CORRESPONDENCE
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Canadian Regulation of Foreign Investment

TO THE EDITOR:

In "Canadian Regulation of Foreign Investment: The Legal Parameters",[1] the author, James Arnett, says[2] that "it may well be" that federal legislation restricting foreign investment would contravene the Bill of Rights as being discriminatory against aliens by reason of their "national origin". I know of no cases interpreting the meaning of the phrase "national origin" in the Bill of Rights, but the English House of Lords has, in the past year, interpreted the meaning of the phrase "national origins" in their Race Relations Act, 1968.[3] In *London Borough of Ealing* v. *Race Relations Board*,[4] it was held that discrimination on the ground of "national origins" meant discrimination either on the basis of the national group to which a person belongs or on the basis of the state of which he was a national at the time of his birth, either of which basis was an entirely different matter than that of that state of which he was a national at the time of the alleged discrimination. In other words, discrimination on the basis of "national origins" is not synonymous with discrimination on the basis of current nationality.

If this definition were to be adopted here, legislation restricting investment by alien persons or corporations would not contravene the Bill of Rights if it discriminated against them only on the basis of their current nationality and not on the basis of their membership in a national group (assuming them to be natural persons) or their nationality at birth or incorporation.

LESLIE KATZ*

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[1] (1972), 50 Can. Bar Rev. 213.
[2] At p. 232.
[3] C. 71.
[4] [1972] 1 All E.R. 105.
* Leslie Katz, of the Ontario Bar, Toronto.

Exemption Clauses in Contracts

TO THE EDITOR:

Last December's issue of the *Review* contained a comment on Exemption Clauses in Contracts by Mr. S. M. Waddams of the Faculty of Law of the University of Toronto.[1] Towards the end of it, Mr. Waddams referred to the recent report on this topic by the Law Commissions in Britain, and to The Consumer Protection Act of Manitoba as having already implemented some of the changes now proposed by the Commissions. As the draftsman of these provisions in the Manitoba statute, I would like to make some minor additions to Mr. Waddams' comment.

First of all, section 58 of The Consumer Protection Act[2] is not an original creation. I used as a model an English Statute now more than thirty years old, section 8 of the Hire Purchase Act, 1938.[3] The application of section 8 is, of course, quite restricted; it applies only to hire purchases of goods of a value of not more than £100, but, since conditional sales are not used in England, hire purchases are much more common there than they are here. This means that England has had over thirty years' experience with a provision of this nature; so far as I know, it has not in practice given rise to any difficulties of interpretation or application.

What is new in the Manitoba statute is the extension of this provision in two directions:

(1) It is extended upwards so that it will cover all private and some commercial purchases up to $7,500.00.

(2) It is extended downward so that it will include cash purchases in a department store.

It is in fact because of the latter extension that the use of a statement of the general condition of the goods (as opposed to a list of specific defects) needs to be permitted. If it were not permitted, department store sales of defective or damaged goods at appropriately reduced prices could present the store with serious difficulties in preparing a proper description of the goods, and this entirely harmless commercial practice might be inhibited.

The implied condition that services shall be performed in a skilful and workmanlike manner probably does not make any change in the law; surely such a condition has always been implied unless excluded. The real change here is that the exclusion must be in writing. Of course, this can be done by a standard form, but I wonder how many contractors are prepared to distribute printed forms which admit that their performance may be unworkmanlike. I cannot myself recall ever having seen such a form.

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[1] (1971), 49 Can. Bar Rev. 578.
[2] R.S.M., 1970, c. C-200.
[3] 1 & 2 Geo. VI, c. 53.

Although in theory section 58 of the Manitoba statute makes a far-reaching change in the law, I suggest that in practice it has really only restored the situation that used to exist until about fifty years ago. It was, I suggest, during or not long before the 1920's that clauses excluding implied conditions began to be used in retail sale contracts. I do not see how this can be due to any strengthening of the economic position of the seller as against the buyer; why is the seller any stronger in comparison to the buyer today than he was a hundred years ago? I suggest that these exclusionary clauses are an unexpected consequence of the codification of the law in the Sale of Goods Act.[4] Prior to that, a seller's obligations could only be ascertained from a careful study of numerous reported cases, and it is difficult to exclude an obligation which is not clearly understood to start with. The Sale of Goods Act for the first time presented the commercial community with a statement of the implied conditions which was clear, concise and complete, and by so doing, it invited them to exclude them whenever it was both possible and advantageous to do so. This is a point that should be borne in mind whenever any part of commercial law is being codified.

There is one point in Mr. Waddams' comment on which I cannot quite follow his line of thought. This concerns a buyer's right to recover damages beyond the price of the goods. I agree that in order to do this, the buyer must be able to treat the breach of condition as a breach of warranty. I do not, however, agree that the usual effect of a breach of condition is to allow the buyer to return the goods; its effect is to permit him to reject the goods. This is very different, because once the buyer has accepted the goods, he cannot thereafter reject them, and a buyer can hardly suffer injuries from using the goods until after he has accepted them. He then has no choice in the matter; for the Sale of Goods Act does not say that he may treat the breach of condition as a breach of warranty, it says that he must. The governing provision is not subsection (1) of section 12 of the Ontario Act, but subsection (3) of that section.[5] This section in the Sale of Goods Act is not restricted to conditions implied by that Act; it applies to all conditions, and therefore also to express conditions and to any implied by another Act. It would appear that it would be excluded if the contract expressly gave the buyer the right to return defective goods after acceptance. It would seem to me that the question of contracting out of some of the possible consequences of a breach of condition is a little more complex than Mr. Waddams allows.

Mr. Waddams also refers to the difficulties of establishing a

[4] First codified in England in 1893 by 56 & 57 Vict., c. 71.

[5] The number 12 refers to the Ontario Act, R.S.O., 1970, c. 421; the corresponding provision is s. 11(1) in England and s. 13 in Manitoba, R.S.M., 1970, c. S-10.

satisfactory test of what constitutes a consumer sale. One problem that he does not mention is that the distinction between a consumer and a non-consumer sale will be of great importance to an assignee of the seller's rights in the case of sales on credit. It is vital to him to know whether the paper he is asked to discount relates to a consumer sale or not, because this may substantially affect his rights and obligations. The distinction between the two must therefore be made to depend entirely on factors which will be readily apparent on the face of the contract itself, and will be so apparent not just to a lawyer, nor even to a businessman, but also to a businessman's clerical employees. I do not believe it is possible to find a basis of distinction which will pass this test and will also be logically satisfying.

In conclusion, I see that Mr. Waddams has noticed the rather curious exclusion of vending machines and bottle coolers. Some parts of The Consumer Protection Act replace an earlier statute, The Consumer Credit Act of 1965.[6] That Act excluded vending machines and bottle coolers, and the exclusion has simply been carried forward into the new Act. I do not pretend to know why they were excluded in 1965.

R. B. CANTLIE*

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[6] S.M. c. 15.

*R. B. Cantlie, Counsel, The Manitoba Securities Commission, Winnipeg.