and survey experienced with certain terms, expressions or concepts used in various Canadian laws, we asked the organizations to give us their own interpretation of those terms in the context of legal warranties, and to tell us whether the case law confirmed their interpretation.

We submitted the following terms to consumer associations: “usage for which it is normally intended”; “serving the normal use”; “reasonable duration”; “reasonable consumer”; “reasonably satisfactory”; “merchantable quality”; and “works adequately.”

Only one organization (Estrie) pointed out that the last four terms were not in the Quebec law.

Here are the aggregated answers:

Use for which it is normally intended: *normal use according to the product's function. Use without excess, no commercial use if designed for private use, use as intended by design. One association thinks it a warranty that the good is fit for all its intended uses and functions, that it must effectively serve the purpose for which it is normally purchased and the uses stated by the merchant, in his advertising and on the packaging.*

Serving the normal use: *one association sees the same meaning as the preceding terms. Another says: "must serve the purpose for which it was designed." Another refers to non-abusive use, according to the use recommended by the merchant. A fourth mentions use under normal conditions, and commercial use of a good designed for individual use.*

Reasonable duration: *two associations refer to a duration corresponding to the use made of the good, and three link reasonable duration to the price paid.*

Some associations also mention: that the concept is vague and is open to interpretation. They also comment that the service life of objects is less and less reasonable and reliable; that the interpretation will depend on the type of object (household appliance vs. gadget, for example).

One association wonders whether the concept of reasonableness should be interpreted according to the merchant's representations, average duration, minimum duration... while recognizing that a law of general application should not be limited by excessive specificity.

Reasonable consumer: *the associations agree that this means a consumer who does not exaggerate, makes normal use of the product, acts appropriately, on average; they also agree in pointing out the subjective character of these terms.*

Reasonably satisfactory: *one of the associations finds this term impossible to define. Another sees in it a compromise in consumer satisfaction: not fully satisfied, not fully dissatisfied. Two others think it means appreciation of correct and satisfactory use that meets expectations.*

Merchantable quality: *basic quality for being put on the market.*

Works adequately: *conforms with advertised functions, according to its intended use.*

Questions 8 and 9 – awareness-raising

We asked the respondents if they had taken some measure to raise consumers' awareness of their rights and recourses in matters of legal warranties, and to raise merchants' awareness of their obligations.

Two associations answered no regarding consumer awareness-raising. The two others

mentioned information (workshops, media, Web), publications and references they offer consumers.

All the associations answer no regarding merchant awareness-raising, while one opines that this is the role of the Office de la protection du consommateur.

Question 10 – facilitation

Question 10 asked respondents whether steps or actions had been taken to facilitate implementation of legal warranties.

One associations again referred to information addressed to consumers, and another to the role of mediator that it plays at times in warranty disputes.

Question 11 – recourses

Question 11 asked the organizations whether they had ever brought actions against merchants in relation to legal warranties and, in that event, on what aspects of the legal warranty those actions had pertained.

All the organizations answered in the negative. One of them clarified as follows:

Mediation was undertaken, yes, but not legal action. The consumers we have informed or accompanied or led to a settlement following a mediation and/or a formal notice either then decided not to bring an action (either because it wasn't worth it given the value of the good, or because of uncertainty as to the chances of winning regarding the appliance's service life.

Question 12 – pros and cons of the legal warranty plan in effect

Finally, we asked respondents to tell us the pros and cons they found in the legal warranty plan in effect in Quebec.

Among the positive aspects mentioned by respondents is the very existence of this warranty. The obligation of merchants proposing the purchase of an extended warranty to disclose the existence and scope of the legal warranty is also recognized as an appreciable advance, with the effect of making less attractive all forms of costly extended warranties.

The associations deplore consumers' general ignorance of legal warranties, and consumers' confusion with other warranties. It is thought that consumers have difficulty understanding vague concepts, and that the law's vague passages lead to the lack of cooperation and to the opposition of merchants to consumers' exercise of their rights.

The associations estimated that application of the legal warranty is difficult, because consumers must go to court, which costs time and money and gives consumers pause when the goods in dispute are of little value.

Question 13 – other comments

We offered respondents the opportunity to formulate any other relevant comment.

One association insisted on the importance of monitoring the way that merchants present the legal warranty now that they are obliged to do so.

Another association passionately advocated the establishment of a consumer court...

4.3 Assessment - Discussion

Number of requests and complaints

We are surprised at the very wide variations between organizations as to the number and complaints and requests they receive regarding warranties, and, when we consider the data, we are also surprised at the proportion of this type of complaint compared to all the complaints the organizations have to deal with. Admittedly, the difference between the total number of complaints received respectively by the various organizations can also be surprising – in five years: in Manitoba, 15,000 requests annually, including 60% about warranties; in Quebec, 3,167 warranties in five years, i.e., 13% of the total number of complaints recorded; in British Columbia, 792 requests for information; in Saskatchewan, 98 requests; in Ontario, 1,580 written complaints and 6,558 verbal requests; in Nova Scotia, less than ten.

We find the same extreme variations among consumer rights organizations: over five years, “one or two, no more” in one case, “a hundred requests for information annually on the subject” in another case, and 40 in another case.

It should be recognized that the lack of uniformity in the organization of the databases of the various organizations does not make comparative studies any easier, given all that is compared: complaints, requests for information, requests about all types of warranties rather than just legal ones, etc.

Under those conditions, it is difficult to draw any conclusion, other than that the number of requests about legal warranties is far from negligible. This is evidently a real concern for consumers.

Types of requests and complaints

While almost all institutional organizations have been approached by consumers regarding the existence of legal warranties, consumer rights associations report no request on the subject, whereas almost all the other subjects mentioned in our questionnaire (scope of the legal warranty; duration of the legal warranty; the manufacturer’s / seller’s / merchant’s obligations; available recourses) have been objects of requests by consumers. Only the subject of the limitations of legal warranties was reportedly addressed very little.

The duration of legal warranties and the recourses available to consumers wanting to have such warranties applied are the subjects least often mentioned (only 5 mentions) by institutional organizations as concerns expressed by consumers who contacted them about warranties.

These results are quite surprising. Evidently, consumers are often unaware even of the existence of the legal warranty, as apparently confirmed by the popularity of extended conventional warranties, which in many cases offer consumers very few quantifiable advantages over the legal warranty.

It is also surprising to note that the legal warranty's duration is one of the subjects that consumers make the least requests about when approaching institutional organizations. Various investigations (and the comments of several authors) indeed tend to demonstrate that this aspect is one of the most difficult to understand for consumers aware of the existence of legal warranties.

The fact that recourses are not often mentioned is also surprising. While nowadays a majority of consumers are likely aware of the existence of small claims courts, we know that they are reticent to bring actions there, particularly when disputes involve goods of little value. This reticence may suggest that consumers who turn to organizations responsible for applying consumer protection laws are trying to see whether they have other recourses to have legal warranties honoured.

This issue of recourses, as we have seen, is one of those organizations' concerns: several organizations told us that the type of information they give consumers partly concerns recourses: formal notices, procedures, recommendation to obtain legal advice...

The value of the goods in dispute may well influence the choice of consumers to approach organizations responsible for applying the law: several of those organizations mentioned that consumers' requests often pertain to automobiles – British Columbia specified that about 90% of calls received about legal warranties concerned auto retail sales and warranties.

Consumer information

The organizations' means of intervention in response to a consumer's request are highly varied: several, whether community or institutional organizations, offer to act as mediators — but not before encouraging the consumer to try to settle the dispute directly with the merchant.

Most organizations offer, to various degrees, information on consumer rights, or references to an organization that will be able to provide such information.

Recommendations made to a consumer, if the organization cannot intervene directly, involve conciliation (approaching the merchant), or seeking legal advice, or going to court.

Interpretation

While consumers seem to have great difficulty in understanding their rights because of the terms used in legal texts, many institutional organizations refuse to give us their own interpretation of those terms, which consumers find too vague or obscure; one of those organizations clearly states that the courts are responsible for interpreting the terms. Some common law provinces confess ignorance of case law interpretation or admit that the courts' interpretation may differ from that of the organization responsible for applying the law.

When the institutional organizations try to explain those terms that consumers find contentious, we observe subtle variations between the interpretations proposed, as well as some cross or redundant interpretations between various terms, and even interpretations of concepts different from those meant by the terms to be defined (see the answers in greater detail on pages 91 and 92; Table 3a to 3g: interpretation).

For his part, the Quebec respondent emphasized that the terms used in the province's law pertain only to their common meaning, while implying that consumers err when they have trouble understanding their meaning while trying to know what protection the law actually gives them. The respondent even suggested that the difficulties of interpretation may be caused by intellectual dishonesty. If consumers and the organization responsible for applying the law disagree on the clarity of legal terms, the explanation may be found in the Quebec respondent's subsequent comment that the terms "are clear from a legal point of view."

From the feedback of all the respondents, it must be recognized that since the terms submitted to them for interpretation were not put in context, they became rather abstract. It should also be kept in mind that in the common law provinces, an adequate interpretation of the terms used requires reading abundant case law, which adds another layer of difficulty to interpretation and to correct knowledge of the terms used in the laws. That being said, we can certainly conclude that an understanding of the scope of legal protection escapes consumers all the more.

Awareness-raising

Almost all the institutional organizations have awareness-raising measures addressed to consumers, while only two (out of four) of the community organizations have this type of measures. But the means employed are similar: print or online documents, media interventions, presentations or workshops for target groups.

Awareness-raising measures addressed to merchants are much rarer – community organizations have none at all, and only two provinces have specific targeted measures.

Facilitation

Community organizations and some legally authorized institutional organizations offer mediation services to facilitate the application of legal warranties.

Several organizations also offer consumers information kits to help them assert their rights.

Recourses

None of the responding organizations has brought actions to have merchants honour legal warranties. As mentioned above, this is partly due to an absence of criminal recourses provided by laws containing legal warranty plans. Still, it is surprising that governmental organizations with the necessary powers to fine merchants or manufacturers who do not honour warranties do not exercise those powers. However, we can understand that the decision to bring criminal

proceedings depends to a certain extent on consumer complaints. Consumers are not well aware of the measures protecting them under the law and thus do not tend to complain, so it is difficult to bring criminal proceedings against merchants or manufacturers who breach legal warranties.

Question 12 – pros and cons of the legal warranty plan in effect

The respondents agree that the very existence of legal warranties should be emphasized: legal warranties offer protection, often of public order, at no charge; cover all consumer goods and in some cases consumer services; and allow consumers to assert their rights by suing a merchant who refuses to honour such a warranty.

As implied by the Quebec respondent, the very existence of legal warranties can have a positive effect on the market: *“Par ailleurs, certains commerçants et fabricants vont accepter d'emblée de réparer ou de remplacer un bien, ou encore d'indemniser le consommateur, lorsque le bien en question n'a pas offert une durée raisonnable, par exemple.”*

In addition, several respondents estimated that the obligation to go to court constitutes a negative aspect of legal warranty plans. Consumers are not well aware of the law and procedures, the courts are intimidating, the results are uncertain (often because consumers find it hard to clearly understand the scope of their rights), and such undertakings require resources of time and money. All this discourages consumers from massively asserting their rights under legal warranty provisions.

Nevertheless, the Quebec respondent attempts to put those obstacles in perspective or minimize them:

S'il est vrai que le respect de la garantie légale nécessite parfois des démarches répétées et musclées de la part du consommateur, allant jusqu'à s'adresser à la Cour (généralement la division des petites créances), c'est aussi parfois le cas pour les garanties conventionnelles et supplémentaires, l'interprétation des clauses d'exclusions faisant souvent l'objet de litiges devant les tribunaux.

It is true that a dispute between consumer and merchant regarding their warranty agreement (binding only to them) can also be the object of legal action – entailing those same obstacles. Still, we could legitimately expect that provisions of public order to defend consumers' individual as well as collective interest offer simpler and more effective means of implementation than those provided for ordinary law disputes.

Indeed, some organizations deplore the fact that the law does not grant them powers to facilitate the application of legal warranties or penalize merchants.

Moreover, a consumer will hesitate all the more to pay for repairs to a product he thinks is covered by a legal warranty if the costs of such repairs induce him to simply buy a new product, given his uncertainty that the court would order the repair costs reimbursed to him. As mentioned by some of the responding organizations, consumers contact them more often regarding goods of greater value: automobiles, household appliances, etc. The warranty issue is obviously more acute for those items: it is more onerous to replace them than to have them repaired, and it is more difficult to be deprived of them than of some other goods, so consumers

will most often have them repaired, while hoping that the court will order repair costs reimbursed to them.

Consumer associations estimate that consumers find it difficult to understand the indeterminate notions used for defining the scope of legal warranties (as confirmed by our consumer surveys), and that such legal vagueness leads to a lack of cooperation and to opposition by merchants when consumers try to assert their rights. The Quebec respondent, not troubled by consumers' incomprehension, nevertheless pleads for this approach (in answers to questions 12 and 13):

Bien que les sondages effectués pour le compte de l'Union des consommateurs laissent croire que les termes utilisés par les dispositions portant sur la garantie légale portent à interprétation, nous sommes d'avis qu'ils sont suffisamment clairs et permettent de fournir un cadre de protection efficace pour tous les biens de consommation.

[...]

Nous ne qualifierions pas les termes de la garantie légale d'équivoque comme certains le font. Elle nous apparaît plutôt flexible et adaptée aux diverses situations qui peuvent se présenter.

[...]

Bien que la vulgarisation du droit soit un objectif louable, le fait pour le législateur d'énoncer un principe clair et répondant à toute la problématique prendra parfois le pas.

[...]

Une autre solution, qui consiste à utiliser un terme défini à l'avance, a été utilisée pour certains biens, particulièrement pour les automobiles d'occasion. Mais nous croyons que cette solution est plus utile lorsqu'elle s'ajoute aux termes généraux de la garantie légale "de base" et non si elle s'y substitue. C'est d'ailleurs cette première solution qui a été retenue par le législateur québécois.

Mais nous croyons qu'il s'agit néanmoins d'un avantage de la garantie légale, qui s'applique à toutes les situations dans le cadre de la tradition du droit civiliste et ne demande pas la lecture d'interminables conditions et exclusions.

While recognizing that a law of general application must ensure not to limit rights by excessive specificity, some community organizations estimate that the vague or subjective character of some provisions can pose problems for consumers who would like to know their rights. And consumers themselves appear to share this view.

As pointed out by the Quebec respondent, "*Le respect de la garantie légale nous semble donc passer par une meilleure connaissance de cette dernière par le public en général.*" But to that end, the consumer must be able to understand what the law says.

5. Foreign Laws: Models to Follow?

Consumer contracts are private contracts, so international law has not been particularly interested in legal warranty issues.

Nevertheless we can mention the *United Nations Convention on Contracts for the International Sale of Goods* (CISG)³²⁵, concluded in Vienna in 1980, which aimed to “provide a modern, uniform and fair regime³²⁶” for this type of transaction.

The CISG governs international sales contracts between private companies established in different contracting States, *excluding sales to consumers and sales of services*.

Chapter ii, Part Three (Sale of goods) provides *Obligations of the seller*. Among those obligations is, in Section II, a warranty of conformity. Under that warranty, the seller must notably deliver goods whose quantity, quality and type conform with those provided in the contract (article 35 1). According to the second subsection of that article (35 2), the goods will be considered to conform with the contract only if they:

a) are fit for the purposes for which goods of the same description would ordinarily be used;

b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement;

c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

³²⁵ United Nations Convention on Contracts for the International Sale of Goods [Online] <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> (page consulted on March 3, 2012). Also noteworthy here is the existence of the *Convention of 2 October on the Law Applicable to Products Liability*, which, while pertaining to consumer goods, only governs extracontractual liability for harm done to persons or goods, and for economic loss, but does not cover damage caused to the product itself.

³²⁶ United Nations Commission on International Trade Law [Online] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (page consulted on March 5, 2012).

Article 36 also provides that the seller is liable even if the defect only appears subsequently.

We note that several warranties under these provisions are also integrated with legal warranty plans developed to protect consumers. As the preamble clearly indicates, this convention is not concerned with consumer protection, but with “the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,” the “development of international trade on the basis of equality and mutual benefit” and “the removal of legal barriers in international trade and promote the development of international trade³²⁷.”

For its part, the *Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980* (80/934/EEC)³²⁸, which established uniform rules for contractual obligation laws in the European Union, pertained directly to consumer contracts in its Article 5 – Certain consumer contracts, which states that “a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.”

Because this obligation to abide by national consumer protection laws risked creating obstacles to “the development of international trade on the basis of equality and mutual benefit,” the European Union did not delay in adopting directives to harmonize national laws on the subject. Such a directive on warranties was indeed adopted.

5.1 European Legal Warranty Plans

Directive 1999/44/CE of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees³²⁹

In 1999 this Directive was adopted, “concerned with the legal guarantee and commercial guarantees³³⁰.” It required Member States to adopt it in their legislation by January 1, 2002. This Directive followed upon the Commission’s Green Book of November 15, 1993, on warranties

³²⁷ United Nations Convention on Contracts for the International Sale of Goods, Preamble. [Online] <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> (page consulted on March 3, 2012).

³²⁸ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, [Online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:HTML> (page consulted on March 3, 2012). This convention was replaced by the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), whose article 6 is to the same effect.

³²⁹ Directive 1999/44/CE of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [Online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:EN:NOT> (page consulted on March 10, 2012).

³³⁰ Directive 1999/44/CE of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Sale of consumer goods and associated guarantees. Summary, [Online] http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32022_en.htm (page consulted on March 23, 2012).

and after-sales service with regard to spare parts³³¹, which assessed the legal situation in Member States and the situation of Community law on warranties³³².

The preamble contains the whereas clauses on which are based the Directive's provisions: the consumer may generally require the seller to repair or replace the good; it is appropriate to limit the period of the seller's liability for any conformity defect that exists at the time the good is delivered; Member States may limit the period during which consumers are authorized to exercise their rights, subject to the delay not expiring during the two years following delivery of the good; extended contractual warranties must contain certain information, notably a statement that the warranty does not impair the consumer's legal rights; etc.

The Directive aims to establish minimal uniform protection for consumers within domestic markets; accordingly, Member States are free to offer consumers broader warranties than those provided in the Directive (article 1, 1.).

The warranty provided by the Directive is one of conformity with the contract:

Article 2

Conformity with the contract

- 1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.*

The Directive's next paragraph states assumptions clearly indicating what is meant by "conformity with the contract":

- 2. Consumer goods are presumed to be in conformity with the contract if they:*
 - a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;*
 - b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;*
 - c) are fit for the purposes for which goods of the same type are normally used;*
 - d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods*

³³¹ Commission of the European Communities, Green Paper on Guarantees for Consumer Goods and After-Sales Services, Brussels, November 15, 1993, [Online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0509:FIN:EN:PDF> (page consulted on December 10, 2011).

³³² *Ibid.* The green paper recalls that: *While there is no Community instrument specifically devoted to the product guarantees and after-sales services, one should not overlook the contribution of other Community instruments to the development of a Community system relating to guarantees* (p. 51), in reference to Directive 85/374/EEC concerning liability for defective products, the Council Directive on Unfair Terms in Consumer Contracts, and Directive 84/450/EEC on Misleading Advertising.

made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

- 3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.*

The Directive thus establishes two types of non-conformity: of a good that does not conform with the description made of it (aspect, qualities, purposes) and of a good that is unfit for the expected use, usual use or special use intended by the consumer.

In the event of a defect of conformity, a consumer has the right, at his choice and at no charge, to repair or replacement of the good or, in some cases (the merchant's failure to repair within a reasonable period, for example), to an adequate price reduction or to termination of the contract (article 2, subsections 3 and 5).

Finally, article 5 provides the period during which this warranty will apply, as well as a simple assumption that the defect of conformity existed at the time the good was delivered:

Article 5

Time limits

- 1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods.*

[...]

- 3. Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.*

Moreover, article 7 states that the seller cannot, except under special circumstances, limit this warranty contractually.

Article 7

Binding nature

- 1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.*

Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time

period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.

2. *Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-Member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.*

Only in 2005 did all Member States finish transposing the Directive to their legislation; only Germany, Sweden, Finland, Spain and the Netherlands reported their transposition measures before the deadline. All European States now have, regarding conformity warranties, provisions harmonized to a certain extent³³³.

However, this conformity warranty is not the only legal warranty offered by the European States. For example, in the following pages we will examine more thoroughly France's legal warranty plan.

a) The Legal Warranty in France and Elsewhere

For goods purchased since February 2005, French consumers have a conformity warranty, transposed to the consumer code according to Directive 1999/44/EC (the ratification law adopted on April 5, 2006 was retroactive to the date of the adoption order).

This new warranty was added to the warranty against hidden defects that was already contained in article 1641 of the French Civil Code.

The texts of articles L211-4 and following, regarding the legal warranty of conformity, are more explicit than those of the Directive. For example, with regard to the principal warranty:

***L211-4.** Le vendeur est tenu de livrer un bien conforme au contrat et répond des défauts de conformité existant lors de la délivrance.*

Il répond également des défauts de conformité résultant de l'emballage, des instructions de montage ou de l'installation lorsque celle-ci a été mise à sa charge par le contrat ou a été réalisée sous sa responsabilité.

The contracts covered are defined in article L211-1. The contracts cover: the sale of tangible property, whether new or used; the provision of tangible property for manufacture or production; water and gas when conditioned in a delimited volume or quantity (bottles, filling a tank, etc.); the sale or exchange of pets. Are excluded goods sold by authority of law and public auctions, sales of electricity, and real estate sales. The conformity warranty applies only in relations between consumer buyer and professional seller.

³³³ For a detailed analysis of national legislation integration efforts made by each Member State, consult the Comparative Analysis: H. Consumer Sales Directive (99/44), written by Christian Twigg-Flesner, which is found on pages 710 and following of the Consumer Law Compendium [Online] http://www.eu-consumer-law.org/consumerstudy_part2h_en.pdf (page consulted on June 1, 2012).

Conformity with the contract is defined in essentially the same way as in the Directive, but without establishing a presumption:

L211-5. Pour être conforme au contrat, le bien doit :

- 1° Être propre à l'usage habituellement attendu d'un bien semblable et, le cas échéant :*
- correspondre à la description donnée par le vendeur et posséder les qualités que celui-ci a présentées à l'acheteur sous forme d'échantillon ou de modèle ;*
 - présenter les qualités qu'un acheteur peut légitimement attendre eu égard aux déclarations publiques faites par le vendeur, par le producteur ou par son représentant, notamment dans la publicité ou l'étiquetage ;*

2° Ou présenter les caractéristiques définies d'un commun accord par les parties ou être propre à tout usage spécial recherché par l'acheteur, porté à la connaissance du vendeur et que ce dernier a accepté.

The consumer code maintains the presumption that the defect existed at the time of delivery if that defect is discovered within six months (L211-7), as well as the exclusion of defects known to the buyer at the time of the purchase (L211-8).

The provisions for recourses are written more clearly than in the Directive, and the consumer code sets a time limit, i.e., one month, for the good to be repaired or replaced.

L211-9. En cas de défaut de conformité, l'acheteur choisit entre la réparation et le remplacement du bien.

Toutefois, le vendeur peut ne pas procéder selon le choix de l'acheteur si ce choix entraîne un coût manifestement disproportionné au regard de l'autre modalité, compte tenu de la valeur du bien ou de l'importance du défaut. Il est alors tenu de procéder, sauf impossibilité, selon la modalité non choisie par l'acheteur.

L211-10. Si la réparation et le remplacement du bien sont impossibles, l'acheteur peut rendre le bien et se faire restituer le prix ou garder le bien et se faire rendre une partie du prix.

La même faculté lui est ouverte :

- 1° Si la solution demandée, proposée ou convenue en application de l'article L. 211-9 ne peut être mise en œuvre dans le délai d'un mois suivant la réclamation de l'acheteur ;*
- 2° Ou si cette solution ne peut l'être sans inconvénient majeur pour celui-ci compte tenu de la nature du bien et de l'usage qu'il recherche.*

La résolution de la vente ne peut toutefois être prononcée si le défaut de conformité est mineur.

Consumers are of course not charged any fees for the application of recourses provided by these articles (L211-11). Proceedings regarding a defect of conformity are prescribed two years from the date of the infraction (L211-12).

As for the coercive nature of the warranty stipulated in the consumer code, we have seen that article L132-1 already stated that liability limitation clauses in a contract between a consumer and a professional are considered unwritten.

This warranty of conformity does not replace but is added to the warranty against hidden defects under the Civil Code.

The warranty against hidden defects is provided in article 1641 of the Civil Code: *“le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement cet usage, que l'acheteur ne l'aurait pas acquise, ou n'en aurait donné qu'un moindre prix, s'il les avait connus”*³³⁴.

We note immediately a fundamental difference between the warranty of conformity and the warranty against hidden defects: the latter allows remedies, according to the letter of the law, only if the thing sold is, by that defect, unfit for use or if the defect considerably diminishes its value.

The warranty against hidden defects applies to all sales contracts, whether or not the seller is a professional.

Two remedies are open to the buyer: a redhibitory action, i.e., returning the good and obtaining a refund; or an estimatory action, i.e., keeping the good and being reimbursed an amount equal to the loss of value entailed by the defect.

1644. *Dans le cas des articles 1641 et 1643, l'acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et de se faire rendre une partie du prix, telle qu'elle sera arbitrée par experts.*

1645. *Si le vendeur connaissait les vices de la chose, il est tenu, outre la restitution du prix qu'il en a reçu, de tous les dommages et intérêts envers l'acheteur.*

1646. *Si le vendeur ignorait les vices de la chose, il ne sera tenu qu'à la restitution du prix, et à rembourser à l'acquéreur les frais occasionnés par la vente.*

The action is prescribed two years from the date on which the defect is discovered (article 1648).

France is of course not the only State where the warranty of conformity has been added to an existent warranty. The Belgian Civil Code, for example, also provides a warranty against hidden defects, which is almost identical to France's. However, the legislation has been amended to incorporate a warranty of conformity³³⁵. Holland has acted similarly, but the warranty's duration

³³⁴ Code Civil, Chapter IV (Des obligations du vendeur), Section 3: De la garantie, Paragraph 2: De la garantie des défauts de la chose vendue. [Online] on Légifrance, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721> (page consulted on May 12, 2012).

³³⁵ On the website of the European Consumer Centre Belgium is a brief document providing consumers a summary of legal warranties, [Online] http://www.eccbelgium.be/20100428/guarantee-legislation-a-clear-brochure-for-buyers-and-sellers-Attach_s56761.pdf (page consulted on May 12, 2012). La Direction

has not been limited there to two years: it is extended for goods that have a longer life expectancy. In addition, a consumer may require a refund or price reduction if the good has had to undergo two repairs or exchanges and still shows defects.

The period of 2 years is a minimum requirement which every EU Member State must comply with. However, under Dutch legislation it is assumed that you are entitled to a longer period of compliance with the requirements of proper performance in the case of products with a longer expected useful life (washing machines, cars and other durable goods). The Netherlands therefore offers consumers (including those from abroad) more far-reaching protection than is required by the European Directive. However, this does not mean that you are entitled to repair free of charge in all cases after a period of 2 years. You must take into account the age of the purchased item in relation to its expected useful life and normal depreciation for age and wear and tear³³⁶.

In France, a Bill reinforcing consumer rights, protection and information was presented in Cabinet on June 1, 2011 by the Secretary of State for Consumer Affairs. The Bill was based on an examination of the 92,500 claims addressed to the Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCRFF) in 2010. The Bill notably aimed to amend articles L. 121-18 and L. 121-19 of the consumer code to improve the accessibility of general or specific contractual clauses during online purchases and to require information on the existence of the legal warranty of conformity, on the after-sales service and on commercial warranties. The Bill also amended article L. 113-3 of the consumer code by requiring a professional to inform his client about the existence and content of the legal warranty of conformity before a contract is entered into. On April 12, 2012, the Secretary of State for Commerce, Crafts, Small and Medium-Size Businesses, Tourism, Services, Liberal Professions and Consumer Affairs announced in the OJ Senate that the Bill could not be ready by the end of the parliamentary session, “Compte tenu de la crise et des mesures d'urgence voulues par le Président de la République³³⁷.”

We also find elsewhere legal warranties complementing the warranty of conformity and its provisions:

Au Royaume-Uni, au Pays de Galles, en Irlande du Nord et en Écosse, le “sales of goods act”, prévoit une garantie de 6 ans (5 ans en Écosse) en cas de produit défectueux, sans entraver l'application de la garantie légale de conformité et notamment le renversement de la charge de la preuve pendant les 6 premiers mois après la livraison.

En Finlande, il n'existe pas de durée limite de garantie. Elle dépend généralement de la durée de vie moyenne de l'appareil qui est déterminée par différents critères comme le prix du produit, l'utilisation faite par le consommateur... Chaque cas est étudié

générale de la Régulation et de l'Organisation du Marché, Service public Fédéral Économie, P.M.E., Classes moyennes et Énergie has also published a practical guide: La nouvelle loi sur les garanties, [Online] http://economie.fgov.be/fr/binaries/folder_warranty_fr_tcm326-36054.pdf

³³⁶ European Consumer Centre, [Online] <http://www.eccnl.eu/page/en/themes/Kopen-in-de-EU> (page consulted on May 15, 2012).

³³⁷ Sénat. Base de questions 2012 : Projet de loi renforçant les droits, la protection et l'information des consommateurs, 13^{ème} législature, [Online] <http://www.senat.fr/questions/base/2012/qSEQ120222492.html> (page consulted on May 16, 2012).

individuellement. Pour avoir un aperçu des durées moyennes de vie d'un appareil, il est possible de consulter les recommandations du "Consumer Dispute Board"³³⁸.

In a document titled *Guidelines for Consumer Protection*, the Consumer Agency Ombudsman specifies certain aspects of Finland's legal warranty under chapter 5 of the *Consumer Protection Act*³³⁹. The *Guidelines* interpret that chapter as follows: "If wear and tear has appeared before the end of its expected durability, this wear and tear is not normal and the seller is not released from liability for lack of conformity." Among the remedies, the document mentions non-payment, in addition to replacement and repair: "In the event of lack of conformity, the buyer is entitled to withhold payment. The amount withheld must correspond to the lack of conformity, in other words it must be in reasonable proportion to the nature and significance of the lack of conformity." The document also specifies the type of compensation a consumer may require in the event of non-conformity:

The buyer shall be entitled to compensation for loss suffered as a result of lack of conformity. Typical losses that may be imposed on the buyer because of lack of conformity include various settlement expenses such as the cost of journeys, postage and telephone calls. Expenses also include the costs of bringing the goods into conformity if the seller does not repair the defect. If the buyer has to hire a similar product for the period the good is being brought into conformity, the seller may also have to indemnify these costs.

If the lack of conformity or loss is owing to negligence on behalf of the seller, the seller shall be obliged to compensate the buyer not only for the direct loss but also for any indirect loss incurred. Indirect loss includes, for example, the loss of earnings suffered by the buyer whilst settling the lack of conformity.

It is also indirect loss if the consumer is significantly disadvantaged as a result of not being able to use the product, or suffers a similar actual disadvantage. In such cases the consumer is entitled to compensation, even though he may not³⁴⁰.

³³⁸ Centre européen des consommateurs de France. Garanties, [Online] <http://www.europe-consommateurs.eu/fr/vos-droits/achats-dans-l-ue/achats-en-europe/quels-sont-vos-droits/garanties/> (page consulted on May 18, 2012).

³³⁹ Consumer Agency Ombudsman (Finland), *Guidelines for Consumer Protection*, [Online] <http://www.kuluttajavirasto.fi/File/b2796a26-ee20-4a01-809c-7ab0f25c95b7/Statutory+liability+for+lack+of+conformity+and+guarantee+in+the+sale+of+consumer+goods+.pdf> (page consulted on May 12, 2012).

³⁴⁰ *Ibid.* p. 6.

b) The United Kingdom

In the United Kingdom, the *Sale of Goods Act 1979*³⁴¹ provides an implied warranty of conformity in article 14; that warranty applies only to movables, and is applicable only to sales – so donations, barter, exchange and rental are excluded from that protection. Article 55 states that any limitation or exclusion of the warranty is void in consumer contracts.

The criterion for evaluating whether the product is of satisfactory quality is that of the reasonable person (*goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory*, art. 14(2)). Quality, as defined in article 14(2B), is evaluated according to the following criteria:

- a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- b) appearance and finish,
- c) freedom from minor defects,
- d) safety, and
- e) durability.

Article 14(3) also provides that the good must be fit for any specific use mentioned by the buyer and confirmed by the seller, whether or not the use is a usual one, except if the circumstances show that the buyer did not rely on the seller's judgment or skills, or if the buyer would have been unreasonable to do so.

Part 5A (article 48 and following) provides additional consumer rights: the right to repair or replacement of a good that does not conform with the contract or is not of satisfactory quality; or the right to a price reduction or to voidance of the contract. The law contains a presumption of non-conformity at the time of the sale if the defect appears within six months of the purchase. An action for breach of warranty is also provided in Part VI of the Act (article 53 and following), which allows the buyer to require a price reduction or elimination, and to claim damages.

c) Germany

While most of the States have been content to integrate to their laws what was provided in the Directive, Germany has taken advantage of the latter to reform its entire law of obligations; the reforms took effect on January 1, 2002. The Directive was thus integrated to the Civil Code, to make the warranty applicable to all contracts (rather than only consumer contracts) pertaining to tangible movable, intangible movable or immovable property.

Division 8 (Specific Types of Obligations) of Book 2 of the Civil Code³⁴², which covers the law of obligations, contains warranties against material defects.

³⁴¹ Sale of Goods Act 1979, [Online] <http://www.legislation.gov.uk/ukpga/1979/54/contents> (page consulted on May 15, 2012).

³⁴² German Civil Code BGB, [Online] http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf (page consulted on May 10, 2012).

434. (1) The thing is free from material defects if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been agreed, the thing is free of material defects

- 1. if it is suitable for the use intended under the contract,*
- 2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing.*

The section specifies that the quality in question includes the characteristics the buyer can expect based on the seller's or manufacturer's representations, or on those that appeared in advertising, packaging, etc., "unless the seller was not aware of the statement and also had no duty to be aware of it, or at the time when the contract was entered into it had been corrected in a manner of equal value, or it did not influence the decision to purchase the thing."

If there is a defect, the buyer may demand repairs, revoke the contract or obtain a price reduction, and even claim damages and a reimbursement of costs (section 437). If applicable, the prescription period for bringing actions will be two years (as a general rule) to 30 years (for certain rights in rem or registered rights).

In all cases, the buyer may demand that the seller correct the defect or replace the good (sec. 439), at the seller's sole expense.

If the seller refuses or fails to correct the defect, or if he does not do so in reasonable time, or if two repair attempts have failed, the buyer may require termination of the contract (sec. 440) or a price reduction (sec. 441) and thus total or partial reimbursement, if applicable.

The Civil Code addresses separately, in sections 443 and following, what it calls the warranty of quality and durability; those provisions in fact deal with conventional warranties.

As for liability limitations, German law covers ordinary law contracts and consumer contracts differently. While liability limitation clauses are valid in ordinary law (barring the seller's prior knowledge of the defect), section 475 of the Civil Code states that consumer rights generally may not be set aside or reduced.

Deviating agreements

475. (1) If an agreement is entered into before a defect is notified to the entrepreneur and deviates, to the disadvantage of the consumer, from sections 433 to 435, 437, 439 to 443 and from the provisions of this subtitle, the entrepreneur may not invoke it. The provisions referred to in sentence 1 apply even if circumvented by other constructions.

(2) The limitation of the claims cited in section 437 may not be alleviated by an agreement reached before a defect is notified to an entrepreneur if the agreement means that there is a limitation period of less than two years from the statutory beginning of limitation or, in the case of second-hand things, of less than one year.

(3) Notwithstanding sections 307 to 309, subsections (1) and (2) above do not apply to the exclusion or restriction of the claim to damages.

5.2 The Legal Warranty in Australia

Like other common law jurisdictions, Australia has a *Sale of Goods Act 1895*³⁴³, which covers legal warranties of conformity.

Under section 14 of that law, there is no implied warranty of quality or conformity for the sale of goods, except in two cases:

1. *where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;*
2. *where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;*

A breach recognized under the above provisions may result in a price reduction or elimination (section 52).

However, another law, the *Competition and Consumer Act 2010*³⁴⁴ (CCA), provides broader warranties for consumer contracts in its *Schedule 2: The Australian Consumer Law (CCA, article 4: Australian Consumer Law means Schedule 2 as applied under Subdivision A of Division 2 of Part XI.)*. Division 1, Part 3-2 (*Consumer transactions*) specifically provides consumer warranties. Section 54 stipulates that goods sold by a merchant, except in an auction, must be of acceptable quality, described as follows:

54(2) Goods are of acceptable quality if they are as:

- a) fit for all the purposes for which goods of that kind are commonly supplied; and*
- b) acceptable in appearance and finish; and*
- c) free from defects; and*
- d) safe; and*
- e) durable;*

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection

³⁴³ Sale Of Goods Act 1895, Western, [Online] Australian Consolidated Acts.
http://www.austlii.edu.au/au/legis/wa/consol_act/soga1895128/

³⁴⁴ The Australian Consumer Law, Competition and Consumer Act 2010, Schedule 2- C2011C00003, [Online] http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/sch2.html (page consulted on May 8, 2012).

The law specifies that the elements provided in that section apply to the good's nature, price, the representations made by the seller, the manufacturer or on packaging, as well as other "circumstances" relevant to the sale (54(3)).

The following sections list specific conditions (for example, that goods will not be considered of unsatisfactory quality if the defect is subsequent to inappropriate use, or if an examination was made that revealed (or should have done so) that the good was not of acceptable quality (54(6), 54(7)).

The warranty applies to specific uses if the merchant has made representations that those uses were acceptable (55(1)), unless the consumer did not rely on those representations or it was not reasonable for him to do so.

If a warranty is breached, the consumer may require the good's repair or replacement, or a full or partial refund (sections 259 and following) and may, in some cases, claim damages (section 271 and following).

The warranties, with the necessary adaptations, also apply to services³⁴⁵.

Section 262(2) clarifies the duration of the warranties' application:

262(2) The rejection period for goods is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee referred to in section 259(1)(b) to become apparent having regard to:

- a) the type of goods; and*
- b) the use to which a consumer is likely to put them; and*
- c) the length of time for which it is reasonable for them to be used; and*
- d) the amount of use to which it is reasonable for them to be put before such a failure becomes apparent.*

5.3 The Legal Warranty in the United States

To harmonize the law regarding certain commercial transactions, including sales, for all the American states, A *Uniform Commercial Code*³⁴⁶ was adopted in the United States, and each state is able to make amendments to it. Accordingly, the *Uniform Commercial Code* is not a law, but a guide whose rules are to be integrated by the states into their respective legislations (regarding sales, rentals, bills of exchange, bank deposits, transfers of funds, secure transactions, etc.). Only Louisiana has not adopted the Code in its entirety, by preferring to continue applying civil law to the sale of goods and to rentals (sections 2 and 2A of the Code).

The legal warranties are found in section 2 (2-314 to 2-318).

³⁴⁵ See the summary of the law as issued by the Australian Competition & Consumer Commission: Consumer Guarantees, [Online] <http://www.accc.gov.au/content/index.phtml/itemId/956980> (page consulted on May 12, 2012). Different rules apply to goods and services acquired before January 1, 2011.

³⁴⁶ Uniform Commercial Code. The text of the Code, without comments, is available on the website of Cornell University Law School, [Online] <http://www.law.cornell.edu/ucc/2/> (page consulted on May 12, 2012).

The legal warranty of merchantable quality (2-314) notably indicates that goods put up for sale must at least be fit for their usual intended uses and conform with the contract and in representations made on the packaging or label, as the case may be.

The implied warranty of conformity (2-315) states that if the merchant is aware of the use intended by the buyer and if the latter chooses the good while relying on the seller's expertise, the good must be fit for that use.

The merchant may set aside the implied warranties by clear provisions in the consumer contract³⁴⁷ or by an apparent mention that the good is sold "as is" or "with all faults" or other common expressions with the same effect (2-316). Under the same provision, the warranties may be set aside, to the extent that an examination has led to the detection of a defect, if the buyer has examined the good to his satisfaction or if he has refused to do so after the seller's invitation. The Code also states that restrictions may be added contractually to remedies the consumer may eventually obtain (2-719).

The remedies provided by the Code are found in section 2-714(2): direct damages, i.e., generally, *the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount*. The Code also provides incidental damages, i.e., the costs incurred to enforce the warranty:

§ 2-715. Buyer's Incidental and Consequential Damages.

1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

2) Consequential damages resulting from the seller's breach include

- a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and*
- b) injury to person or property proximately resulting from any breach of warranty.*

a) The Civil Code of Louisiana

A former French colony (also under Spanish rule for a time), Louisiana was sold to the United States by Napoleon Bonaparte in 1802. The state maintained its civil law tradition (crossed with

³⁴⁷ However, the courts have already rejected as unfair such statements of non-liability. See: Robert J. Williams. *Getting what you bargained for: how courts might provide a coherent basis for damages that arise when remedies fail of their essential purpose*. Virginia law & business review, Volume 5, Number 1, Fall 2010, p. 134 : "When contracts substantially limit remedies that a party might otherwise be entitled to by law, and there is evidence that the party waived the right because it lacked a real choice in the matter, courts may employ the doctrine of unconscionability to restore a remedy." [Online] <http://vlbr.net/wp-content/uploads/2011/02/4-Williams.pdf> (page consulted on May 18, 2012).

Castilian law) and adopted in 1808³⁴⁸ its own civil code, the *Digest of the Civil Laws now in Force in the Territory of Orleans, with Alternations and Amendments Adapted to its Present System of Government*, a mix of Spanish and French law with a structure based on that of the Napoleonic Code. A more complete Civil Code was adopted in 1825. The latest major revision was made in 1992.

As mentioned above, Louisiana has adopted the *Uniform Commercial Code*³⁴⁹, except for section 2, on legal warranties. So Louisiana's Civil Code must be referred to for the state's warranty rules; provisions inspired by section 2 of the *Uniform Commercial Code* have been incorporated to the Civil Code.

Most of the legal warranties (against eviction, against hidden defects, and warranty of conformity) are found in article 2475 of Louisiana's Civil Code:

Art. 2475. Seller's obligations of delivery and warranty.

The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use.

The good sold must be delivered in the condition the parties expected to find it (article 2489).

A warranty against redhibitory defects is provided in article 2520, which sets parameters of interpretation and identifies the applicable remedy:

Art. 2520. Warranty against redhibitory defects

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.

A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

This warranty applies only if the defect existed at the time of delivery. The defect is presumed to have existed if it appears within three days following delivery (art. 2530).

The seller is not bound to guarantee a good against defects that were known to the buyer or that a prudent buyer would have detected (art. 2521). Unless the buyer knew the defect, the buyer must disclose it in a timely way, to give the seller the opportunity to make necessary corrections. Without such notice, the buyer may receive a diminished warranty (art. 2522).

³⁴⁸ Only four years after the adoption of the French Civil Code in 1804.

³⁴⁹ Integrated to Title: Commercial Laws, of Louisiana Revised Statutes.

The good sold *must be reasonably fit for its ordinary use* or for the specific use intended by the buyer and for which he relied on the seller's expertise or judgment. *If the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations*³⁵⁰ (art. 2524).

If the good sold does not conform with the contract or with representations made about it, the buyer's rights are governed by the sale and by the general rules of conventional obligations³⁵¹ (art. 2529).

A seller who was unaware of the defect is bound only to repair or correct it. A seller unable to make such repairs is then bound to reimburse the buyer, with interest, and to reimburse any reasonable expenses resulting from the sale and from keeping the thing; the seller may deduct an amount as credit for the buyer's use of the thing, if such use or usufruct had some value to the buyer (art. 2531). The same applies to a seller who was aware of the defect. He also incurs any reasonable legal expenses. The seller is presumed to know the redhibitory defects of any products he manufactures (art. 2545).

A buyer who has his contract rescinded as a result of a redhibitory defect must return the good, but not before everything due to him has been paid. If the good is destroyed because of the defect, the buyer retains his remedy. If the good is destroyed by accident, the buyer assumes liability for the loss unless he notified the seller before that event of a defect that would have entitled him to rescind the contract (art. 2532).

If the seller was unaware of the defect, the remedy for a redhibitory defect is generally prescribed four years from the first of the following two dates: that of delivery or that of discovery of the defect. The remedy is prescribed one year from the discovery if the seller was aware of

³⁵⁰ Title III - Obligations In General, articles 1756 and following; Art. 1758. A. The obligation may give the creditor the right:

- (1) to have the service to which the debtor is bound executed in full;
- (2) to have it executed in full by a third party at the debtor's expense;
- (3) to recover damages and interest for the debtor's non-execution of the service, or for his defective or late execution.

Title IV – Conventional Obligations or Contracts, articles 1906 and following. Section 4 – Damages, articles 1994 and following; Dissolution, article 2013 and following:

Art. 2013. When the obligor fails to perform, the obligee has a right to the judicial dissolution of the contract or, according to the circumstances, to regard the contract as dissolved. In either case, the obligee may recover damages.

In an action involving judicial dissolution, the obligor who failed to perform may be granted, according to the circumstances, an additional time to perform.

Art. 2015. Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time allowed for that purpose must be reasonable according to the circumstances.

The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

Art. 2016. When a delayed performance would no longer be of value to the obligee or when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor.

³⁵¹ See the preceding note. Also: Title VII - Sale; Chapter 1 - Of the Nature and Form of the Contract of Sale, articles 2438 and following. Art. 2438. In all matters for which no special provision is made in this title, the contract of sale is governed by the rules of the titles on Obligations in General and Conventional Obligations or Contracts.

the defect. The prescription is interrupted when the seller accepts the good under repair and it is reset when the seller returns the good or informs the buyer of his refusal or inability to repair it (art. 2534).

The buyer may choose (or the court grant) only one price reduction in lieu and place of a rescission of the contract (art. 2541).

The parties may agree to exclude or limit the seller's liability; the terms of such an exclusion must be clear and brought to the buyer's attention. The exclusion will be without effect if the seller declared that the thing had qualities he knew it had not (art. 2548).

5.4 The Legal Warranty in Brazil

Consumer protection ranks exceptionally high in Brazilian legislation, and is found at the very heart of the Constitution.

It is in the 5th article of the 1988 Federal Constitution, in Chapter I, on the Individual and Collective Rights and Duties, of Title II, concerning The Rights and Fundamental Warranties, in its incise XXXII, where we find the first reference to consumer rights. In this act, the Constitution does not leave any doubts as to the responsibility of the State to promote consumer rights. When treating the economical and financial order, as stated in Chapter I, on the General Principles of the Economic activity of Title VII, that is on the Economical and Financial Order, the Great Letter, in article 170, states that one of its basic principles is consumer protection. Finally, in the Actions 4 of the Transitory Constitutional Dispositions, the Constitution determined that the National Congress must promulgate no later than 120 days after its own promulgation the Code of Consumer Protection. In practice, it ended up taking approximately two years, since Law no. 8.078, known as the Consumer Protection Code, is dated September 11th, 1990³⁵².

While consumers' fundamental rights are listed in article 6 of the Act of September 11, 1990, article 4, notably article 4 II d) of said Act, contains the policies listing the various consumer warranties.

It is said in the 4th Art. of the CDC [Código de Defesa do Consumidor] : "The National Consumption Relationship Policies have as their objective, the service of consumer's needs, the respect to their dignity, health and safety, the protection of their economic interests, the improvement of their quality of life, as well as the transparency and harmony of consumption relationships, according the following principles:"

I - recognition of consumer vulnerability in the consumption market;

II - government action in the sense of protecting the consumer effectively:

a) by direct initiative;

b) by incentives to the creation and development of representative associations;

c) by the presence of the State in the consumption market;

³⁵² Luciano Rodrigues Maia Pinto, Consumer Protection In Brazil - A General View. The George Washington University, School of Business and Public Management, Institute of Brazilian Business and Public Management Issues. XV – Minerva Program – Fall 2002, p.3.
<http://www.gwu.edu/~ibi/minerva/Fall2002/Luciano.Maia.pdf>

d) *by the warranty of products and services with appropriate quality, safety, durability and performance patterns*³⁵³.

The Consumer Protection Code³⁵⁴ provides warranties that appear all the more able to protect consumers that the means to implement them are facilitated and that violating those protection provisions may entail serious consequences for merchants.

The consumer is defined as follows: any natural or artificial person who acquires or uses a good or service as an end user (thus excluding middlemen on the distribution chain).

The goods covered are movables and immovables, whether tangible or intangible. All services provided to consumers for remuneration (article 3), including banking, financial, credit and insurance services, are covered. Excluded are services resulting from a working relationship (article 3 § 2).

Article 6 of the Code states the fundamental rights of consumers. Notably:

I – the right to the protection of life, health, and against safety hazards posed by goods or services considered dangerous or harmful;

II – the right to education and knowledge on the correct use of products and services, to enable informed choices;

III – the right to adequate and clear information on the various products and services, which specifies notably the characteristics, composition, quality and price, as well as the risks involved;

IV - protection against misleading and unfair advertising, and against coercive or misleading and unfair business practices;

V – the right to amend contractual clauses establishing disproportionate advantages or to revise them due to ulterior events to the consumer's disadvantage;

VI – the right to effective prevention and to repair of any damage, whether individual, collective or diffuse;

VII – access to legal and administrative organizations in order to prevent or repair damage, whether individual, collective or diffuse, as well as access to legal, administrative and technical assistance;

VIII - facilitation of the defence of their rights, notably overturning the burden of proof in favour of the consumer in civil procedures, at the judge's discretion;

³⁵³ Chapter II, article 4, II. *Ibid.* p. 7.

³⁵⁴ Act No. 8.078 of September 11, 1990, Consumer Protection Code – *Código de Defesa do Consumidor* (in Portuguese)
<http://portal.mj.gov.br/data/Pages/MJ7E3E5AAEITEMID736B189700174E618C00EF8DA589D98CPTBRIE.htm>

Suppliers are jointly and severally liable for all defects limiting the expected use of a good or diminish its value, and for non-conformity with information appearing on the packaging or label or in advertising. The consumer may require that the good be repaired or, if that is not done within 30 days, or if replacing parts may compromise the good's quality or value, he may require replacement of the product by another of the same kind in perfect condition, or immediate restitution of the amount paid, with interest, without prejudice to damages, or a proportional price reduction (article 18).

If the defect pertains to quantity (net content less than announced), the consumer may also require a proportional price reduction, a supplementary weight or size, a replacement of the product for another of the same kind, brand or model, without the defect mentioned, or immediate restitution of the amount paid, with interest, without prejudice to damages (article 19).

Those warranties and remedies also apply to services, with the necessary adaptations (article 20).

Legal warranties apply independently of any express warranty, and the contract cannot provide any waiver, exemption or limitation of those warranties (articles 24 and 25).

Article 30 provides that any product or service information given the consumer, in any form, be part of the contract.

The prescription period varies according to the nature of the good (durable or perishable), and according to that of the defect (hidden or apparent): for apparent or easily identifiable defects, the prescription period is 30 days, in the case of services and perishable goods, as of the good's delivery date or the end of the service provision. For hidden defects, the prescription begins from the date on which the defect is discovered (article 26 § 3). The right to compensation for damages caused by the defect has a prescription period of five years from discovery of the defect (article 27).

Articles 56 to 60 provide sanctions for infractions of consumer protection rules; those sanctions may be applied by a simple administrative procedure, without prejudice to civil or criminal actions. Those sanctions, which may be cumulative, include: a fine (of up to 200 to three million times the value of the fiscal reference unit (UFIR)); seizure and/or destruction of the product; voiding of the product registration; prohibition against manufacturing the product; cancelling the licence of the establishment or activity; etc.

For its part, article 66 provides criminal proceedings in the event of false or misleading statements or failure to disclose important information about the nature, characteristics, quality, quantity, safety, performance, durability, price or warranties of products or services. Infractions may entail imprisonment of 3 months to one year, as well as fines.

6. Analysis and Conclusion

6.1 Analysis

In this study, we have tried to answer the following questions: Do legal warranties sufficiently protect consumers? Are they easy to apply or is their applicability, on the contrary, illusory or too complicated? What is actually covered by the legal warranty? Are there regulatory frameworks easier to apply in foreign jurisdictions?

In an attempt to answer these questions, we made a study of legal warranty plans in Canada and elsewhere, conducted a poll and held discussion groups, to determine whether consumers were aware of the warranties granted to them by law, and to learn their views on the effectiveness of the protection measures benefiting them. Moreover, we sent a questionnaire to provincial governmental institutions responsible for applying consumer protection laws and to Union des consommateurs member consumer associations. The goal of that survey was to know the organizations' viewpoint on the regimes' effectiveness, learn about their role in implementing consumer laws and raising consumer awareness, and find out what they considered to be the pros and cons of existing legal warranty plans.

Ultimately, we tried to determine the best practices likely to improve consumer protection and facilitate the application of legal warranty plans.

a) Canadian Legal Warranty Plans

The evolution of legal warranty plans for consumer contracts has been tortuous and driven by court decisions. Given the difficulties faced by consumers under the plan of the *Civil Code of Lower Canada* in Quebec, and under the plan of the *Sale of Goods Act* in English Canada, the legislatures of some provinces have intervened to better protect consumers and offer them a broader regulatory framework that would be easier to apply. We must emphasize the primary advantage constituted by the very existence of legal warranty plans adapted to the specific circumstances of consumer contracts. An analysis of the common law and of Quebec's ordinary law regime quickly led us to understand what prompted some provincial legislatures to intervene as early as the seventies, given that provincial regimes were less and less effective regarding consumer contracts.

Nevertheless, only a minority of Canadian provinces today have included additional legal warranties in consumer protection acts or have adopted a plan adapted to the peculiarities of consumer contracts. The imprecision of the ordinary law plan contained in the SGAs, along with the fact that the bases of that plan (contractual freedom and absolute contract primacy, which justify, for example, the contractual exclusion of those basic warranties) do not reflect the reality of consumer contracts, but maintain the imbalance of power that victimizes consumers. The latter should have recourse to a plan adapted to their situation – a plan understandable to them, with easily accessible recourses, with application conditions that are not excessively stringent, etc.

In our view, a legal warranty plan applicable to consumer law must contain clear and defined terms regarding the warranty of product quality. Common law provinces that reproduce in their statutory law the warranties contained in SGAs or that refer to SGA provisions should thus provide clearer measures in consumer protection laws, to facilitate the respect and application of consumer rights. The fact that such plans are found in a consumer protection Act is likely to facilitate access to their content and reaffirms the importance attached to this particular protection.

As demonstrated by the study of Canadian legal warranty plans contained in statutory consumer protection laws, it seems obvious that the primary intention of legislatures is to better protect consumers when they purchase a good (and, in some circumstances, services, with the necessary adaptations) by guaranteeing that the good will have a reasonable service life, will be fit for the use intended (by the manufacturer or the consumer), and will conform with what the seller or manufacturer stated about it – conform of course with the content of the contract, but also with the consumer's expectations.

It seems evident that goods or services acquired by a consumer must meet his reasonable expectations. The good or service must be capable of the use for which it was purchased; it must be entirely as described, whatever the means of communication used; it must of course be free of any defect – not only defects making it unfit for use or seriously affecting such use; the good must have reasonable duration; the consumer must not be required to call upon an expert to discover defects in advance, whether minor or major, that are likely to affect his product, but must also not be required to explain to a merchant or a court the reasons why he is dissatisfied; the consumer must not have to become a legal expert to explain to whomever that the law allows him to obtain a good that meets his reasonable expectations: the law must reflect these obvious principles and ensure that every consumer can, quickly and easily, obtain compensation if what he acquires does not meet his reasonable expectations.

Between the Middle Ages, the industrial era and the advent of mass consumption, things have greatly changed. Mass production and the depersonalization of relations between consumers and merchants quickly led to an imbalance in contracts between consumers and merchants – an imbalance that almost systematically put consumers in a position of vulnerability. It is certainly surprising that many of the principles and procedures that might be acceptable before this revolution are still in effect nowadays, practically unchanged, in consumer matters.

Accordingly, to better protect consumers, some provincial legislatures have adopted regimes providing minimal, basic warranties to which consumers are entitled.

In legal warranty plans incorporated in consumer protection laws, we find certain similarities. First, those laws set aside the illusion of contractual freedom: the merchant may not exclude legal warranties, and the consumer cannot waive them. The content of the mandatory warranty is also common to those laws, on several points: notably, warranties of fitness (for the use usually or specifically intended for a product), durability, conformity with the contract and the seller's or manufacturer's statements. The laws also contain, in one form or another, warranties against hidden defects, at times with legal presumptions of knowledge and existence of the defect.

To make sure to cover as much as possible any situation that might arise, the laws adopt general terms leaving much room for assessment and interpretation. The terms used are

“reasonable duration,” “merchantable quality,” etc. While those terms are used, case by case, for considering a vast range of situations, they also have the unfortunately effect of leaving consumers in the most complete uncertainty: does the warranty apply or not? Faced with this uncertainty and the barriers making the consumer hesitate to go to court, the merchant is well placed to sow confusion... and maintain to his advantage the imbalance the law was attempting to correct.

How can the lawmaker clarify warranties without making them so rigid that they cannot adapt to the various situations arising in a multitude of consumer transactions? This resembles an enigma that has always haunted lawmakers.

We have seen that a European Directive sets a minimal term of two years for legal warranties and establishes a presumption of non-conformity if a defect appears within six months after the good is acquired. Is this a path to follow in Canada? If so, how to apply it? To the warranty of durability? To the warranty of use? To any defect that may affect a good or service? And what rights will the consumer have when that minimum term expires?

In Quebec, the legislature has adopted this approach for certain types of goods, notably used cars. The courts have concluded that the basic warranty still applies when that term expires. A uniform period for all goods and services seems difficult to apply. Could a list by product category be considered? Or would we be faced with an interminable and unmanageable list?

In addition to difficulties of interpretation, the application of legal warranties poses another major problem for consumers: if the merchant refuses to meet his obligations, the consumer has to go to court. (This is also the case, one might object, for all private civil disputes. But such disputes do not involve, as is the case for legal warranties, a protection measure of public order that covers the private relationship between consumer and merchant, as well as the collective interest of consumers, whom minimal market standards are intended to protect). Given that many merchants now monetize their cooperation by offering to extend the manufacturer's warranty for a high price, a consumer who has not acquired that “protection” and encounters a problem with his acquisition will most often face a firm refusal (and be reproached for not having bought the “protection”).

New Brunswick and Saskatchewan have attempted to bypass this problem by giving consumers, under certain circumstances, the right to simply refuse a good that does not meet their expectations.

Problems of access to justice, long delays, the product's value and excessive uncertainty deter consumers from going to court. Ignorance of their rights and of legal limit procedures, and the absence of an appropriate forum, thus end up making the legal warranty plan difficult to apply according to consumers.

So how to convince merchants to honour the warranties that the law grants to consumers? In only a few jurisdictions, a breach of legal warranties can lead to criminal actions. The deterrent nature of criminal actions is a key element, in our view, of an effective regime that will be respected by merchants and manufacturers. That being said, governmental organizations that are empowered to bring criminal actions do not take that path. Is that because consumers do not complain about breaches of legal warranties before consumer protection organizations? Is it

because criminal actions require a degree of evidence that might be difficult to conciliate with this rather individualized type of consumer problem?

Accordingly, if neither the texts adopted, nor civil actions, nor criminal actions are likely to help implement this elementary right that is the right to a warranty, what should be done to reach the goal set by lawmakers – the existence of a legal warranty plan assuring the consumer that what he acquires will meet his expectations? And how to ensure that the consumer knows he has rights, knows the merchant's obligations, and is able to settle a problem without too much difficulty?

b) Consumers' Perception and the Role of Governmental Consumer Protection Organizations

The views of consumers surveyed by a Canada-wide poll and discussion groups did not surprise us at all. Their ignorance of legal warranties is not a new issue: already, in the eighties, Professor Claude Masse wrote that one of the major difficulties of Quebec's legal warranty plan is consumers' ignorance of it³⁵⁵. Consumers who had participated at the time in a poll on behalf of the Office de la protection du consommateur were confused about the various types of warranties on the market³⁵⁶.

In our survey, while Quebec fared slightly better regarding consumers' knowledge of legal warranty parameters, the poor results obtained for Canada were worrisome. How is a law supposed to be effective and have full effect if it is not invoked, if its observance is not required by the people it is intended to protect, and if a law of public order can largely be ignored or disrespected by those to whom it imposes unavoidable? As is well known, "The best legal text is ineffective if the people for whom it was adopted have little or no knowledge of its content"³⁵⁷.

The survey and discussion groups also revealed that consumers obtain their little knowledge of legal warranty plans from the media – Quebec consumers expressly mentioned television consumer programs. In Quebec, the media indeed emphasize this subject, which seems so mysterious and incomprehensible to consumers³⁵⁸; the media often present clips and reports on

³⁵⁵ BELLEY, J.G. and MASSE, v. *La société de consommation au Québec*, la documentation québécoise, OPC, Quebec Official Publisher, (1980), p. 350.

³⁵⁶ *Ibid.*

³⁵⁷ POUPART, F. *Op. cit.*, note 18, p. 310. Our translation.

³⁵⁸ See for example the following articles: PERRON, S. "Les garanties : Comment s'y retrouver ?," in *Protégez-vous*, September 1, 2011, Montreal, Canada; LE SOLEIL. Des armes de Marketing, September 8, 2003, Québec, Canada, p. D4; THERRIEN, Y. "Garantie légale sur les biens- Faites valoir vos droits" in *Le Soleil*, June 11, 2007, Québec, Canada, p. A9; PERRON, S. "Garantie légale : la difficulté, c'est son application," in *Protégez-vous*, September 1, 2011, Montreal, Canada; PERRON, S. "Société : Des commerçants toujours pas en règle," in *Protégez-vous*, February 2011, Montreal, Canada, p. 43; RAYMOND D. "Le contrat dont vous êtes le zéro" in *Affaire Plus*, vol. 33 no.1, February 2010. P. 39; VAILLES, F. "Assurez-vous que la garantie s'applique au Canada" in *La Presse*, April 13, 2008, Montreal, Canada, p. La presse Affaires 2.; CÔTÉ, c. "Tout ce que vous achetez est garantie" in *La Presse*, March 24, 1999, Montreal, Canada, p. 4; TISON, M. "Votre cellulaire flanche ? Pensez à la garantie légale" in *La Presse*, August 3, 2010; FROST, G. "Garantie légale: la solidarité a meilleur goût" in *Le Nouvelliste*, Trois-Rivières, Canada, le April 6, 2009, p. 18; FROST, G. "La garantie légale ne lui est d'aucun secours" in *Le Nouvelliste*, Trois-Rivières, Canada, November 9, 2009, p. 27; FROST, G. "Écho du Tribunal : Son

the application and scope of legal warranties, and beyond the individual cases we find a desire to better inform consumers or to denounce the actions of merchants who do not honour legal warranties. The latter are also mentioned in the English Canadian media – less often than in Quebec, and more focused on sensationalizing individual cases³⁵⁹.

The results of our survey and discussion groups reveal that confusion persists about the various types of warranties offered on the market. When warranties are mentioned, the first reflex of consumers was to talk about “extended warranties.” This is notably explained by the fact that many consumers are not even aware of the very existence of legal warranties – whereas all of them must of course have been offered an “extended warranty” at some time. That being said, consumers are faced with a wide variety of warranties: the CCQ’s legal warranty, which provides rules for the seller and manufacturer, the seller’s conventional warranty, the manufacturer’s conventional warranty, and the seller’s extended warranty; or, in the common law provinces, the *Sale of Goods Act*’s warranty, the consumer protection Acts’ warranty, and all the merchants’ warranties; so we can understand that there is a certain confusion.

That confusion is not the consumer’s alone, and it is cleverly maintained by merchants. For instance, the consumer program La Facture reported a bizarre case.³⁶⁰ To a consumer demanding application of the legal warranty to the HD digital recorder purchased from a major cable operator, the company’s answer mixed the warranty of fitness for normal use (CPA article 38) with the manufacturer’s warranty (12 months), by explaining that the manufacturer’s warranty sets parameters for applying the legal warranty. “*En vertu de l’article 38 de la loi sur la protection du consommateur, la garantie légale offerte par le fabricant sur l’enregistreur numérique personnel HD (ENPHD) est de 12 mois.*” The company added that the consumer had the choice of obtaining a 24-month extended warranty, in application of what the CPA has stated since the 2010 amendments. “*Under Bill 60 enacted on June 30, 2010, you could have chosen to benefit from a 24-month extended warranty.*” The merchant added that thanks to technological progress, “*The manufacturer, with this new device, chose to increase the legal warranty on terminals.*” Confused? To make sure the customer clearly understood, the company specified in a subsequent e-mail: “*Par rapport au contrat, il n’y a pas de contrat pas la Loi 60 et ce, depuis juillet 2010.*” [sic]. Then, in response to the mention that the previous answer may have confused the manufacturer’s warranty and the legal warranty: “*Pour revenir au terminal, il*

VTT neuf roulait surtout vers le garage” in *Le Nouvelliste*, Trois-Rivières, Canada, October 18, 2010, p. 28; BEAUDOIN, S. “Tenir à sa garantie légale,” *Le Blogue de La Facture*, June 1, 2012. [Online] <http://blogues.radio-canada.ca/facture/2012/06/01/tenir-a-sa-garantie-legale/> (page consulted on June 1, 2012).

³⁵⁹ THE CHRONICLE HERALD, *Ouch! Hot Pickle lawsuit settled*, Nova Scotia, Canada, April 14, 2001, p. B5; BORDEN, S. “McDonald’s sued over burned breast: N.S. woman claims damages of \$50,000 after hot chocolate incident” in *The Chronicle-Herald*, January 15, 2002, p. A5; CRANSTON, M. “Woman sues over worm in package of napkins” in *The Daily News*, Halifax, Canada, December 9, 1996, p. 5; THE TELEGRAM, *Woman says tacks in burger sues for \$7.7M*, St-John’s, Canada, January 31, 2002, p. A8; THE CHRONICLE-HERALD. “Woman sues after toaster blamed for house fire,” Halifax, Canada, February 23, 2011, p. E3; TIMES HERALD, *Man sues Bombardier after Sea-Doo explodes*, Moose Jaw, Canada, August 11, 2011, p.2; TERYL L. “How to protect yourself from getting stuck with a lemon” in *The Daily News*, Halifax, Canada, September 17, 2000, p. 30; THE CHRONICLE-HERALD, *Warranties: peace of mind for every new-car owner*, Halifax, Canada, July 31, 2008, p. G5.

³⁶⁰ BEAUDOIN, S. “Tenir à sa garantie légale,” *Le Blogue de La Facture*, June 1, 2012. [Online] <http://blogues.radio-canada.ca/facture/2012/06/01/tenir-a-sa-garantie-legale/> (page consulted on June 1, 2012).

y a bel et bien 2 garanties. La garantie légale et celle du fabricant. 1 an étant la durée légale d'une garantie, cela ne veut pas dire que vous avez une garantie de 2 ans." Clarity at last!

While consumers appear not to know the existence and content of legal warranty plans, merchants seem either just as ignorant of their content or simply eager to profit by that ignorance.

As for the simple awareness of legal warranties, a measure such as that adopted in Quebec, which states that a merchant offering consumers an extended warranty must inform them of the existence and content of the legal warranty, is certainly promising. Still, we note that consumers faced with the legal text, as communicated to them by a merchant meeting that obligation, have difficulty understanding its scope...

If the consumer is unaware of the rights and remedies available to him, if he has access to little information on the subject, if he finds it difficult to interpret the legal terms or the information given to him, if he finds it difficult to go to court for the legal warranty to be applied, where can he turn for additional knowledge of his rights, and who can help him have the legal warranty honoured?

The questionnaire we sent to governmental institutions responsible for applying legal warranty or consumer protection regimes gives us some answers... that leave us somewhat perplex. The role of those organizations seems secondary regarding legal warranties and be limited to providing information, and often to directing consumers to the courts. In some circumstances, governmental organizations do not have the necessary powers to bring criminal actions against persons breaching legal warranties. If it is essential that products and services obtained by a consumer meet his expectations, it is unfortunate that monitoring organizations do not have the necessary tools to enforce or facilitate respect for legal warranties.

Could the organizations take the lead in having legal warranties applied and honoured? Given that consumers are ignorant of the existence of legal warranties and have difficulty understanding their content, consumer protection organizations should have effective tools to ensure respect for legal warranty plans and make the latter a pillar of consumer protection laws.

Criminal actions should certainly be seriously considered, to the extent possible, as well as administrative measures. The example mentioned above suggests that it is time to wake up. Like that particular consumer mystified by the company, all consumers suffer from such a practice that – in addition to flagrant disregard of the law – demonstrates a determination to sow confusion. While coercive measures should not be the only way to deter merchants from not honouring legal warranties, the collective interest of consumers requires merchants to be severely penalized for their systematic practices aiming to diminish or trivialize legal warranties.

The education of consumers and merchants alike appears necessary. Only the Office de la protection du consommateur du Québec has established awareness-raising measures addressed to merchants. The above example clearly indicates that there is much room for improvement. Still, such initiatives can be positive and could be generalized. It remains to be seen whether awareness-raising can be effective if merchants calculate that non-compliance with the legal warranty will not have a serious negative impact on them.

While consumers seem to have problems interpreting legal warranty provisions, the organizations responsible for informing consumers and ensuring the observance of legal warranty plans seem at times to have difficulty providing the requested clarifications. If those to whom consumers turn complain about the vagueness and difficult interpretation of legal warranty plans, how can consumers be protected adequately?

While not claiming to hold the key to the dilemma between the imprecision of legal warranty plans and the necessity that those regimes be flexible enough to adapt to different situations, our study may offer avenues for generally defining legal warranties that would better protect consumers.

c) Elements and Components of a Legal Warranty Plan That Would Protect Consumers Adequately

Scope of the legal warranty

The legal warranty aims to ensure, as part of contracts entered into by parties of unequal strength and resources, that the weaker party acquires through a transaction exactly what it is entitled to expect.

As we have seen, the common law plans distinguish between implied warranties – included in the contract by the sole effect of the law, without having to be mentioned – and explicit warranties, based on the statements of the merchant, seller or manufacturer. The common law plans also distinguish between actual warranties and what legislators call “conditions,” whose non-compliance often suffices to invalidate a contract.

Those distinctions, which are certainly useful within the framework of common law plans, do not lead to a better understanding by consumers. An ideal legal warranty plan would merge those two notions and consider that, since all warranties, explicit or implied, are considered part of the contract, any breach of a warranty actually affects the consumer’s very consent to an essential element of the contract, i.e., meeting his reasonable expectations.

The legal warranty must therefore be of public order; the merchant must not be able to exclude the legal warranty, nor the consumer to waive it.

Goods as well as services must be covered by a similar warranty, subject to necessary adaptations. It would be ill advised for service contracts to be governed solely by ordinary law, given the difficulties of application and interpretation we have listed in the present study, and given that the warranty of ordinary law cannot be set aside by merchants.

A good or service acquired by the consumer must meet his reasonable expectations in every respect. The law must guarantee him that.

Finally, the legal warranty should cover new as well as used goods, with reasonable adaptations.

Who is bound by the legal warranty?

One of today's market realities is that manufacturers may be located outside Canada and that merchants can close shop quickly and disappear from the market.

The consumer's direct link is with the merchant from whom he acquires the good or service. The merchant must be bound by the warranty at all times.

The manufacturer must also be bound by all warranties, except those based on particular representations that the seller may have made about a product and that the manufacturer does not approve.

Who benefits from the legal warranty?

The consumer who is the initial acquirer of a good is the primary beneficiary of legal warranties. It goes without saying that for the legal warranty plan to be effective, subsequent acquirers must also benefit from it.

A third-party acquirer should be able to bring an action against the manufacturer. However, if the expectations of the subsequent acquirer were based on representations made by the seller to the initial acquirer or to the general public, the third-party acquirer should be able to bring an action against the seller.

Legal warranty components

A legal warranty plan that would protect consumers adequately should ensure that the good or product meets all of the consumer's reasonable expectations.

Legal warranty components should ideally include, at minimum, the following: a warranty of quality involving a warranty of fitness for normal use and for a specific use declared by the consumer and approved by the merchant; a warranty of reasonable durability; and a warranty that the good is of acceptable quality.

Those warranties should not be confused with the warranty against hidden defects or require an excessively heavy burden of proof. A consumer should not have to establish the source of non-conformity with his expectations, nor even a substantial gap between expectations and reality. The law can determine elements for measuring the expectations' reasonableness. The expectations taken into account should be the objective as well as the subjective ones. There again, the law could set the necessary parameters.

Those warranties would constitute the basic, minimum warranties to which consumers are entitled. The provinces could specify the methods of application, for example by adding a warranty of available spare parts and repair services, to ensure that such a warranty helps implement the warranty of durability.

Warranty of fitness for normal use and specific use

In the light of the various approaches we find in legal warranty plans in Canada and abroad, we retain that the legal warranty of fitness for normal use would primarily warrant that the good or service is fit for its normally intended use according to objective and subjective criteria. The objective criteria would include the use prevailing on the market and the body of representations about the good or service. The subjective criteria would include the consumer's reasonable expectations based on those representations or, if a specific use is desired by the consumer, on the specific representations made by the seller or manufacturer at the time of the sale or at any other time.

The common law plans tend to provide that the seller or manufacturer will be bound to a warranty covering a specific use only if the consumer in fact relied on the merchant who assured him that the good is fit for that specific use, or if the consumer could reasonably believe the merchant. Apart from problems of evidence that such conditions are likely to raise, thus complicating consumer remedies, it appears relevant by contrast to ensure that the merchant is bound by all his statements. If some statements should not reasonably be believed by the consumer, but still might be believed by a naïve consumer, the merchant should avoid making them. In any case, if a statement might be believed, the merchant is always the one who should be reproached; the collective interest of consumers should result in the consumer never being reproached for not being naïve. That would justify a merchant in trying to deceive the most vulnerable consumers.

Warranty of reasonable durability

Like the warranty of fitness for use, the warranty that the good and its components will have a reasonable service life should be based both on objective and subjective criteria. The former should include the quality of the good (which can notably be evaluated by comparing its price with that of goods of the same type), its age at the time of the sale, the good's expected conditions of use, the usual service life of goods of the same type, the seller's or manufacturer's representations, etc. The consumer's reasonable expectations should also be taken into account, as well as the specific use he has made of the product.

As mentioned above, the choice of a fixed term warranty does not appear appropriate to a general plan that would apply to a broad range of goods and services. To ensure that the measure has a certain logic and effectiveness, the fixed-term warranty of durability would likely require an unmanageable quantity of sub-categories, which would only make the legal warranty plan more complex.

As an indication, an estimate of the normal service life of various types of products could be useful as a basis for consumer expectations. This could be a means of facilitating the implementation of that warranty by consumers, merchants and, as the case may be, by the courts, without consumers having to consult an expert each time.

Taking into account what has been done in Finland by means of the *Consumer Dispute Board*, Canadian provincial legislatures could set up an independent forum that would establish those average service lives.

The task could of course be facilitated if manufacturers had the obligation (or took the initiative) of indicating on products the normal duration of the goods they put on the market. Before entering into the contract, the consumer would thus be clearly informed about the product's service life that he could reasonably expect... and he would make choices while considering that information and comparing it for the various similar products offered to him. Implementation of the warranty of durability would definitely be greatly facilitated by that measure.

Warranty against hidden defects

Warranties against hidden defects are generally designed or interpreted as limited to serious defects affecting the good's use, either totally or at least enough to reduce its value. Even Quebec's CPA, although clearly separating the warranty of use and the warranty against hidden defects, has been interpreted in such a way that the two warranties are confused.

As mentioned above, consumers should be able to invoke the legal warranty as soon as a good or service displays a defect that was not apparent or that was not disclosed to them at the time of the transaction, whatever the defect's seriousness. If the product received is not as advertised or illustrated, if it is not in perfect condition, if it presents characteristics distinguishing it negatively from what the consumer observed of a product presented as identical, the product received should be considered to have a defect, whether or not the latter affects the operation, use, appearance, possible resale price, etc.

The application conditions of a warranty against hidden defects would then be essentially the same as those in the other Canadian jurisdictions: a hidden defect that would not be apparent during an ordinary examination.

The plan will be more effective if the warranty's application is not dictated by the defect's seriousness, but rather if that seriousness is one of the elements taken into account to determine the consumer's remedies. The latter should also take subjective elements into account: a reduction in the price paid for a device that makes an unexpected noise could not, for example, be an appropriate remedy for a consumer suffering from misophonia...

To facilitate the application of this warranty against hidden defects, it would be laudable to provide presumptions of knowledge of the defect, as does Quebec's CPA article 53, as well as a presumption of the defect's existence if the defect appears within a determined period after the contract is entered into. This is the case notably in the laws of European Union Member States, to which a Directive has imposed a minimum presumption period of six months.

Warranty of conformity

The legal warranty must of course provide a warranty that the good or service conforms with the statements made by the seller, manufacturer, their employee or representative, with the clauses of the contract, with advertisements, and with statements made on product labels or packaging.

The term "statement" should be understood in a broad sense, without distinction between verbal and written statements, in words or pictures, etc.

Common law plans tend to provide that the seller or manufacturer will be bound this type of warranties only if the consumer could reasonably believe them, or even if he has actually believed them. Apart from the obvious problems of evidence that such conditions are likely to raise, thus complicating consumer recourses, it rather appears appropriate to ensure that the seller is bound by all his statements. If certain statements should not reasonably be believed by the consumer, but still risk being believed by a naïve consumer, the merchant should avoid making them. In any case, if a statement was likely to be believed, the reproach should always be addressed to the merchant; again, the collective interest of consumers should imply that a consumer should never be reproached for not having been naïve. That would be to admit that the merchant can legitimately try to deceive the most vulnerable consumers.

Tripartite recourses and remedies

Implementation of such a legal warranty plan will depend essentially on effective recourses and remedies, which offer appropriate, quick and effective compensation. Do court proceedings always represent a viable and ideal solution?

Some governmental consumer protection institutions deplore the absence of criminal actions that would allow them to sanction breaches of legal warranties. Moreover, consumers tell us they are discouraged by the fact that application of the legal warranty necessarily depends on the courts, given merchants' lack of cooperation. In all the jurisdictions studied, going to court is the preferred way to apply the legal warranty.

Given consumers' reticence to go to court, particularly for remedies of little value (our poll indicated that only after a purchase of over \$100 do the majority of consumers begin to consider going to court to have a legal warranty honoured³⁶¹), all the more so because consumers are very uncertain of their rights, it appears appropriate to consider other types of recourses if we want the legal warranty to have any meaning at all.

Some measures allow the consumer to have a legal warranty honoured more quickly than going to court. For the law to be effective, easy to apply, and persuasive, it may be worth considering tripartite recourses for the application of legal warranties, and in that case the application of recourses: private recourses available to consumers, administrative measures that can be exercised by competent authorities, as well as criminal recourses. This approach was taken by the *Consumer Protection Act* in Saskatchewan and Manitoba.

Recourses and remedies available to consumers

The remedies found in Canada in case of a breach of the legal warranty vary from one province to another: right of refusal, reduction of the price paid, refund of that price, right of retention of the price to be paid in case certain warranties are breached, right to damages, right to punitive damages, and right to the good's repair or replacement.

³⁶¹ See on page 78: On average, 31.8% of respondents would not be inclined to bring an action if the dispute represented a value of less than \$100. A value between \$100 and \$500 would likely induce 60.1% of respondents to bring an action; that percentage rises to 79.9% for a disputed amount between \$500 and \$1,000, and to 90.3 % for an amount greater than \$1,000 (Q.18).

The consumer should always have a right to refuse the good in the event of a substantial breach of the legal warranty, and in cases where the breach would not be remediable or the merchant would refuse or delay too long to apply the remedy. Following the example of Saskatchewan, the law might define what it means by a substantial breach³⁶². This right of refusal without the need to go to court should be circumscribed as follows: a reasonable period for the right to be exercised, the consumer's obligation to return the good to the seller or manufacturer so the infraction can be corrected at their expense, as well as the consumer's right to keep the good until he receives a full refund³⁶³.

The right to have the good repaired or replaced should also be clarified. The seller or manufacturer should be bound to repair the good at no charge within a reasonable period. Under France's consumer code, that period is 1 month³⁶⁴. The law should also oblige the merchant and manufacturer repairing or replacing the good to give the consumer a written statement of the measures taken and of the date on which the consumer will receive the good. To ensure that consumers have optimum protection, the law should also provide that the legal warranty is reset to zero from the moment when the good repaired or replaced is delivered to the consumer. Following the example of Germany's Civil Code, an ideal warranty regime should also provide that after two failed attempts to repair or replace the good, the consumer is entitled to require termination of the contract³⁶⁵. Such termination should be accompanied by damages that could, for example, take into account the time during which the consumer was deprived of the good, the trouble and inconveniences suffered other than expenses, which the merchant bears, the replacement cost, etc.

Consumers should also in any case be entitled to damages for prejudice suffered and to exemplary or punitive damages to sanction a flagrant violation of the law, whether or not the merchant or manufacturer knowingly violates the law. To encourage merchants to spontaneously meet legal warranty obligations, specific punitive damages should be provided and be automatically imposed for any unjustified refusal by the merchant to honour the legal warranty.

To facilitate consumer recourses, the legal warranty plan should allow the consumer to submit testimonial rather than written evidence when he intends to prove that a legal provision was not respected. Such a measure is already provided in Quebec³⁶⁶ and Saskatchewan³⁶⁷, for example.

Administrative measures

Administrative measures that would enable governmental consumer protection organizations to act more promptly by allowing them to submit a report when observing a violation of legal provisions are a means to improve the implementation of legal warranty plans. Those measures exist in Manitoba³⁶⁸ and Saskatchewan³⁶⁹. The Manitoba law imposes administrative fines of up

³⁶² Sec. 39 of the CPA.

³⁶³ Sec. 18(1), CPWLA of New Brunswick.

³⁶⁴ Sec. L211-9 of the *Code de la consommation*.

³⁶⁵ Sec. 440 of Germany's *Civil Code civi*.

³⁶⁶ Sec. 263, CPA, R.S.Q., c. P-40.1.

³⁶⁷ Sec. 46 of the CPA.

³⁶⁸ Sec. 136 of the CPA-MB, C.C.S.M. v. C200.

to \$5,000. Those fines might be publicized to induce consumers to assert their rights, and merchants to spontaneously meet their legal obligations.

Criminal recourses

We reported above that some governmental organizations are not empowered to bring criminal recourses to sanction breaches of the legal warranty. Given the flagrant problems of access to justice across Canada, it would seem essential that the authorities responsible for enforcing the law be able to take necessary measures to sanction breaches of legal warranties.

Other measures

It appears essential to take, in addition to measures inducing merchants to spontaneously meet legal warranty obligations, urgent measures to teach consumers about the existence and scope of legal warranties and about how to have them honoured. Legal warranty plans – more specifically those integrated to consumer protection laws – aim to ensure that a good or service obtained by a consumer contracting with a merchant meets the consumer's legitimate expectations. It would be good that all consumers know that the seller is obliged, at all times, to meet those requirements, failing which he can be compelled to do so, and that he may pay a high price just for forcing consumers to take necessary steps to compel him.

As in Quebec, an adequate legal warranty plan would oblige a seller who offers an extended warranty to inform the consumer verbally and in writing about the existence and content of the legal warranty and about the existence of any other existing conventional warranty³⁷⁰. The regulatory authorities should ideally ensure that such information is provided to the consumer adequately, i.e., without trying to denigrate the legal warranty or diminish it in any way. One of the practices that should obviously be prohibited and severely sanctioned is for a merchant to advise consumers in advance that he will not meet his legal obligations without consumers going to court.

To enable consumers to learn the scope of all applicable legal warranties – which he cannot reasonably do at the time of the purchase –, it is essential that a consumer who buys an extended warranty have a certain period allowing him to exercise a right to terminate that warranty contract after assessing the actual advantages of such a warranty.

To remove another obstacle to consumers availing themselves of their recourses, provincial laws could, as in Saskatchewan³⁷¹, provide that, as part of legal proceedings for applying the legal warranty, no fees or expenses may be imposed on a consumer, or a subsequent acquirer, etc., who brings an action against a manufacturer or a seller, unless the court rules that the action was frivolous or vexatious.

To facilitate the application of legal warranties, it may be good for consumers to have access to a mediation service, as in Manitoba³⁷², or at least to a consulting service. Several organizations,

³⁶⁹ Sec. 77.20 of the CPA.

³⁷⁰ Sec. 228.1 of the CPA, R.S.Q. c.P-40.1.

³⁷¹ Sec. 66 of the CPA.

³⁷² Sec. 58(10) of the CPA-MB, C.C.S.M. v. C200.

both governmental and non-governmental, have reported acting as mediators, informally, in disputes concerning the application or honouring of legal warranties. One may object that the organizations responsible for applying the law should not be settling the problems of a few consumers on a case-by-case basis, but that their role should rather be to defend the collective interests of consumers by ensuring that merchants respect the law in full with all consumers.

To clearly assert the importance of legal warranties in consumer contracts, a welcome development would be for the law to provide a specialized mediation service available to consumers in all Canadian provinces. That organization could also be empowered to issue recommendations for improving the law, if applicable, and could be responsible for drawing the lists we suggested above.

Given that a consumer who demands the application of the legal warranty should not be deprived of the non-conforming good or service by long delays typical of legal actions, such a mediation service could prove practical as well as effective. It would shorten waiting times, give access to a rapid procedure, and allow the creation of a database on the application of legal warranties (reasonable duration, use, etc.). Such a database could be made available to consumers wanting to know the scope of legal warranties and their application to a specific good or service. When applicable, the database could also be available to the courts, which would be informed by the data collected and the recommendations issued.

Sooner or later, that mediation service could be integrated to services inherent to a Consumer Court – a specialized forum we recommended establishing in a study produced in 2011³⁷³.

Finally, to ensure quick application of legal warranties, perhaps consumer protection and legal warranty application organizations could consider the possibility and relevance of establishing a fund that would quickly compensate consumers after non-compliance with a legal warranty, and that would be subrogated to the rights of compensated consumers.

6.2 Conclusion

The development of elements we find essential in a legal warranty plan that adequately protects consumers leads us to a somewhat comforting conclusion: many of those elements are already contained, in one form or another, in Canadian legal warranty plans. Can we therefore conclude that the existing legal warranty plan in Canada is adequate? Too many irritants have unfortunately been raised for us to reach that conclusion.

The simple fact that legal warranty plans are contained in consumer protection laws is certainly positive in itself. The development of legal warranty plans is remarkable and the legislators' intentions laudable. The necessary elements for a functional warranty regime are generally already contained in provincial laws.

Apart from the lack of harmonization between those regimes (several provinces have not integrated legal warranties in a consumer protection framework; the regimes of Quebec and the

³⁷³ UNION DES CONSOMMATEURS. *Consommateurs et accès à la justice : Un guichet unique pour les consommateurs*, June 2011. [Online] http://uniondesconsommateurs.ca/docu/protoc_conso/TribunalConsommation.pdf (page consulted on June 1, 2012).

other provinces, although compatible, differ in many respects), our study led us to report a panoply of problems related to legal warranty plans: imprecision, problems in interpreting terms and concepts, consumer ignorance, merchants' ignorance and non-observance of their obligations, difficulties in applying the warranties, and the general fact that consumers seem well protected in theory, but not in reality.

Apart from Canadian provinces that still apply the *Sale of Goods Act* to consumer contracts or reproduce its content literally in their statutory protection laws, the regulatory framework that exists in Canada is not without advantages and does not lack measures that could actually protect consumers. Rather, it is the implementation of those measures that proves deficient.

Our study leads us to think that improving the Canadian legal warranty plans does not necessarily depend on a complete reform of laws and regimes, but rather on specifying and improving existing rights and recourses, and on clarifying certain key concepts of legal warranty plans. It is high time that the legal warranty take its rightful place, attain its legitimate objectives, that consumers be able to assert their rights without obstacles, and that merchants be seriously induced to meet their obligations without having to be coerced.

A protection regime cannot be effective if those whom the law is intended to benefit are unaware of its existence and content³⁷⁴. Provincial legislators must ensure that consumer protection laws containing legal warranty plans are adapted to the realities of consumerism. In provinces that have already adopted such laws, legislators must make available to consumers laws that are as clear and understandable as possible. In addition, they must see to it that consumers are truly able to assert their rights: free of charge, quickly, effectively. And merchants trying to shirk their obligations or complicate the lives of consumers should beware!

In matters of legal warranty, it should be clear from now on that "The consumer is always right."

³⁷⁴ This is also the view of the authors who are the foremost authorities on the subject. See: BOURGOIGNIE, T. *Garanties légales et commerciales liées à la vente de produits de consommation*, p. 46; MASSE, c. *Garanties conventionnelles et garanties légales*, p. 490; POUPART, F., *Les garanties relatives à la qualité d'un bien de consommation*, pp. 309-310.

Recommendations

Existence of a specific legal warranty plan applicable to consumer contracts

- Whereas it is important for legal warranties to ensure that acquirers of goods and services receive and benefit from goods and services meeting their legitimate expectations;
- Whereas our analysis of Canadian legal warranty plans points to their difficulties of application and interpretation;
- Whereas legal warranty plans incorporated in consumer protection laws offer specific advantages more likely to establish a certain balance between consumers and merchants, notably because the warranties provided in such plans are of public order;

Union des consommateurs recommends:

1. That provincial legislators ensure that their legal warranty plans are adapted to the peculiarities of consumer contracts;
2. That provincial legislators take care to include, if they have not already done so, legal warranties in their consumer protection laws, to the extent that such laws are in effect in the province;
3. Failing which, that those provinces' respective legal warranty plans provide specific protections in consumer contracts;
4. That relevant laws provide in all cases that legal warranty plans are of public order, that a merchant cannot evade them, and that a consumer cannot waive his legal rights and recourses;
5. That legislators of all Canadian provinces commit themselves to modernizing and clarifying legal warranty plans so as to better protect consumers;
6. That those modernization processes take care to define, notably, the scope and components of appropriate recourses and remedies;

Scope of an efficient legal warranty plan

- Whereas the imbalance between merchants and consumers arises in all types of consumer contracts;
- Whereas consumers are entitled to see their reasonable expectations met in all types of contracts they enter into with a merchant;
- Whereas the legal warranty will offer an adequate level of protection in consumer contracts only if legal warranty plans have a broad scope and if all types of contracts are covered by adequate warranties;
- Whereas developments in warranty law have established that the stakeholders in the chain of consumer contracts have a shared responsibility to meet consumers' legitimate expectations;
- Whereas this chain of responsibility should be recognized by law for all merchants – manufacturers, producers, distributors, suppliers and retailers of products and services – and that certain rights and recourses should be extended to subsequent acquirers;

Union des consommateurs recommends:

7. That legal warranty plans benefiting consumers apply to services as well as goods;
8. That those legal warranty plans apply to used as well as new goods;
9. That all merchants – manufacturers, producers, distributors, suppliers and retailers of products and services – also be bound by the obligations imposed by legal warranty plans;
10. that legal warranty plans provide protections, rights and recourses for subsequent acquirers of a good or service that is the object of a consumer contract;

Components of an efficient legal warranty plan

- Whereas consumers are entitled to have their reasonable expectations met;
- Whereas consumer protection laws should provide minimal warranties to ensure respect for this right;
- Whereas the legal warranty will offer an adequate level of protection in consumer contracts only if all aspects those warranties can cover are included in the plans developed by legislators;
- Whereas our research has revealed many of those essential aspects and components;
- Whereas it is important to adopt a coherent and complete plan;
- Whereas, in order to simplify and facilitate interpretation, understanding and application, the various warranties should be clearly identified;

Union des consommateurs recommends:

11. That legal warranty plans contain, identify and detail a warranty that goods and services meet consumers' legitimate expectations, including:
 - a warranty of fitness for use;
 - a warranty of durability;
 - a warranty against hidden defects;
 - a warranty of conformity with the merchant's statements;
 - a warranty of acceptable quality;

The warranty of fitness for use should:

- ensure that the good or service is fit for its intended use;
- cover both normal use and the specific use for which the consumer intends the good or service, if the merchant has approved such use;
- take into account, in determining the normal use of the good or service, subjective as well as objective criteria;

The warranty of reasonable durability should:

- ensure that goods and services that were the object of a consumer contract have a reasonable service life;
- be evaluated while taking into account objective criteria, such as: the good's quality (which may be evaluated by comparing its price with that of goods of the same category), the statements of the seller or manufacturer, etc.
- be evaluated while also taking into account subjective criteria, such as: the specific use that the consumer made of the product;

The warranty against hidden defects should:

- apply as soon as a good or service presents a defect that was not apparent or was not disclosed to the consumer at the time of the transaction, since the apparent character is related only to an ordinary examination, without requiring an expert;
- apply whatever the seriousness of the defect affecting the good or service;
- include a presumption of the existence of a good or service, such as: is not in perfect condition, does not have all the expected functions, presents characteristics distinguishing it negatively from what the consumer could observe on a product presented as identical;
- include a presumption of non-conformity if, within six months following acquisition of the good, a defect appears that does not result from simple normal wear;
- provide that recourses and remedies are available to the consumer as soon as the good or service shows a defect, whether or not the defect affects the operation, use, appearance, possible resale price, or other;
- provide that the merchant cannot allege, to be released from his warranty obligation, that he was unaware of that defect;
- provide that the defect's seriousness – evaluated subjectively as well as objectively – is one of the elements that can be taken into account in determining the remedies to which the consumer is entitled;

The warranty of conformity with the merchant's statements should:

- provide that merchants are bound, when a defect is determined, by contractual clauses, written and verbal statements, and any other description made by means of packaging, labels, advertising, etc.
- provide that the term "statement" must be understood in the broad sense, without distinction between verbal and written statements, in words or pictures, etc.

The warranty of acceptable quality should:

- provide that a good or service that does not comply with applicable standards or regulations, or that presents characteristics distinguishing it negatively, and markedly, from products of the same type and category, is considered not to be of acceptable quality;

12. That all merchants be bound by each of the warranties; the manufacturer and the distributor may be released from their warranty obligation if they can establish that they did not approve the particular statements made by the seller about the good or service;

13. That the law provide that relevant subjective as well as objective criteria be taken into account when interpreting and applying legal warranties;

14. That legal warranty plans ban the "*reasonable reliance test*," which allows a merchant to set aside warranties based on statements that the consumer did not or should not have believed;

- Whereas legal warranty plans are very imprecise about the effective duration of the warranty of durability;

- Whereas consumers do not have access to clear and precise information about that duration of about the expected service life of products;
- Whereas manufacturers may be able to calculate the service life of the goods they produce;
- Whereas Finland has set up an independent forum that establishes, to facilitate the legal warranty's application, the average service life of consumer products;

Union des consommateurs recommends that provincial governments:

15. Assess the possibility and relevance of setting up an independent organization responsible for establishing, to facilitate the legal warranty's application, the average service life of consumer products, or of entrusting that mandate to an organization that might have a broader mandate related to legal warranty plans;
16. Assess the possibility and relevance of imposing on producers, manufacturers and retailers an obligation to inform the consumer of the normal service life of the product offered, on the basis of objective sources that must be disclosed to him;

Appropriate recourses and remedies and the powers of governmental consumer protection institutions

- Whereas the effectiveness of the legal warranty plan depends on the possibility for the consumer to require that the warranty be applied quickly and efficiently;
- Whereas it is important that respect for the law be required by those it is intended to protect and that they be given the means to assert their rights;
- Whereas going to court, as the only effective recourse offered to consumers who want to assert their rights, involves serious obstacles;
- Whereas consumers must have access to recourses and remedies that are varied, proportional, effective, and easy to apply;
- Whereas merchants are able not to spontaneously meet their legal warranty obligations toward consumers;
- Whereas it cannot be tolerated that a law of public order can be largely ignored or disrespected by those to whom it imposes binding obligations;
- Whereas some merchants can abuse consumers' ignorance of the law;
- Whereas when merchants do not meet their legal warranty obligations, it is likely to affect a great many consumers and harm the collective interest of consumers;
- Whereas simply raising merchants' awareness risks being ineffective if they calculate that not honouring the warranty will not actually have a negative impact on them;
- Whereas the collective interest of consumers requires merchants to be severely penalized for voluntarily not honouring legal warranties and for systematic practices aiming to diminish or trivialize the legal warranty;
- Whereas some governmental consumer protection institutions do not have the necessary tools to sanction breaches of legal warranties and ensure respect for the law;
- Whereas the power to impose fines or bring criminal proceedings can have a welcome coercive effect on the market;
- Whereas publicizing rulings, statements of offence and other penalties would likely induce consumers to assert their rights, and merchants to spontaneously meet their legal obligations;

Union des consommateurs recommends:

17. That legal warranty plans provide tripartite recourses, i.e.:
 - a) Private recourses available to consumers (recourse for warranty execution, for price reduction or rescission, for damages, for punitive damages, right of refusal, etc.);
 - b) Administrative measures and criminal recourses available to governmental consumer protection organizations;
 - Private recourses should, in addition to access to the courts, include recourse to mediation by a specialized organization;
 - Verdicts should be widely publicized;
 - Administrative and criminal remedies should be publicized, in addition to imposing fines and criminal sanctions on delinquent merchants;
 - Fines and criminal sanctions should be substantial enough to have an adequate deterrent effect;
18. That varied, proportional, effective and easily applied remedies be provided if a legal warranty is breached; those recourses could include: right of refusal without having to go to court, reduction of the price paid, refund of the price paid, right to retain the price to be paid if certain warranties are breached, right to damages, right to punitive damages, right to have the good repaired or replaced, right to terminate the contract, etc.;
 - The consumer should also in all cases be entitled to damages in compensation of the prejudice suffered;
 - The consumer should be entitled to exemplary or punitive damages for any flagrant violation of the law;
 - Specific punitive damages should be provided and be imposed automatically for any unjustified refusal by the merchant to honour the legal warranty;
19. That, in order to facilitate the execution of recourses made available to consumers, legal warranty plans should provide that costs should not be imposed on a consumer who sues a merchant or manufacturer for breach of warranty, unless the court rules that the recourse is vexatious or frivolous;
20. That provincial legislators should study the possibility and relevance of establishing a specialized consulting and mediation service that could settle legal warranty disputes quickly and at a lesser cost than the courts. Such an organization could also be empowered to issue recommendations for improving the law, as the case may be, and to draw lists regarding the normal service life of consumer products. Sooner or later, that mediation service might be integrated to the services of a Consumer Court.

Information and intervention measures

- Whereas even best legal text is ineffective if those for whom it has been adopted are unaware of its content;
- Whereas, for a legal warranty plan to be effective, it is essential that consumers be aware of their legal rights and the recourses available to them to assert those rights;
- Whereas consumers are generally ignorant of the legal warranty's existence and parameters;

- Whereas consumers perceive legal warranty plans negatively given, notably, the difficulty of applying warranties;
- Whereas merchants also appear either to be ignorant of legal warranty parameters or to simply take advantage of consumers' ignorance of the law;

Union des consommateurs recommends:

21. That provincial legislators take measures to raise consumers' awareness of the legal warranty's existence;
22. That measures be taken to raise merchants' awareness of their legal obligations under legal warranty plans;
23. That governmental consumer protection institutions have the necessary means, provided by law, to ensure observance of legal warranty provisions and that they have the necessary powers to have any violation of the law sanctioned, through administrative measures and criminal recourses;
24. That when offering an extended warranty, sellers be obliged, if that is not already the case, to inform the consumer about the existence and content of the legal warranty and about the existence of any other existing conventional warranty;

Harmonization of legal warranty plans in Canada

- Whereas the legal warranty is an essential pillar of consumer law;
- Whereas, depending on the place of residence, consumers may not benefit from the same protection measures;
- Whereas merchants who do business with consumers from various provinces would benefit from a greater level of certainty if provincial laws regarding legal warranties were harmonized;

Union des consommateurs recommends:

25. That all provincial governments legislate to harmonize consumer protection laws regarding legal warranties;
26. That the issue of legal warranties be submitted to the Consumer Measures Committee in order to harmonize provincial legislations.

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ANNEX 1: Poll Report

La garantie légale

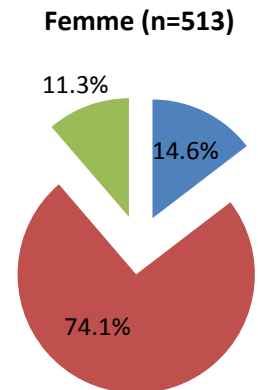
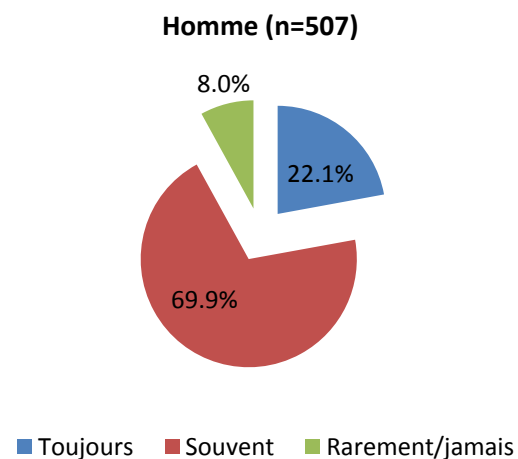
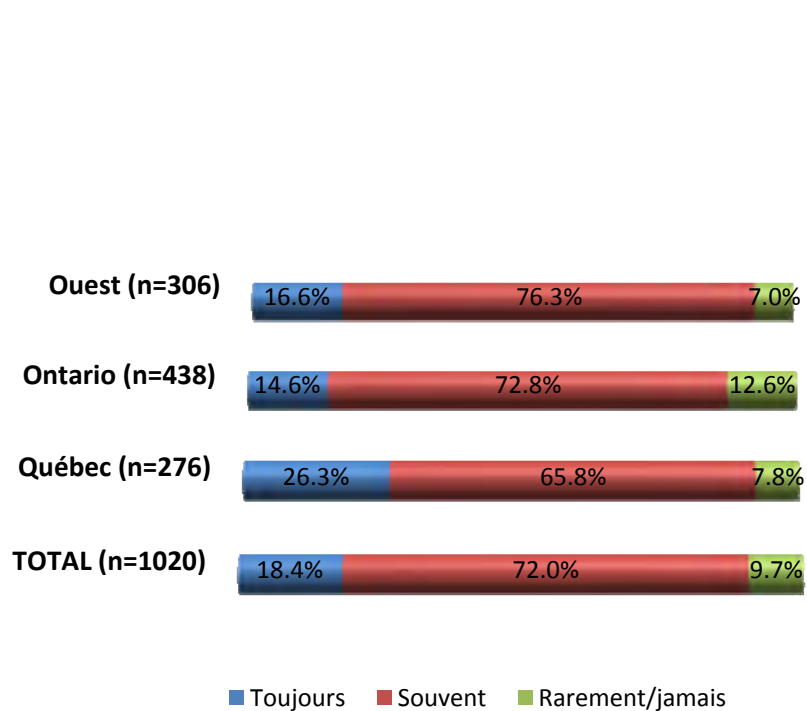
**Union des
consommateurs**

Janvier 2012

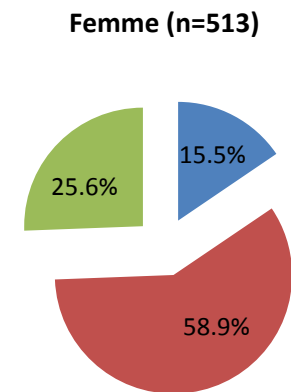
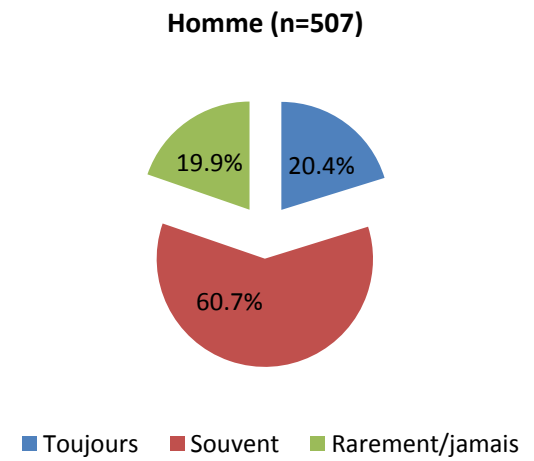
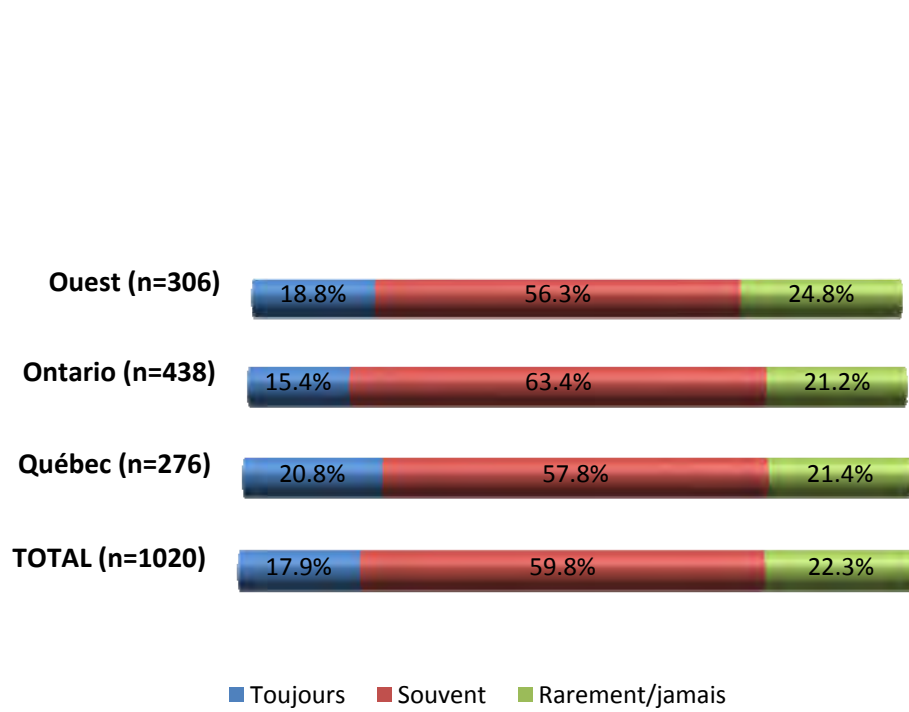
Méthodologie

- **Méthode de collecte** Sondage en ligne
- **Nombre de sondage complété** 1020 (marge d'erreur maximale de 3.01% 19 fois sur 20)
- **Nombre de sondage complétés par province (%)**
 - Québec 431 (42%)
 - Ontario 222 (22%)
 - Colombie Britannique 154 (15%)
 - Saskatchewan 66 (6%)
 - Alberta 148 (15%)
- **Durée moyenne du questionnaire** 7.8 minutes
- **Période de collecte** Du 27 décembre 2011 au 3 janvier 2012
- **Pondération** Les résultats ont été pondérés par province sur le sexe et l'âge des répondants, selon le recensement 2006 de statistique Canada.

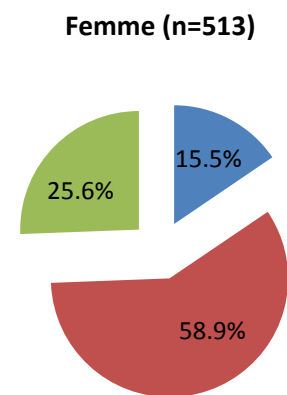
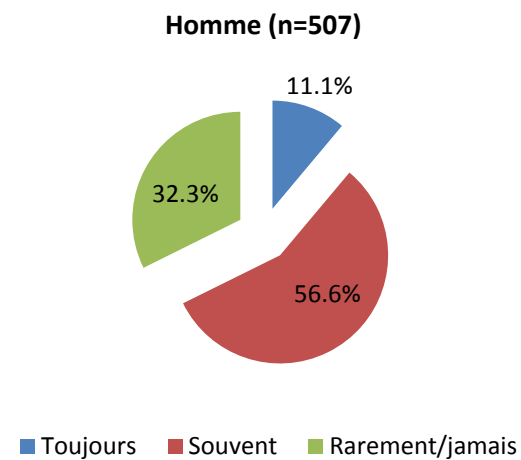
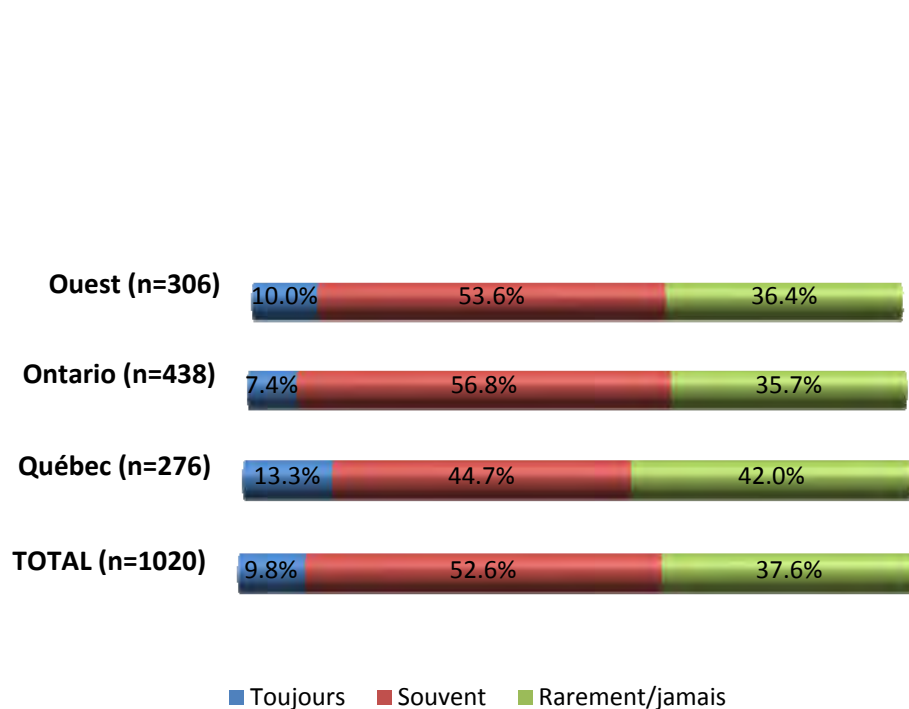
Q1. À votre connaissance, le fabricant ou le commerçant offrent-ils une garantie sur les biens ou les services qu'ils proposent?



Q2. De manière générale, connaissez-vous la durée de la garantie offerte par le fabricant ou par le commerçant sur ce que vous vous procurez?



Q3. De manière générale, savez-vous ce que couvre cette garantie?

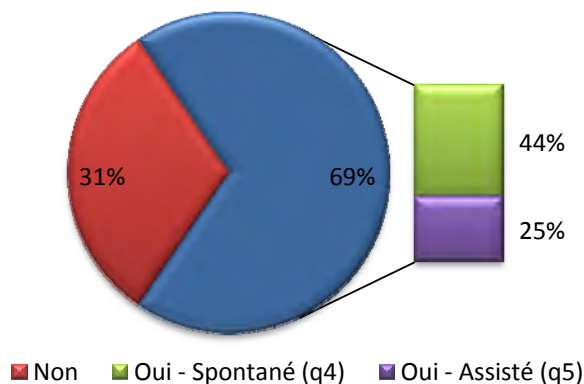


Q4. Avant aujourd'hui, aviez-vous déjà entendu parler de la garantie légale, ne serait-ce que de nom?

Q5. Si on vous dit que, selon la loi, tout ce que vous achetez doit être en bon état de fonctionnement (et que c'est ce que l'on appelle la garantie légale), cela vous rappelle-t-il quelque chose?

Q6. Comment qualifieriez-vous votre niveau de connaissance de la garantie légale?

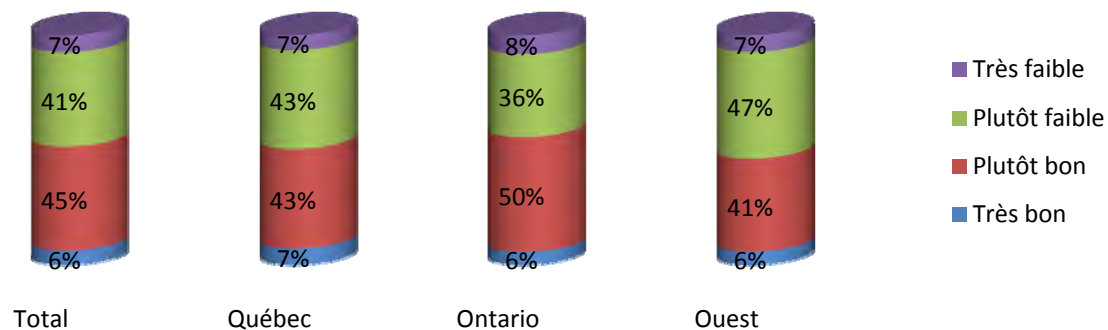
Connaissance de la garantie légale (n=1020)



Connaissance (q4+q5 n=709)



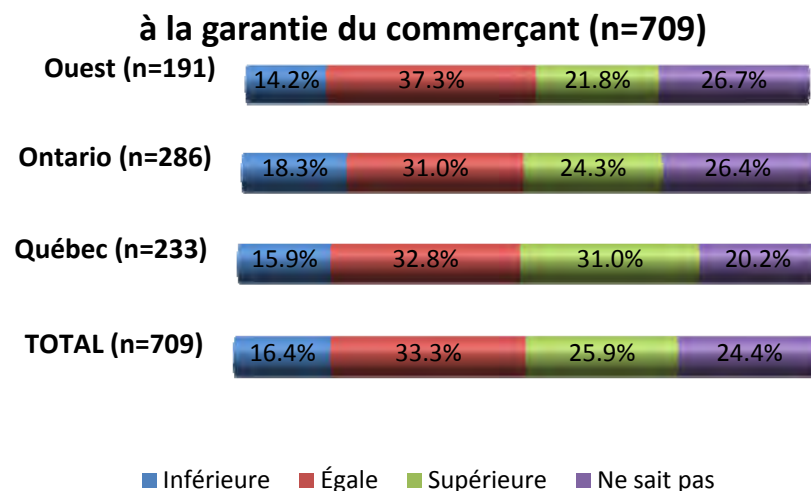
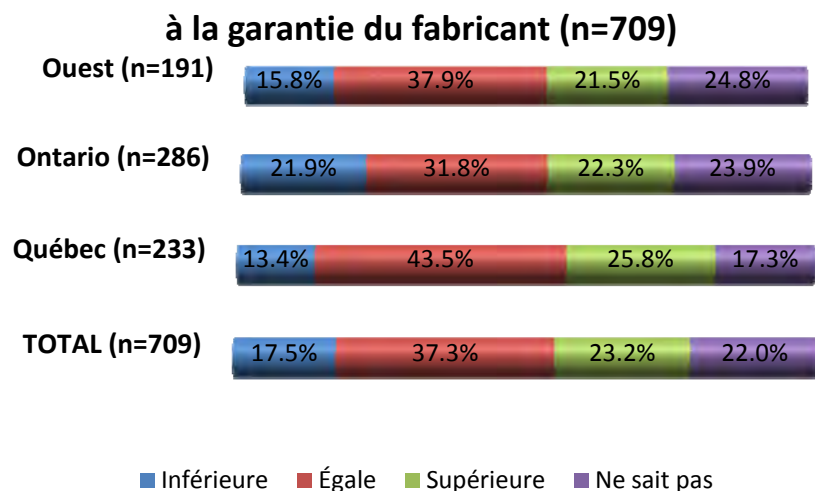
Niveau de connaissance (n=709)



Q7. D'après vous, Quelle protection offre la garantie légale? Veuillez svp être le plus précis possible (question ouverte)

| | Total (n=656) | Québec (n=217) | Ontario (n=262) | Ouest (n=177) |
|---|------------------|-------------------|--------------------|------------------|
| Ne sait pas / Ne répond pas | 21.7% | 18.4% | 21.9% | 25.6% |
| Garantie de bon fonctionnement des biens - la qualité des biens | 15.8% | 10.7% | 19.1% | 17.1% |
| Réparation et/ou échange gratuit/ Garantie de remplacement | 15.4% | 10.7% | 18.3% | 16.9% |
| Garantie contre les vices de fabrication - les défauts | 11.4% | 7.6% | 13.0% | 13.6% |
| Réparation et/ou échange gratuit pour une durée raisonnable/ Garantie de remplacement pour une durée raisonnable | 9.1% | 8.1% | 8.6% | 11.0% |
| Une durée de temps (30 jours, 90 jours, 1 an, etc.) | 8.6% | 14.9% | 6.1% | 4.6% |
| Garantie la durée de vie d'un bien | 7.5% | 17.5% | 3.7% | 0.8% |
| Garantie imposée au fabricant - vendeur par le gouvernement | 4.8% | 8.2% | 3.5% | 2.7% |
| Réparation et/ou échange gratuit dans le cadre d'une utilisation normale/ Garantie de remplacement dans le cadre d'une utilisation normale | 3.9% | 8.4% | 2.2% | 1.0% |
| Garantie - loi qui oblige le vendeur - manufacturier à respecter ses obligations | 3.2% | 1.4% | 5.9% | 1.5% |
| Garantie qui prend effet après l'expiration de celle offerte par le manufacturier / Garantie qui s'applique lors que le bien est vendu sans garantie par le fabricant | 1.6% | 1.3% | 1.6% | 2.1% |
| Garantie qui couvre les pièces et la main d'œuvre | 1.3% | 0.2% | 2.0% | 1.9% |
| Autre | 4.7% | 4.9% | 2.8% | 7.5% |

Q8. D'après vous, la garantie légale offre-t-elle une protection inférieure, égale ou supérieure à la garantie du fabricant et du commerçant

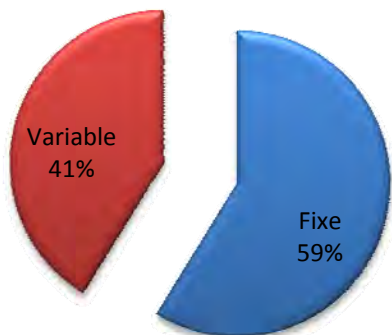


Q9. À votre avis, que couvre la protection offerte par la garantie légale?

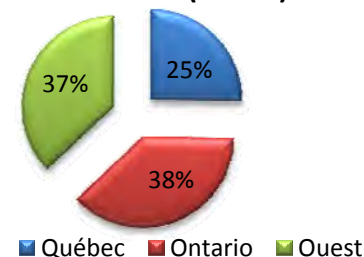
| | Total (n=709) | Québec (n=233) | Ontario (n=286) | Ouest (n=191) |
|--|------------------|-------------------|--------------------|------------------|
| L'obligation de remplacer un bien défectueux | 64.5% | 63.6% | 62.7% | 68.4% |
| La conformité avec ce qui a été annoncé (documentation, publicité, représentations du vendeur) | 51.2% | 53.2% | 54.7% | 43.7% |
| Le coût des pièces nécessaires pour les réparations | 40.9% | 41.6% | 38.7% | 43.2% |
| La conformité avec les attentes raisonnables du consommateur | 40.5% | 49.0% | 35.4% | 37.7% |
| Les biens | 32.5% | 30.9% | 36.1% | 29.1% |
| Le coût de la main-d'œuvre sur les réparations | 32.1% | 33.1% | 32.3% | 30.7% |
| Les services | 26.7% | 23.4% | 28.3% | 28.3% |
| Seulement certains types de biens ou de services | 20.5% | 15.7% | 21.1% | 25.4% |
| Les dommages causés à un bien par un accident | 17.2% | 13.6% | 16.2% | 23.2% |
| Uniquement ce qui est offert par un commerçant (par opposition à un particulier) | 11.5% | 12.2% | 11.2% | 10.9% |
| Aucune de ces réponses | 1.5% | 0.5% | 2.1% | 2.0% |

Q10. À votre avis, la durée de la garantie légale est-elle fixe (peu importe le bien ou le service) ou variable?

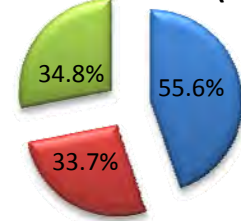
Durée de la garantie (n=709)



Fixe (n=417)



Variable (n=292)



Q11. Combien de temps la garantie légale s'applique-t-elle?

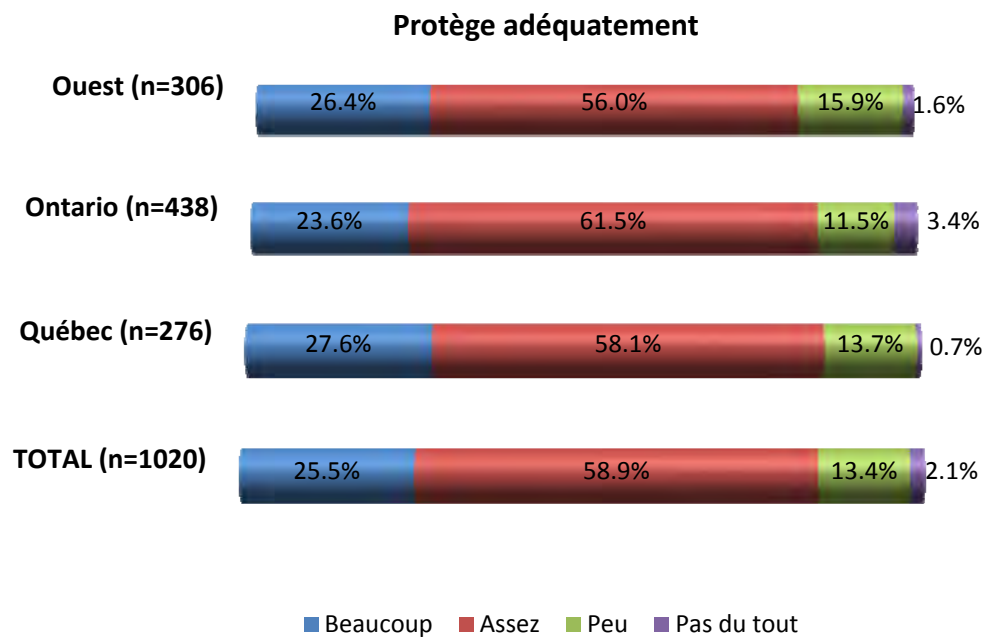
| | Total (n=417) | Québec (n=103) | Ontario (n=189) | Ouest (n=124) |
|------------------|---------------|----------------|-----------------|---------------|
| Moins d'un an | 28.5% | 30.7% | 30.2% | 24.0% |
| Entre 1 et 2 ans | 47.8% | 50.7% | 41.3% | 55.2% |
| Entre 2 et 3 ans | 11.3% | 9.8% | 13.4% | 9.4% |
| Entre 3 et 4 ans | 2.1% | 0.3% | 2.5% | 2.9% |
| Entre 4 et 5 ans | 3.2% | 3.1% | 4.4% | 1.6% |
| 5 ans ou plus | 7.1% | 5.4% | 8.2% | 6.9% |

Q12. À votre avis, de quoi dépend la durée de la garantie légale?

| | Total (n=292) | Québec (n=129) | Ontario (n=96) | Ouest (n=66) |
|--|---------------|----------------|----------------|--------------|
| Les conditions d'utilisation du bien ou du service | 55.2% | 53.0% | 60.9% | 51.1% |
| Le fait que le bien acheté soit neuf ou usagé | 49.2% | 52.8% | 49.3% | 42.3% |
| La valeur du bien ou du service | 35.2% | 40.3% | 34.1% | 26.8% |
| Le fait que le bien ou le service soient offerts par un commerçant ou d'un particulier | 28.4% | 26.4% | 28.5% | 31.9% |
| Le fait qu'un article était en solde ou en liquidation | 18.0% | 11.7% | 23.9% | 21.6% |
| La marque du bien ou du service | 17.3% | 7.8% | 22.7% | 27.9% |
| Aucune de ces réponses | 8.6% | 7.8% | 7.5% | 11.9% |

Question posée après la lecture d'un résumé de la garantie légale

Q14. À partir de cette lecture et selon votre compréhension, jusqu'à quel point la garantie légale est-elle une mesure qui protège adéquatement les consommateurs?



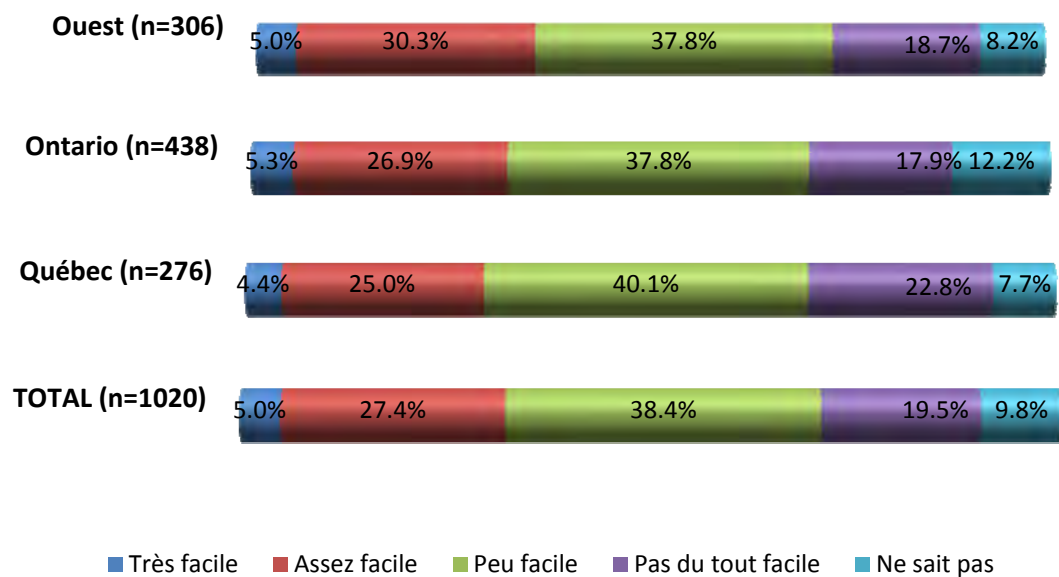
Q15. La garantie légale est-elle assez précise en ce qui a trait...

| | Total (n=1020) (% de oui) | Québec (n=276) (% de oui) | Ontario (n=438) (% de oui) | Ouest (n=306) (% de oui) |
|--|--|--|---|---|
| aux protections qu'elle offre | 55.0% | 59.3% | 52.2% | 55.2% |
| à la durée des protections qu'elle offre | 36.9% | 42.0% | 33.9% | 36.4% |
| aux obligations du commerçant | 55.9% | 56.3% | 54.6% | 57.3% |
| à la manière de la faire respecter | 38.3% | 37.2% | 40.3% | 36.4% |
| aux recours en cas de non respect par le commerçant | 33.5% | 36.0% | 33.9% | 30.5% |

16. Certains éléments vous semblent-ils ambigus ? (question ouverte)

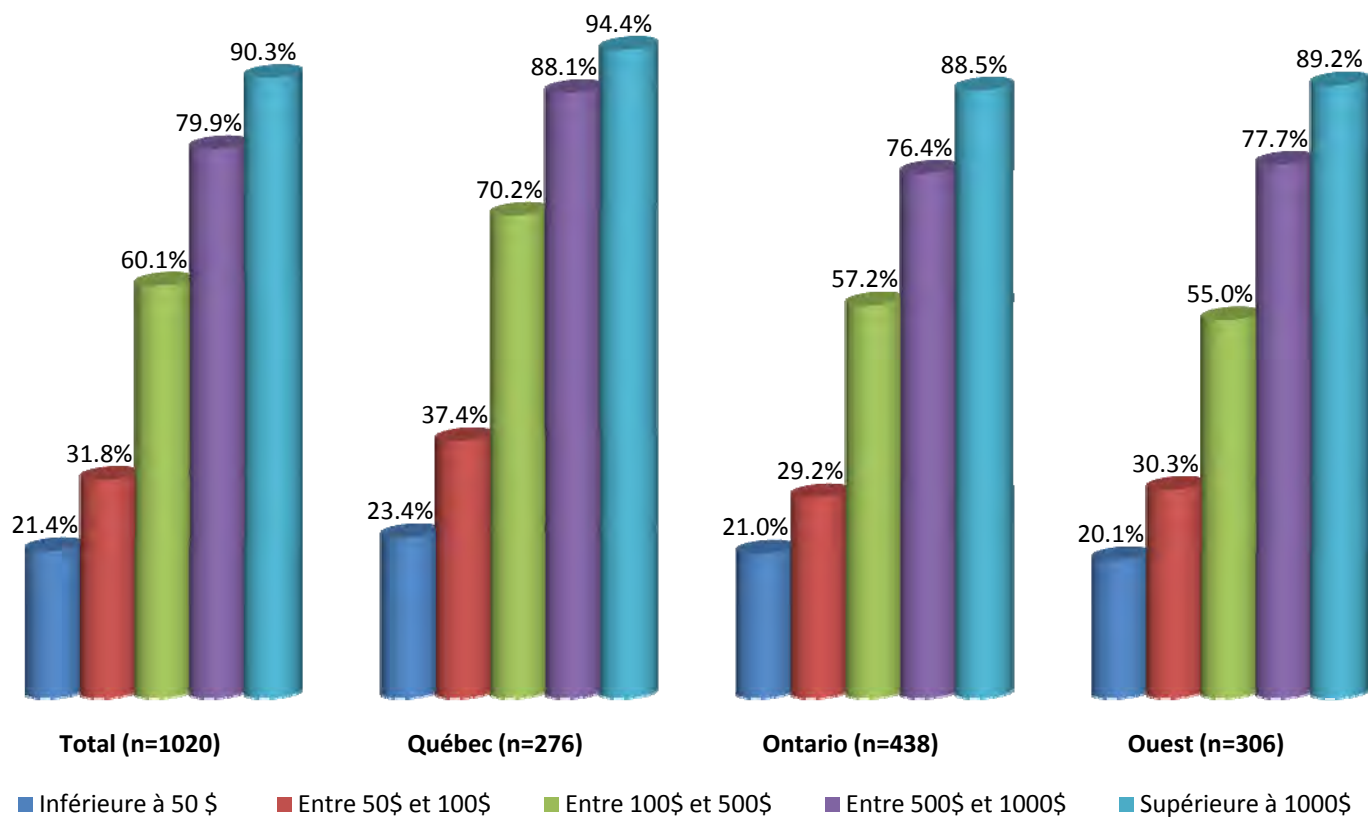
| | Total (n=1020) | Québec (n=276) | Ontario (n=438) | Ouest (n=306) |
|--|-------------------|-------------------|--------------------|------------------|
| Oui | 72.5% | 62.6% | 75.3% | 77.4% |
| <i>Lesquels</i> | | | | |
| Ne sait pas / Ne répond pas | 20.0% | 23.0% | 19.4% | 18.4% |
| Tous | 15.9% | 8.9% | 16.8% | 20.8% |
| Aucun | 11.5% | 15.5% | 10.2% | 9.6% |
| Le terme "Durée raisonnable" est vague / L'élément en rapport à la durée | 8.2% | 19.9% | 3.3% | 4.9% |
| Le quatrième élément de la description de l'Ontario, Alberta et la CB | 8.1% | | 11.3% | 10.8% |
| Le premier élément de la description de l'Ontario, Alberta et la CB | 6.9% | | 11.3% | 7.0% |
| Le troisième élément de la description de l'Ontario, Alberta et la CB | 6.7% | | 11.4% | 6.1% |
| L'expression "aux conditions d'utilisation du bien" - "condition suitable" est trop vague - porte à interprétation | 3.9% | 2.2% | 4.0% | 5.2% |
| C'est incomplet / Ça manque de précision / Il y a trop de place pour l'interprétation / Qui définit quoi ? | 3.6% | 4.9% | 3.0% | 3.5% |
| Le terme "Usage normal" est vague / Les références à l'usage "normal" - "the specific use" | 3.1% | 9.7% | 0.9% | 0.1% |
| Le deuxième élément de la description de l'Ontario, Alberta et la CB | 3.0% | | 4.3% | 3.8% |
| L'expression "reasonably satisfactory manner" est trop vague - porte à interprétation | 3.0% | | 3.7% | 4.6% |
| L'expression "merchantable quality" est trop vague - porte à interprétation | 2.6% | | 3.6% | 3.6% |
| Le terme "raisonnable - reasonable" est trop vague - porte à interprétation | 2.5% | | 3.6% | 3.3% |
| Le quatrième élément de la description du Québec | 2.2% | 8.2% | | |
| Le premier élément de la description du Québec | 2.1% | 7.7% | | |
| Autres | 6.8% | 16.1% | 1.3% | 6.4% |

Q17. D'après vous, est-il facile pour un consommateur de faire honorer la garantie légale par un commerçant?



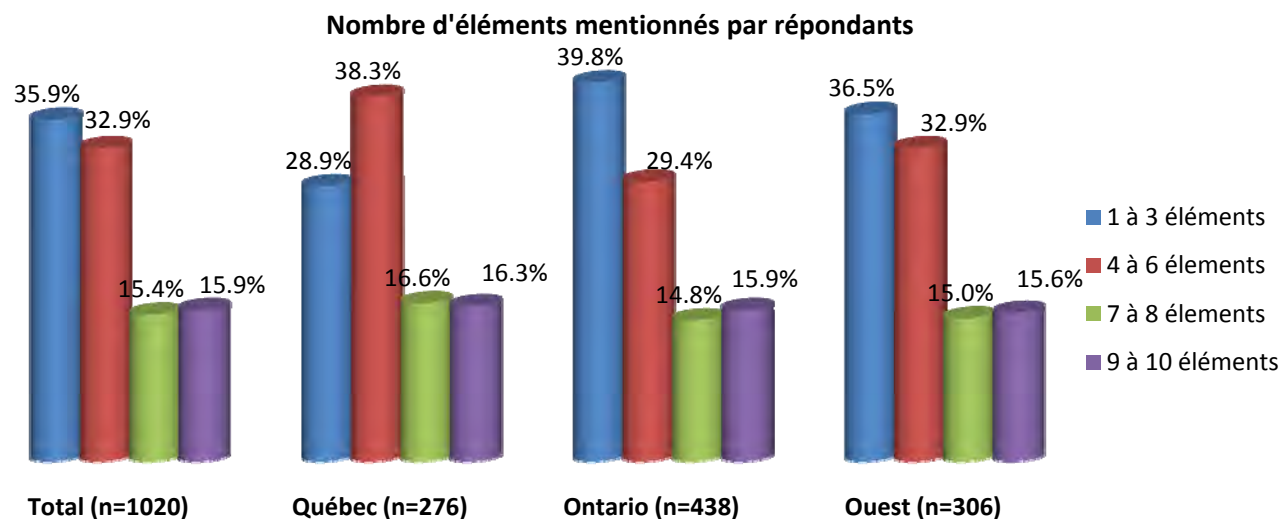
Q18. Dans l'hypothèse où un commerçant refuserait fermement d'honorer la garantie légale sur un bien que vous auriez acheté, seriez-vous prêt à poursuivre en justice le commerçant afin de faire respecter la garantie légale si la valeur du bien concerné était :

% des répondants qui serait certainement ou probablement prêt à poursuivre selon la valeur de bien

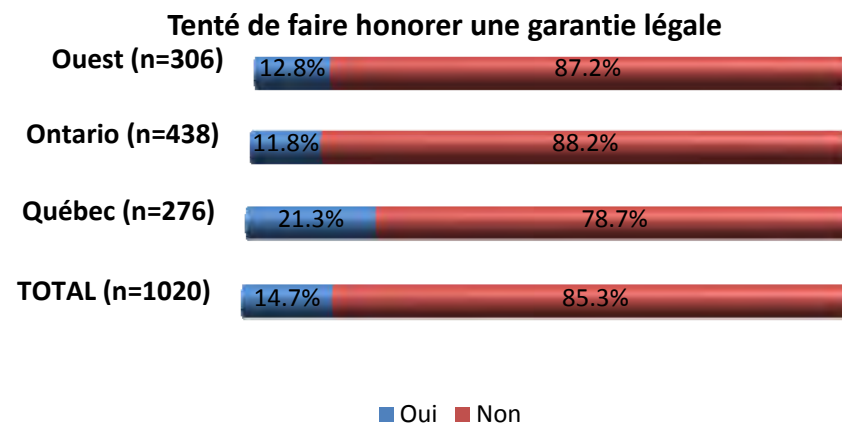


Q19. Outre le prix du bien, quels éléments seraient susceptibles de vous encourager à faire valoir vos droits relativement à la garantie légale?

| | Total (n=1020) | Québec (n=276) | Ontario (n=438) | Ouest (n=306) |
|--|-------------------|-------------------|--------------------|------------------|
| L'aide d'un organisme gouvernemental de protection du consommateur | 58.1% | 61.1% | 55.5% | 59.2% |
| Une meilleure connaissance de vos droits | 57.5% | 52.4% | 58.4% | 60.8% |
| Une meilleure connaissance des procédures | 56.5% | 55.0% | 57.3% | 56.7% |
| La possibilité de faire valoir vos droits à faible coût | 54.9% | 61.6% | 49.6% | 56.5% |
| La possibilité de faire valoir vos droits sans avocat | 54.2% | 64.0% | 49.0% | 52.7% |
| Une meilleure connaissance des recours disponibles | 53.8% | 53.7% | 51.8% | 56.7% |
| La possibilité d'obtenir rapidement un jugement | 52.4% | 61.6% | 48.2% | 50.2% |
| Des recours simplifiés (sans preuve d'expert, par exemple) | 46.9% | 55.4% | 42.5% | 45.6% |
| L'aide d'un organisme non gouvernemental de protection du consommateur | 46.1% | 51.2% | 42.3% | 46.8% |
| Aucune de ces réponses | 5.9% | 2.7% | 7.7% | 6.0% |



Q20. Avez-vous déjà personnellement tenté de faire honorer une garantie légale?
 Q21. Comment avez-vous tenté de faire honorer une garantie légale

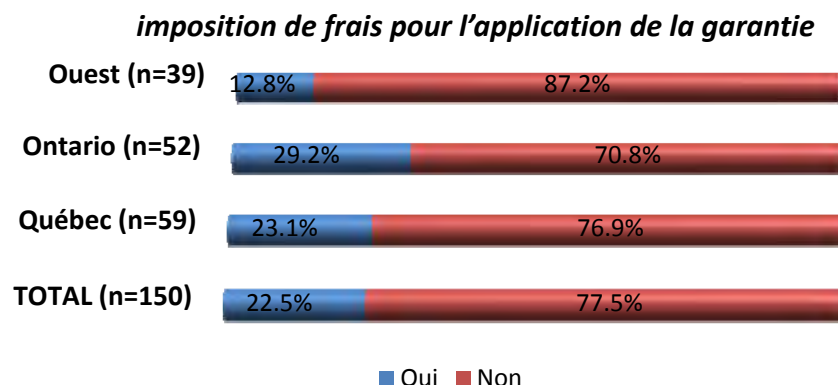


Q21. Comment avez-vous tenté de faire honorer une garantie légale

| | Total (n=150) | Québec (n=59) | Ontario (n=52) | Ouest (n=39) |
|---|------------------|------------------|-------------------|-----------------|
| Directement auprès du commerçant | 57.8% | 57.6% | 59.3% | 56.3% |
| Directement auprès du fabricant | 24.1% | 14.9% | 27.7% | 33.0% |
| Auprès de l'organisme gouv. chargé de la protection du consommateur | 5.4% | 11.7% | - | 3.2% |
| Auprès des tribunaux | 5.3% | 7.4% | 4.0% | 3.9% |
| Auprès d'un organisme non gouvernemental | 4.0% | 4.6% | 5.0% | 2.0% |
| Autres | 3.3% | 3.9% | 4.0% | 1.5% |

Q22. Quel a été le résultat de votre tentative de faire honorer la garantie légale? (question ouverte)

Q23. Est-ce que le commerçant ou le fabricant vous a imposé des frais pour l'application de la garantie légale?



Q22. Quel a été le résultat de votre tentative de faire honorer la garantie légale?

| | Total (n=150) | Québec (n=59) | Ontario (n=52) | Ouest (n=39) | Imposition de frais (n=150) | |
|--|------------------|------------------|-------------------|-----------------|--------------------------------|------|
| | | | | | Oui | Non |
| Positif / Le problème à été résolu / Le bien à été remplacé - réparé | 46.0% | 50.2% | 41.3% | 45.8% | 19% | 81% |
| Aucun résultat/Demande ignorée/Pas de réponse du fabricant ou du commerçant | 24.2% | 18.3% | 25.7% | 30.9% | 13% | 87% |
| Ne sait pas / Ne répond pas | 15.6% | 10.5% | 21.3% | 15.7% | 68% | 32% |
| Après une longue attente - procédure nous avons obtenu un résultat positif | 7.8% | 8.2% | 11.7% | 1.9% | 11% | 89% |
| Après avoir eu recours à des mesures légales - aux petites créances nous avons eu gains de cause | 4.5% | 7.8% | - | 5.7% | 11% | 89% |
| Procédure pas encore terminée | 1.9% | 5.0% | - | - | - | 100% |

Profil sociodémographiques

| | Total (n=1020) | Québec (n=276) | Ontario (n=438) | Ouest (n=306) |
|---|---------------------------|---------------------------|----------------------------|--------------------------|
| Scolarité | | | | |
| Primaire | 2.7% | 0.3% | 3.8% | 3.4% |
| Secondaire | 32.2% | 29.4% | 28.9% | 39.6% |
| Collégial | 28.6% | 34.5% | 25.3% | 28.0% |
| Universitaire | 36.4% | 35.8% | 42.0% | 29.0% |
| Emploi | | | | |
| Au travail à temps plein (plus de 30 heures par semaine) | 46.8% | 45.6% | 47.2% | 47.3% |
| Au travail à temps partiel (30 heures par semaine ou moins) | 12.6% | 11.1% | 10.9% | 16.4% |
| En chômage ou en recherche d'emploi | 8.7% | 7.4% | 9.9% | 8.1% |
| Retraité | 16.2% | 21.4% | 13.0% | 16.0% |
| À la maison à temps plein | 8.5% | 7.5% | 9.6% | 7.8% |
| Revenu annuel | | | | |
| Moins de 15 000\$ | 7.5% | 7.4% | 7.7% | 7.1% |
| 15 000\$ à 29 999\$ | 10.8% | 13.4% | 8.2% | 12.2% |
| 30 000\$ à 49 999\$ | 22.0% | 22.6% | 20.2% | 24.2% |
| 50 000\$ à 69 999\$ | 17.1% | 16.1% | 17.9% | 16.8% |
| 70 000\$ à 99 999\$ | 16.9% | 16.0% | 17.0% | 17.6% |
| 100 000\$ et plus | 13.9% | 13.5% | 16.2% | 11.0% |
| Je préfère ne pas répondre | 11.8% | 11.0% | 12.8% | 11.2% |
| Nombre d'adultes par ménage (en moyenne) | 1.65 | 1.49 | 1.75 | 1.66 |
| Nombre d'enfants par ménage (en moyenne) | .59 | .50 | .62 | .63 |

Profil sociodémographiques

| | Total (n=1020) | Québec (n=276) | Ontario (n=438) | Ouest (n=306) |
|-----------------------|---------------------------|---------------------------|----------------------------|--------------------------|
| Age (pondéré) | | | | |
| 18 à 24 ans | 11.8% | 10.2% | 12.7% | 12.0% |
| 25 à 34 ans | 20.5% | 19.1% | 22.2% | 19.2% |
| 35 à 44 ans | 18.7% | 14.2% | 21.6% | 18.5% |
| 45 à 54 ans | 24.3% | 28.5% | 21.7% | 24.1% |
| 55 à 64 ans | 15.7% | 11.8% | 17.7% | 16.5% |
| Sexe (pondéré) | | | | |
| Homme | 49.7% | 49.3% | 50.3% | 49.2% |
| Femme | 50.3% | 50.7% | 49.7% | 50.8% |

ANNEX 2: Discussion Groups Report

Mieux comprendre la garantie légale

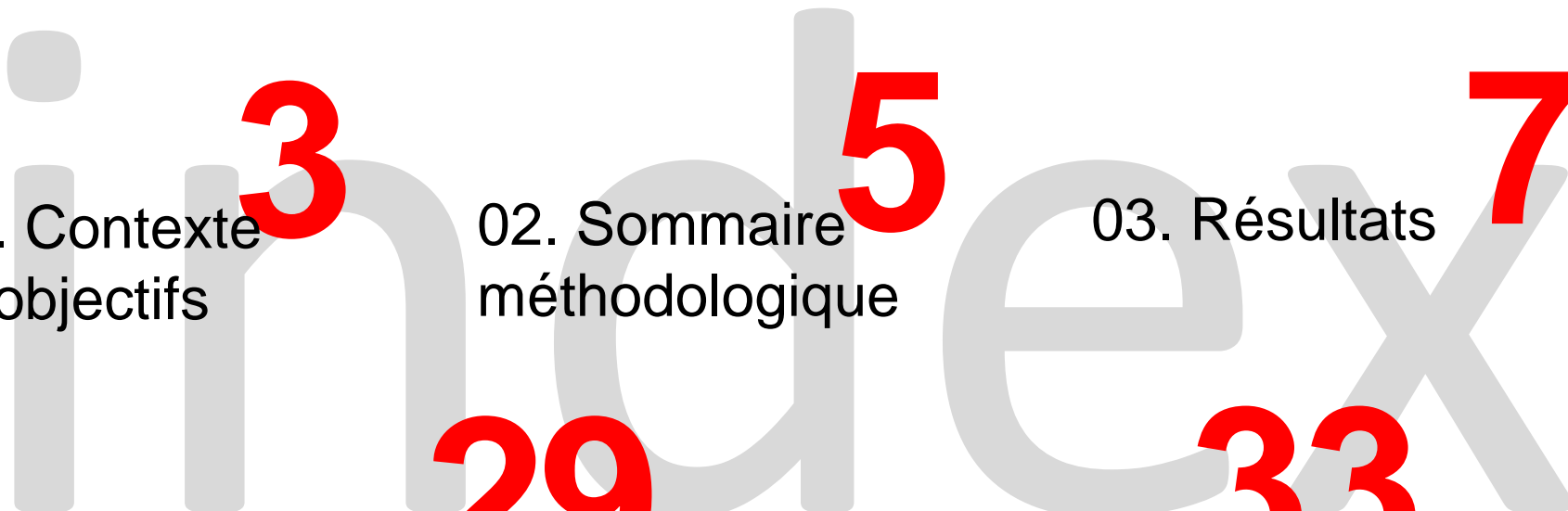
Étude sur les perceptions à l'égard de la garantie légale

Rapport remis à Yannick Labelle le 02/12/2011



substance stratégies

TABLE DES MATIÈRES



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Contexte et objectifs

DÉMYSTIFIER LA GARANTIE LÉGALE

- L'Union des Consommateurs effectuera sous peu un sondage pancanadien auprès de 1000 Canadiens dans le but de mesurer les perceptions à l'égard de la garantie légale.
- Cette étude permettra non seulement de mesurer la notoriété de la garantie légale, mais également la profondeur de connaissance dont elle bénéficie et les sources potentielles de confusion la concernant. Ces apprentissages permettront à l'Union des Consommateurs de mieux peaufiner ses stratégies de communication et de sensibilisation par la suite.
- Parallèlement à ce sondage, l'UC désire effectuer une recherche qualitative auprès de consommateurs canadiens. C'est dans cette optique qu'elle a contacté Substance stratégies.



Sommaire méthodologique

COMMENT EXTRAIRE LA SUBSTANCE?



**Groupe-
discussion**

Méthodologie



Adultes 25-44 ans

Groupe cible



Entre 8 et 9

*Nombre de personnes
par groupe*

**Habitent régions
de Montréal ou de
Toronto**

25-44 ans



*Critères
communs*

**Ont l'habitude
de s'informer
minimalement**

21 et 24 novembre



Dates des groupes

120 minutes



Durée des groupes

Résultats



UN SUJET QUI SURPREND...

D'entrée de jeu, une majorité de participants semblent pris de court lorsqu'on leur parle de leurs droits à titre de consommateurs. Autrement dit, il semble que cette problématique soit relativement éloignée de leurs préoccupations quotidiennes.

Les premières évocations des participants quant à la protection du consommateur sont éparses et peu précises. À ce titre, les gens se tournent vers le quotidien (exactitude des prix, règle du 10\$, retour, etc.) afin de trouver des exemples. Le terme « garantie » ne trouve que très peu d'écho. Un seul participant (de Montréal) a avancé le concept de garantie légale d'entrée de jeu au moment où il était question des droits des consommateurs en général.

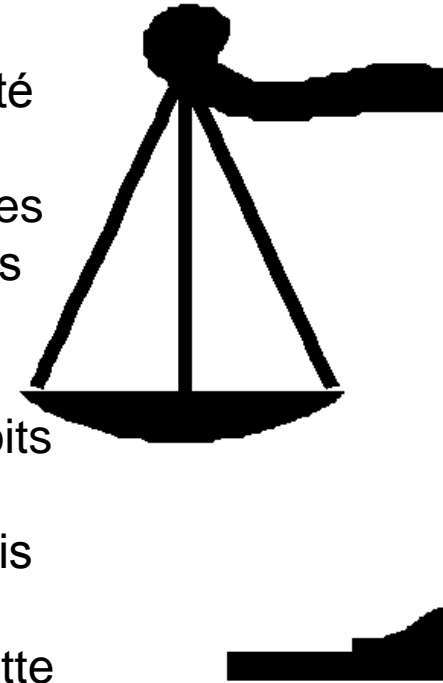
Protection
Garantie légale
Gestions des plaintes
Politique de retour
Exactitude des prix
Recours
Publicité mensongère

Implications pour le sondage: Mieux circonscrire les notions de droits

NUL N'EST CENSÉ IGNORER LA LOI, MAIS...

La Loi sur la protection du consommateur est connue d'une majorité de Montréalais, qui affichent toutefois une profondeur de connaissance relativement limitée. Les lois ontariennes équivalentes ne trouvent que très peu d'écho à Toronto, où quelques participants en ont vaguement entendu parler.

Dans la même veine, les organismes voués à la protection des droits des consommateurs se révèlent peu connus à Montréal. Quelques participants évoquent l'Office de Protection du Consommateur, mais surtout les émissions traitant de consumérisme tels que J.E. et La Facture. Cette situation est encore plus manifeste à Toronto, où cette question ne provoque aucun souvenir, ne serait-ce même qu'imprécis.



DE GRÉ À GRÉ...

Lorsqu'interrogés sur leurs droits à titre de consommateurs, plusieurs participants évoquent les politiques de retour de marchandise dans les différents magasins. Certains soulignent également la loi sur l'étiquetage (règle du 10\$).

Seule une poignée de participants à Montréal ont déjà eu à défendre leur droit à titre de consommateur (dans la mesure où les cas cités dépassaient le simple imbroglio avec le préposé d'un magasin. Or, ces litiges ont dans tous les cas été réglés directement avec le vendeur (le plus souvent un gérant). Les participants torontois semblent davantage animés par une mentalité du *Do It Yourself*, par le biais de laquelle ils s'engagent eux-mêmes – souvent avec succès – à contacter directement le vendeur en cas de litige.

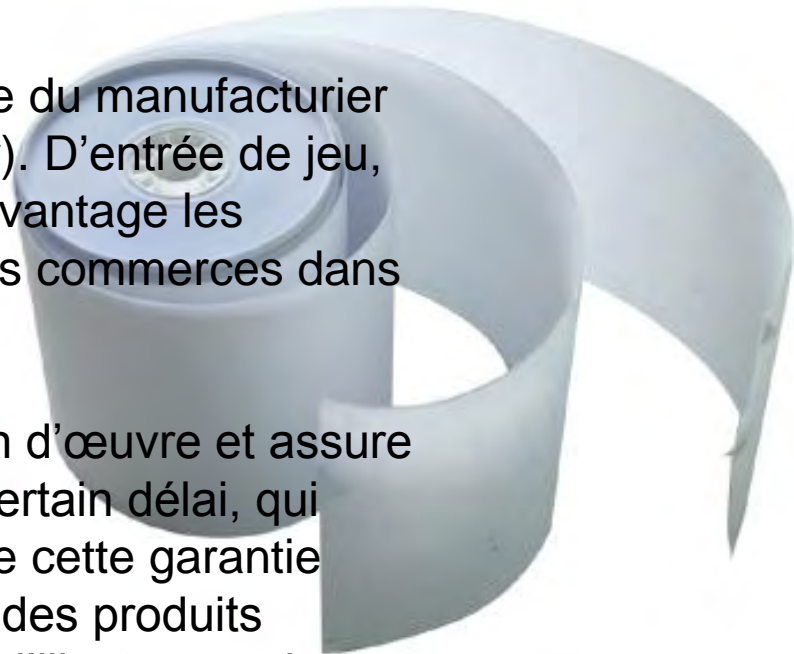


Implications pour l'avenir: Éviter de définir la garantie légale avec des exemples extrêmes

GARANTIE = RETOUR?

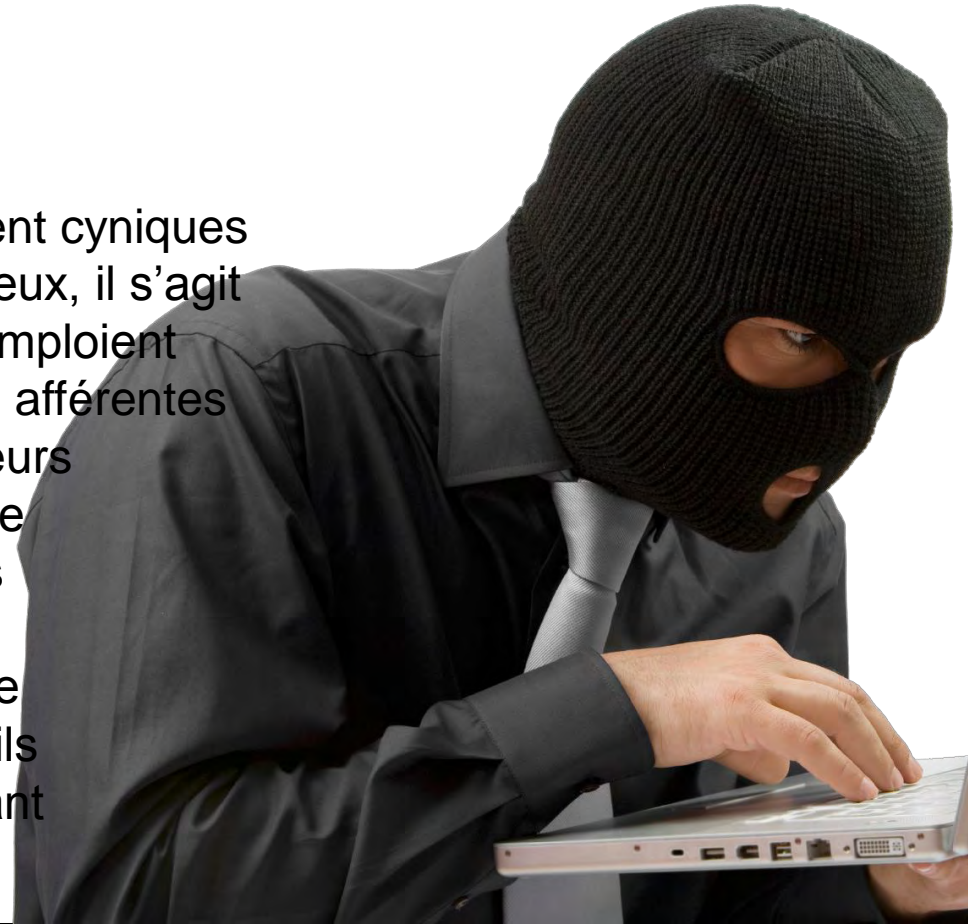
Il existe une confusion manifeste entre la garantie du fabricant et celle offerte par le magasin (politique de retour). D'entrée de jeu, une majorité de participants évoquent en effet davantage les politiques de retour de marchandise des différents commerces dans lesquels ils ont l'habitude de faire leurs achats.

Selon eux, la garantie du fabricant couvre la main d'œuvre et assure le bon fonctionnement de l'item acheté pour un certain délai, qui varie selon la nature du produit. Or, ils croient que cette garantie n'existe pas toujours. Ils se servent de l'exemple des produits vendus en « vente finale » (*as is* en anglais) afin d'illustrer ce doute.



LA GRANDE ARNAQUE

La plupart des consommateurs se montrent cyniques vis-à-vis de la garantie prolongée. Selon eux, il s'agit davantage d'une manière détournée qu'emploient les commerçants pour gonfler les marges afférentes aux achats effectués par les consommateurs (ce qu'un participant de Toronto qualifie de *scam*). Seule une poignée de participants avouent acheter la garantie prolongée, principalement pour avoir l'esprit tranquille ou parce qu'ils savent par expérience qu'ils auront à faire remplacer l'item acheté avant le terme de cette garantie.



Implications pour l'avenir: Opposer la garantie légale à la garantie prolongée

UNE AFFAIRE DE BIENS ET D'ACHAT?

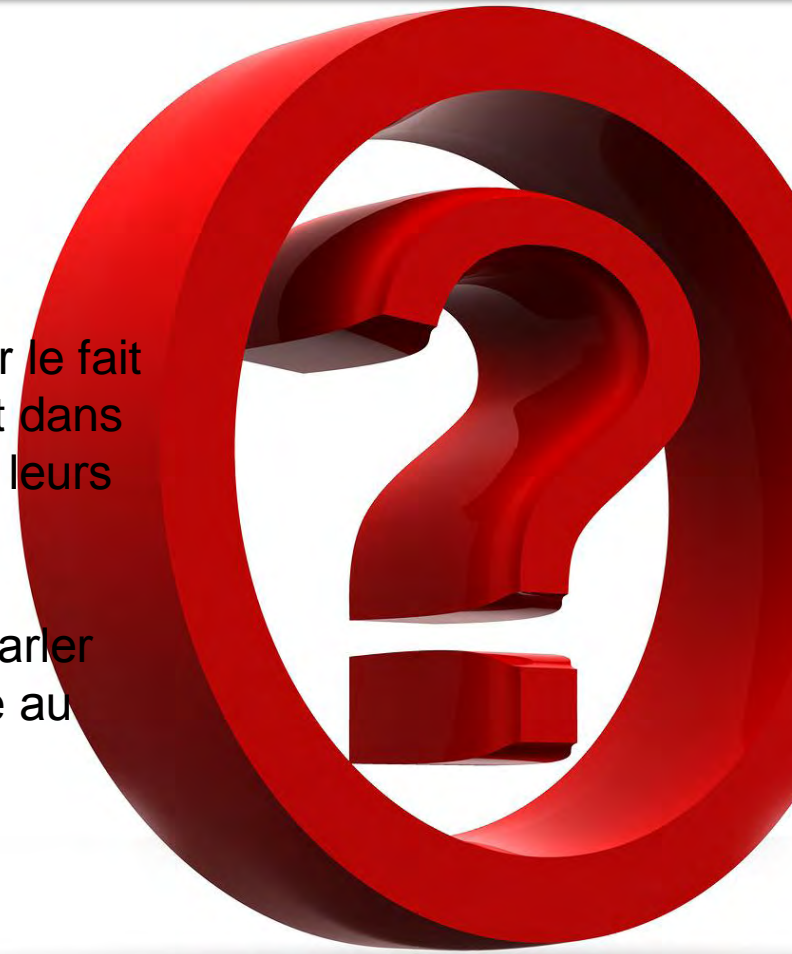
Les garanties sont essentiellement associées aux produits, mais rarement aux services. À cet égard, plusieurs participants soutiennent qu'il est beaucoup plus difficile pour eux de statuer sur la qualité d'un service offert, dans la mesure où les paramètres de qualité ne sont pas aussi circonscrits que ceux d'un produit.

Dans la même optique, il règne une confusion en ce qui a trait aux biens loués. La plupart des participants évoquent à cet égard le fait qu'ils doivent déboursier davantage pour être bien assurés lorsqu'ils louent une voiture. À ce propos, certains soulignent le fait que cette assurance supplémentaire les couvre davantage que l'assurance de base et qu'il s'agit également d'une manière pour l'entreprise locatrice d'aller chercher des revenus supplémentaires (au même titre que la garantie prolongée).

LA GARANTIE COMMENT?

De manière générale, la garantie légale se révèle relativement peu connue. On peut certes souligner le fait que les Montréalais de 25-34 ans la connaissent dans leur majorité, mais cette notoriété s'estompe chez leurs semblables de 35-44 ans et chez les Torontois.

Il est à noter qu'aucun Torontois n'avait entendu parler de près ou de loin de la garantie légale. L'exercice au cours duquel le texte de loi leur était divulgué n'a d'ailleurs rafraîchi la mémoire d'aucun participant.



TRÈS PEU DE PROFONDEUR

Il faut souligner qu'à la très timide notoriété de la garantie légale s'ajoute une profondeur de connaissance très faible.

Les quelques participants montréalais qui se rappelaient de l'appellation ne pouvaient fournir que très peu de précisions sur celle-ci. Au mieux, ils se souvenaient avoir entendu le terme dans un bulletin d'information ou dans une émission dédiée au consumérisme telles que J.E. ou la Facture



QU'EST-CE QU'UN CONTRAT?

L'exercice de l'analyse du texte de loi se rapportant à la garantie légale à Montréal soulève de nombreux doutes, notamment en ce qui a trait à tout ce qui se réfère au contrat. Plusieurs participants se demandent ce qui peut faire figure de contrat au moment d'effectuer une transaction dans un commerce. Pour eux, cette notion semble devenir plus formelle à mesure que le prix du bien augmente.

Or, il faut souligner le fait que la plupart des consommateurs rencontrés considèrent le texte comme étant avantageux pour ses semblables. Or, ce bénéfice perçu est légèrement assombri par les quelques imprécisions, qui laissent trop de place à interprétation.



Bleu : avantageux

Rouge : surprenants

Noir : pas clairs

Voici sommairement ce que dit la Loi sur la protection du consommateur du Québec au sujet de la garantie légale à portée générale:

Un bien qui fait l'objet d'un contrat doit être tel qu'il puisse servir à l'usage auquel il est normalement destiné.

Un bien qui fait l'objet d'un contrat doit être tel qu'il puisse servir à un usage normal pendant une durée raisonnable, eu égard à son prix, aux dispositions du contrat et aux conditions d'utilisation du bien.

Un bien ou un service fourni doit être conforme à la description qui en est faite dans le contrat.

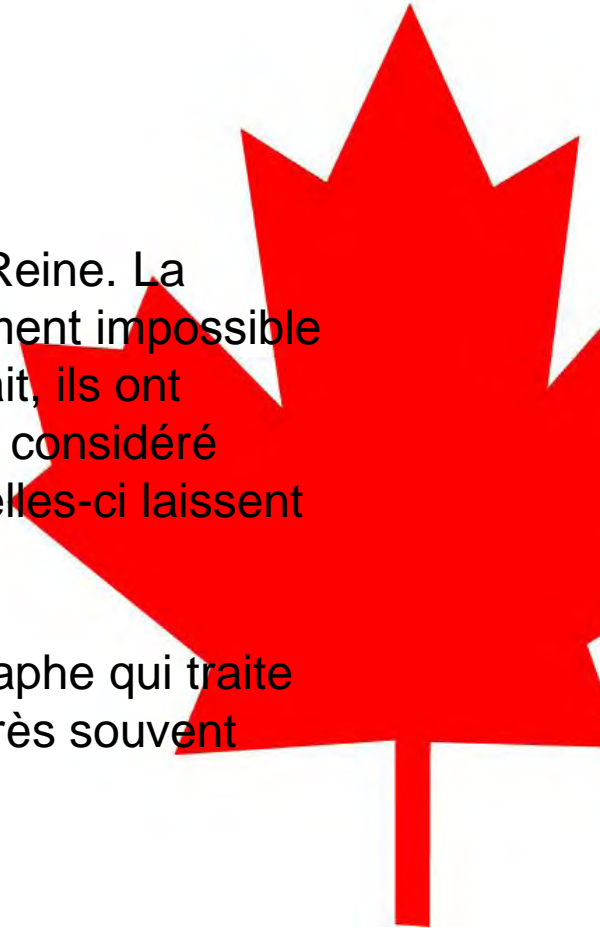
Un bien ou un service fourni doit être conforme à une déclaration ou à un message publicitaire faits à son sujet par le commerçant ou le fabricant.

UN TEXTE QUI SÈME DES DOUTES...

Le son de cloche est relativement semblable dans la Ville-Reine. La plupart des participants soulignent le fait qu'il soit pratiquement impossible de statuer sur ce qu'est un « *reasonable consumer* ». En fait, ils ont tendance à ne pas percevoir les références à ce qui doit être considéré comme « raisonnable » comme étant claires. Selon eux, celles-ci laissent trop de place à l'interprétation.

Certains se montrent aussi dubitatifs par rapport au paragraphe qui traite de la description de l'objet, dans la mesure où celle-ci est très souvent pour le moins sommaire en magasin.

Implications pour le sondage: Expliquer ce qu'on entend par « raisonnable »



Blue: beneficial for consumers

Red: surprising

Black: not clear

Here is a summary of what the Sale of Goods Act and the Consumer Protection Act state about general legal warranties:

The goods purchased must be new and unused, unless stated otherwise by the merchant.

The goods purchased must be in adequate working condition and in a suitable condition for sale in the eyes of a reasonable consumer.

The goods purchased must conform to the description made of them.

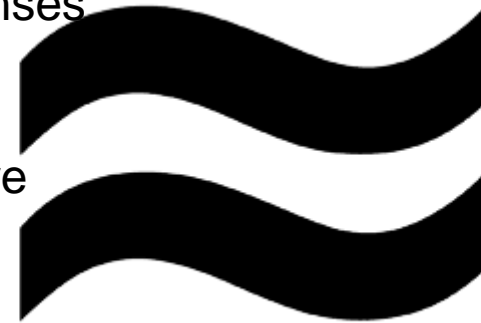
The goods purchased must be reasonably suited for the specific use that the buyer has made known to the merchant.

The services obtained by the consumer must be provided in a reasonably satisfactory manner.

...MAIS QUI NE DISSIPE PAS LA CONFUSION

Après avoir mit tous les participants sur le même dénominateur au plan de l'information sur la garantie légale, il demeure une certaine confusion dans les trois groupes. Autrement dit, le dévoilement du texte déclenche plusieurs questions et génère très peu de réponses lorsqu'on interroge les participants.

Ceux-ci se demandent en outre comment la garantie légale entre en vigueur lorsqu'un consommateur a acheté la garantie prolongée, si la garantie légale a cours pendant le terme de la garantie prolongée, etc.



UNE PROCÉDURE DISSUASIVE

Très peu de participants envisageraient de faire valoir leurs droits en ce qui a trait à la garantie légale lorsqu'ils apprennent que cette démarche implique de se rendre au tribunal. Selon eux, le temps qu'ils devraient y consentir et le renoncement à leurs activités professionnelles constituent autant de freins potentiels. Qui plus est, une majorité de participants se montrent sceptiques quant à la probabilité que leur parole l'emporte sur celle d'un commerçant dans le cadre d'un litige au cours duquel ils auraient à invoquer la garantie légale.

Ils se disent toutefois plus ouverts lorsque la possibilité de se faire défendre par une tierce partie est mentionnée.

UN PROCESSUS LOURD?

Le fait que la garantie légale relève du gouvernement provoque un certain cynisme, dans la mesure où cela suggère une lourdeur administrative. Qui plus est, une participante souligne que la plupart des individus subissent un litige à un moment ou un autre avec une entreprise. Dans cette optique, le fait de revendiquer ses droits par rapport à la garantie légale ferait en sorte qu'elle devrait attendre longtemps avant d'obtenir gain de cause.

Par ailleurs, deux Torontois se questionnent sur les conséquences qu'encourent les commerces lorsqu'un consommateur fait valoir ses droits. Selon eux, le règlement du litige se traduit davantage par une amende au commerçant que par un remboursement au consommateur.



Implications pour l'avenir: Se dissocier de la lourdeur gouvernementale

UN MAL POUR UN BIEN

De manière générale, les consommateurs jugent que la protection offerte par la garantie légale est suffisante, et ce, même s'ils ne sont pas certains de bien saisir l'étendue de celle-ci. Dans cette optique, ils croient que l'amélioration de ce texte légal passe davantage par sa clarification que par des ajouts à proprement parler.

Au moment où tous les participants ont été exposés à l'information sur la garantie légale, leur cynisme envers la garantie prolongée s'en trouve bonifié. Celle-ci est encore davantage perçue comme étant inutile et comme un prétexte à peine camouflé pour gonfler les marges.

UN MANQUE D'INFO QUI MÉRITE NUANCE

Il règne un consensus dans les deux marchés selon lequel la confusion manifeste et la faible notoriété de la garantie légale est davantage la conséquence d'un manque d'information que d'un manque d'intérêt. Selon les participants, les consommateurs canadiens doivent obtenir de l'information. Ils émettent toutefois du même souffle le fait qu'il s'agit d'un sujet aride, qui est difficile à aborder sur le plan communicationnel (ce qui démontre la limite de leur intérêt pour le sujet).

Il est aussi possible qu'une volonté de fournir des réponses vertueuses ait pu amener certains participants à prétendre que la faible profondeur de connaissance était davantage attribuable à l'absence d'information qu'à l'absence d'intérêt.

Implications pour l'avenir: Ne pas oublier que notre sujet n'est pas léger!



LA GRANDE SÉDUCTION D'ABORD

Les exercices de créativité effectués en équipe permettent de faire ressortir le fait qu'il serait difficile, voire illusoire, d'informer pleinement le consommateur de la garantie légale par le biais des créations publicitaires. Selon eux, il serait beaucoup plus judicieux de se servir de celles-ci comme des aguiches (*teasers*).

Autrement dit, les exécutions publicitaires devraient pouvoir être assez intrigantes et sibyllines pour pouvoir créer de l'achalandage sur le site Internet. Les Montréalais penchent davantage pour un ton humoristique afin de piquer la curiosité des consommateurs, tandis que les Torontois s'en tiennent principalement à une tonalité informative.

Implications pour l'avenir: Intéresser d'abord, informer ensuite.



TROP D'INFO TUE L'INFO

Quelques participants soulignent le fait que la garantie légale était très peu connue au sein de leur propre groupe et se servent de cette méconnaissance pour illustrer que la route s'annonce longue afin de faire connaître cette disposition à une majorité de Canadiens. Selon eux, on doit toutefois éviter de céder à la tentation de tout dire d'un seul coup.

Nous souscrivons donc à la stratégie des « petits pas publicitaires ». Autrement dit, la mesure du chemin à parcourir sur le plan communicationnel ne doit pas occulter l'efficacité publicitaire. Il serait en effet dangereux d'opter pour une approche trop informative. On pourrait, par exemple, opter pour une stratégie étagée (un message ou un élément d'information par campagne) ou encore semer le doute chez le consommateur (ce qui le pousserait à s'informer davantage).

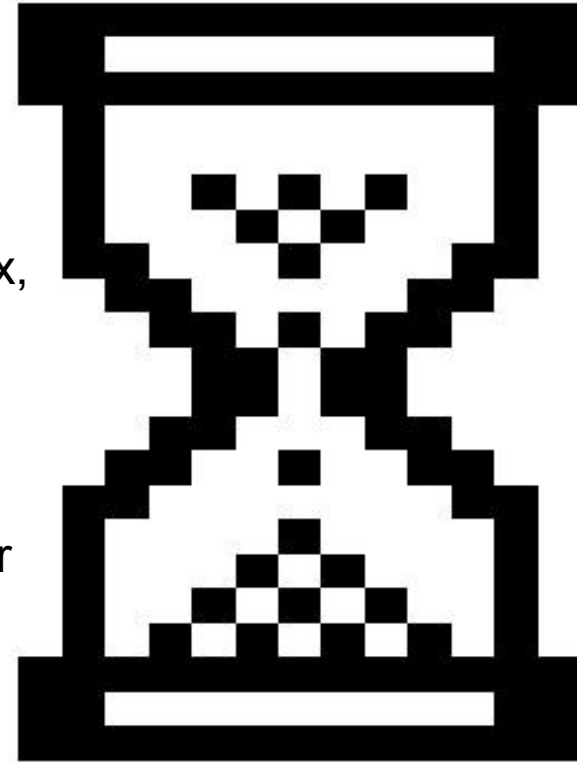


Implications pour l'avenir: prévoir plusieurs exécutions

UNE BONNE IDÉE... SUR PAPIER...

La très grande majorité des participants rencontrés démontrent de l'enthousiasme à l'idée que la durée de vie escomptée d'un produit soit affichée en magasin. Selon eux, cette durée de vie serait beaucoup plus longue que la garantie du fabricant.

Certains d'entre eux démontrent néanmoins un certain scepticisme quant à l'identité de l'instance qui devra statuer sur cette durée de vie.



UN EXEMPLE 2.0 À UTILISER!

L'exemple du iPod (nous aurions préféré un iPad) servant à démontrer la primauté de la plus haute promesse entre la publicité, la représentation et le contrat suscite un intérêt certain. Les participants se sentent interpellés par cet exemple (peut-être parce qu'il s'agit d'un produit connu).

Dans cette optique, il serait intéressant de l'utiliser lors d'éventuelles campagnes de communication. Le fait d'utiliser un tel produit à titre d'exemple pourrait faciliter la compréhension et diluer l'impression de lourdeur du sujet.





Sommaire

LES CONSOMMATEURS

Les consommateurs sont très peu informés sur leurs droits.

Ils se montrent généralement cyniques par rapport aux garanties qu'ils connaissent, particulièrement la garantie prolongée

Ils sont relativement réfractaires aux explications trop légales et ont l'habitude de régler leurs litiges eux-mêmes.

Ils se disent intéressés à en savoir plus sur la garantie légale, (sans surestimer leur capacité d'attention publicitaire).

LA GARANTIE LÉGALE

La garantie légale affiche une notoriété confidentielle et une profondeur de connaissance relativement faible, particulièrement à Toronto.

Le texte sur la garantie légale est généralement bien reçu, mais plusieurs jugent qu'il contient trop de termes vagues et qu'il laisse ainsi trop place à l'interprétation.

La garantie légale est perçue comme un bon contrepois à la garantie prolongée, mais le processus de sa revendication apparaît comme étant potentiellement rébarbatif.

L'AVENIR...

La garantie légale n'est pas le sujet le plus accrocheur d'un point de vue publicitaire.

Il faut éviter de vouloir trop en dire d'un seul coup. Il s'agit plutôt d'accrocher le consommateur pour le rediriger vers un support plus informationnel. On aurait ainsi le loisir de présenter exécutions.

On doit exemplifier afin de démystifier la garantie légale. L'exemple du iPod (ou iPad!) devient alors éloquent.



Méthodologie et annexes

- Cette étude a été réalisée par le biais de 3 groupes-discussion menés à Montréal (2 groupes) et à Toronto (1 groupe).
- Un groupe à Montréal réunissait des 25-34 ans (21 novembre, 17h30), tandis que l'autre comptait des 35-44 ans (21 novembre, 19h30). Celui de Toronto (24 novembre, 18h00) regroupait finalement des 25-44 ans.
- Les participants ont reçu un montant de 60\$ à Montréal et de 75\$ à Toronto pour les remercier de leur participation.
- Les sessions ont duré environ 120 minutes chacune et ont été enregistrées sur bande vidéo.
- L'animation des trois séances a été assurée par Benoit Cyrenne, associé chez Substance stratégies.

Note importante:

Les commentaires recueillis dans le cadre de groupes-discussion contribuent à mieux cerner un phénomène et permettent de mieux comprendre certaines réalités plus subtiles. Qui plus est, on ne peut prétendre à la généralisation ou à la représentativité statistique de ceux-ci.

Simplifier pour amplifier

208, rue Dominion Montréal (Qc) H3J 2X1
www.substance-strategies.com



substance stratégies

ANNEX 3: Survey of Governmental and Non-Governmental Organizations

Montréal, le 30 mars 2012

PAR COURRIEL

Objet : Recherche sur les régimes de garantie légale au Canada
Questionnaire de participation

Madame, Monsieur,

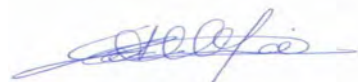
L'Union des consommateurs est un organisme sans but lucratif voué à la défense et à la promotion des droits des consommateurs par le biais de l'éducation, de la recherche et de la représentation.

Nous effectuons présentement une recherche sur les régimes de garanties légales intitulée : L'adéquation des régimes de garantie légale au Canada, financée par le Bureau de la consommation d'Industrie Canada. Nous tentons notamment de répondre aux questions suivantes: Les garanties légales protègent-elles suffisamment le consommateur? Sont-elles faciles à faire appliquer ou leur applicabilité est-elle au contraire illusoire ou trop compliquée? Qu'est-ce qui est réellement couvert par cette garantie? D'autres législatures étrangères ont-elles réussi à définir un cadre de garanties légales plus facile d'application?

Lors d'une première prise de contact avec votre organisme en décembre 2011, nous avons sollicité votre participation à notre recherche. Pour y donner suite, nous vous soumettons un questionnaire afin de connaître votre point de vue du régime de garantie légale en vigueur dans votre province ou territoire. Vous trouverez annexé aux présentes ledit questionnaire, ainsi que les comptes rendus d'un sondage et d'un groupe de discussion que nous avons menés sur le sujet.

Nous vous serons gré de bien vouloir nous faire parvenir le questionnaire complété au plus tard le vendredi 13 avril 2012 par courriel (labelle@consommateur.qc.ca). L'Union des consommateurs vous remercie d'avance de votre participation.

Cordialement,



Yannick Labelle, avocate
Analyste, Pratiques commerciales et Protection du consommateur
Tél.: 514 521-6820 poste 240
Ligne sans frais: 1-888 521-6820
labelle@consommateur.qc.ca

pj.

La force d'un réseau

Nos membres associatifs

ACEF ABITIBI-TÉMISCAMINGUE
ACEF AMIANTE – BEAUCE – ETCHEMINS
ACEF DE L'EST DE MONTRÉAL

ACEF DE L'ÎLE-JÉSUS
ACEF DE LANAUDIÈRE
ACEF DU NORD DE MONTRÉAL
ACEF ESTRIE

ACEF GRAND-PORTAGE
ACEF MONTRÉGIE-EST
ACEF RIVE-SUD DE QUÉBEC
ACQC

6226, rue Saint-Hubert, Montréal (Québec) Canada H2S 2M2

T : 514 521 6820 | Sans frais : 1 888 521 6820 | F : 514 521 0736

info@uniondesconsommateurs.ca | www.uniondesconsommateurs.ca



Montreal, March 30th 2012

BY MAIL

**Subject: Research on legal warranties in Canada
Questionnaire**

Madam, Sir,

Union des consommateurs is a Quebec independent not-for-profit organization devoted to advance consumer interests and rights through research, education and advocacy.

We are presently working on a research project on legal warranties, funded by the Canadian Office of Consumer Affairs (Ministry of Industry). Our research, entitled *Adequacy of Legal Warranty Plans in Canada*, will attempt to answer the following questions: Do legal warranties sufficiently protect Canadian consumers? Is the enforcement of legal warranties easy? Are the legal warranties regulatory schemes too complicated? What is actually covered by this warranty? Have other foreign legislatures been able to define legal warranties regulatory frames that are easier to apply?

We first got in touch with your organization in December 2011 requesting your participation in our research. To follow suite, we have enclosed a questionnaire as well as the summary of a survey and of discussion groups that we have carried out on the subject of legal warranties in Canada.

Would you be so kind as to fill out the enclosed questionnaire and to send it back to our organization by Friday the 13th of April 2012 at the following email (labelle@consommateur.qc.ca). Union des consommateurs is grateful for your participation in the present study.

Sincerely,

Yannick Labelle, Attorney
Consumer Protection and Commercial Practices Analyst
Phone: 514 521-6820 ext. 240
Toll free: 1-888 521-6820
labelle@consommateur.qc.ca

Enclosure

La force d'un réseau

Nos membres associatifs

ACEF ABITIBI-TÉMISCAMINGUE
ACEF AMIANTE – BEAUCE – ETCHÉMIN
ACEF DE L'EST DE MONTRÉAL

ACEF DE L'ÎLE-JÉSUS
ACEF DE LANAUDIÈRE
ACEF DU NORD DE MONTRÉAL
ACEF ESTRIE

ACEF GRAND-PORTAGE
ACEF MONTRÉGIE-EST
ACEF RIVE-SUD DE QUÉBEC
ACQC

6226, rue Saint-Hubert, Montréal (Québec) Canada H2S 2M2

T : 514 521 6820 | Sans frais : 1 888 521 6820 | F : 514 521 0736

info@uniondesconsommateurs.ca | www.uniondesconsommateurs.ca

QUESTIONNAIRE

Organismes gouvernementaux et associations de consommateurs

Présentation de l'organisme

L'Union des consommateurs est un organisme à but non lucratif du Québec qui regroupe plusieurs Associations coopératives d'économie familiale (ACEF), l'Association des consommateurs pour la qualité dans la construction (ACQC) ainsi que des membres individuels. La mission d'Union des consommateurs est de représenter et défendre les droits des consommateurs, en prenant en compte de façon particulière les intérêts des ménages à revenu modeste.

L'Union des consommateurs agit principalement sur la scène nationale, en représentant les intérêts des consommateurs auprès de diverses instances politiques, réglementaires ou judiciaires et sur la place publique. Parmi ses dossiers privilégiés de recherche, d'action et de représentation, mentionnons le budget familial et l'endettement, l'énergie, les questions liées à la téléphonie, la radiodiffusion, la télédistribution et l'inforoute, la santé, l'alimentation et les biotechnologies, les produits et services financiers, les pratiques commerciales, ainsi que les politiques sociales et fiscales.

Présentation du projet :

Notre projet de recherche, comme l'indique son titre, porte sur L'adéquation des régimes de garantie légale au Canada. Notre recherche tente d'évaluer cette adéquation sur deux plans, soit sur celui de l'efficacité réelle de ces régimes face aux réalités du marché et aussi sur celui de la capacité des consommateurs de faire appel à ces protections, soit leur connaissance des garanties et des recours et l'efficacité de ces recours. Nous tenterons par le biais de notre recherche, à partir de l'analyse de textes et de sondages d'opinion, de répondre à une série de questions, notamment: pourquoi le consommateur semble-t-il ne pas se satisfaire de la garantie légale? Pourquoi semble-t-il subsister une méconnaissance de la garantie légale? Celle-ci protège-t-elle adéquatement les consommateurs? Quelles sont les limites des régimes de garantie légales que nous retrouvons au Canada? Existe-t-il des modèles innovateurs qui ont fait leur preuve?

Dans le cadre de notre recherche, nous tenterons également de connaître le point de vue des organismes gouvernementaux chargés de la protection des consommateurs et des organismes non gouvernementaux œuvrant auprès des consommateurs.

Le questionnaire

1. Identification de votre organisme

Nom de l'organisme :
Adresse :
Personne à contacter :
Champ d'activité :
Courriel :

2. Au cours des cinq (5) dernières années avez-vous reçu des plaintes ou des demandes d'information de la part de consommateurs concernant la garantie légale? (Si c'est le cas, veuillez indiquer le nombre de plaintes et/ou de demandes d'information reçues).

3. Veuillez cocher le type de questions sur la garantie légale le plus souvent posées par les consommateurs :

- Existence de la garantie légale
- Portée de la garantie légale
- Durée de la garantie légale
- Limites de la garantie légale
- Obligations du fabricant / vendeur / commerçant
- Recours disponibles
- Autre (Spécifier)

4. Si vous disposez d'exemple plus précis de demandes d'information de la part des consommateurs, veuillez les indiquer ici :

5. Quels types de conseils offrez-vous aux consommateurs qui tentent de ou qui éprouvent des difficultés à faire appliquer la garantie légale (démarches possibles, recours disponibles, droit et procédures applicables, etc.)?

6. Selon un sondage et des groupes de discussion menés par notre organisme, les consommateurs ont un niveau de connaissance déficient des régimes de garantie légale. De plus, une fois informés sur la garantie légale, les consommateurs sont d'avis que certains éléments des textes qui prévoient des régimes de garantie légale sont difficiles d'interprétation et d'application. Quelle interprétation donnez-vous aux termes suivants (s'ils existent dans la loi de votre province ou territoire) dans le cadre de la garantie légale?

- a. Le terme « Usage auquel il est normalement destiné » :
- b. Le terme « Servir à un usage normal » :
- c. Le terme « Durée raisonnable » :

- d. **Le terme « consommateur raisonnable »**
 - e. **Le terme « raisonnablement satisfaisant »**
 - f. **Le terme « Qualité marchande » :**
 - g. **Le terme « Fonctionne de manière adéquate» :**
- 7. Est-ce que la jurisprudence confirme votre interprétation des termes mentionnés à la question précédente?**
- 8. Votre organisme a-t-il entrepris des démarches en vue de conscientiser les consommateurs quant à leurs droits et recours en lien avec la garantie légale (ex. campagne publicitaire, dépliant, site Internet, kit d'information) ? Spécifier:**
- 9. Avez-vous entrepris des démarches afin de conscientiser les commerçants des obligations qui leurs incombent en vertu du régime de garantie légale?**
- 10. Quelles sont les démarches et actions entreprises par votre organisme afin de faciliter la mise en œuvre de la garantie légale (ex : conciliation, médiation, etc.)?**
- 11. a. Est-ce que votre organisme a déjà entrepris des recours en lien avec la garantie légale contre des commerçants?**
- b. Si oui, sur quels aspects de la garantie légale ont porté ces recours?**
- 12. Selon vous, quels sont les avantages et inconvénients de régime de garantie légale en vigueur dans votre juridiction.**
- 13. Autres commentaires :**

Nous vous remercions d'avoir pris le temps de remplir le présent questionnaire.

Vous pouvez nous le retourner aux soins de Me Yannick Labelle, Analyste en protection du consommateur et pratiques commerciales, à l'adresse suivante : labelle@consommateur.qc.ca au plus tard le **lundi 23 avril 2012.**



Research project 2011-2012: *Adequacy of Legal Warranty Plans in Canada.*

QUESTIONNAIRE

Governmental agencies and consumer protection groups

WHO ARE WE?

UNION DES CONSOMMATEURS is an independent, not-for-profit organization devoted to advance consumer interests and rights through research, education and advocacy. We are a non-profit organization whose membership is comprised of several ACEFs (Associations coopératives d'économie familiale), l'Association des consommateurs pour la qualité dans la construction (ACQC), as well as individual members. Our mission is to advocate for the rights of consumers, with particular emphasis on the rights of low-income households.

Union des consommateurs is active mainly at the national level, by advocating for the interests of consumers before political, regulatory or legal judiciary authorities or in public forums. In terms of research, action, and advocacy, its main areas of interest include the following: family budget and indebtedness, energy, telephony, broadcasting, teledistribution and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policies.

OUR PROJECT

As the title indicates, our research examines the Adequacy of Legal Warranty Plans in Canada. We aim to evaluate legal warranties regulations on two fronts: Firstly, we will evaluate the regulation's efficacy, taking into consideration the realities of the market. Secondly, we will evaluate the capacity of consumers to effectively use those protections: their knowledge of legal warranties regulations, of the rights, protection and recourses bestowed to them by Canadian laws. By analysing survey, discussion groups and doctrine, we will attempt to answer the following questions, amongst others: Why do consumers seem to be dissatisfied with legal warranty measures? Do legal warranties sufficiently protect consumers? What are the limitations of legal warranties schemes in Canada? Have other foreign legislatures been able to define legal warranties that are easier to apply?

Another very important element of our research is the point of view of governmental bodies in charge of consumer protection in Canada, as well as the point of view of non-governmental organizations whose mission is to defend consumer rights. We are therefore requesting your participation in our research by filling out the present questionnaire about legal warranties scheme in your province or territory.

Please be aware that the present questionnaire concerns general legal warranty schemes and not specific regulations such as Quebec's legal warranty scheme for used vehicles.

THE QUESTIONNAIRE

1. Your organization:

Name of the organization:

Address:

Field of activity:

Resource person:

Email:

2. During the last five (5) years, has your organization received any complaints or request for information from consumers in regards to legal warranty? If the answer is yes, please indicate the amount of complaints and/or requests for information received.

3. Please indicate the type of questions on legal warranties that you receive the most often from consumers:

- Existence of the legal warranty
- The coverage of the legal warranty
- The duration of the legal warranty
- The limitations of the legal warranty
- The obligations of the manufacturer/the vendor/ the merchant
- The judicial recourses
- Other (please specify)

4. If you have specific examples of complaints or request for information received from consumers, please indicate them below:

5. What type of information do you provide to consumers attempting to or having difficulties to get the legal warranty respected (ex: application of the law, recourses, rights and procedures, etc.)?

6. According to a survey and to discussion groups carried out by our organization, Canadian consumers have a very limited knowledge of their rights in regards to legal warranties. Furthermore, when those consumers were informed of the existence and of the content of legal warranties scheme in their provinces, they felt that some terms and concepts used in legal warranties regulations were hard to interpret and to apply. What is your organization's interpretation of the following terms (if they exist in the legal warranty legislation of your province or territory)?

a. Purpose for which good or ordinarily used :

b. Durable in normal use:

c. For a reasonable length of time:

- d. **Reasonable consumer:**
 - e. **Reasonably satisfactory:**
 - f. **Merchantable quality:**
 - g. **Adequate working condition:**
- 7. Does the jurisprudence confirm your interpretation of the terms mentioned above?**
- 8. Has your organization taken any measures in order to raise consumer awareness of their rights and recourses in regards to legal warranties (ex: leaflets, Website, information kit, ad campaigns, etc.)?**
- 9. Has your organization taken any measures in order to raise manufacturers' and sellers' awareness of their obligations in regards to legal warranties?**
- 10. What are the measures and steps taken by your organizations in order to facilitate the application of legal warranties in your jurisdiction (ex.: mediation, conciliation, etc.)?**
- 11. a. Has your organization ever taken any legal actions against a manufacturer or a seller in relation to legal warranties?**
- b. If so, to what aspects of legal warranties did the legal actions pertain?**
- 12. In your opinion what are the pros and cons of the legal warranty scheme in effect in your jurisdiction?**
- 13. Other comments:**

Thank you for taking the time to fill out the questionnaire.

We would be grateful if you could return the questionnaire to our organization to the attention of Yannick Labelle, Consumer protection and policy analyst at labelle@consommateur.qc.ca before Monday the **23rd of April 2012**.