

# THE FUTURE OF CANADIAN CONSUMERISM

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## I. *Introduction.*

Fifty years ago the word consumerism had not been coined and the suggestion that consumer law should be taught as a separate intellectual discipline would have been regarded as fanciful. Today the one has become a household word and the other an accomplished fact.

Much has happened in the intervening period to justify this transformation. Concern about abuses in the marketplace is as old as the recorded history of civilized man, but the tempo of change in the character of the marketplace and the types of goods and services offered in it has been greater in this century than during any comparable period in Canadian history. From a predominantly agrarian society we have moved into a predominantly urbanized society. The simple wants of yesteryear have been replaced by the modern supermarket with its more than 7,500 items. The products of the agrarian society were for the most part uncomplicated, produced or manufactured locally, and buyer and seller dealt with each other on a basis of relative equality.

All this too has changed. Modern technology has placed at the disposal of the Canadian consumer a bewildering variety of highly complex products, consumable and non-consumable, many of which were unknown before the war. The notion of the consumer bargaining from a position of equal strength has become a fiction in any but the most attenuated sense. The contract of adhesion has replaced the hand-shake and a multi-billion dollar credit industry is threatening to make the cash transaction a museum curiosity. The merchant himself has largely become a conduit pipe for goods manufactured and prepackaged often thousands of miles from the place of sale. The "medium is the message" accurately describes the modern salesman as a sophisticated advertising industry first creates the mass consumption markets and then sustains them by claims and images often far removed from reality.

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The consumer's legitimate ignorance and his almost total dependence on the fairness and competence of those who supply his daily needs have made him a ready target for exploitation. The rapidly escalating number and variety of the complaints and enquiries received by Box 99, the federal consumer listening post, the provincial consumer protection bureaux, and the popular newspaper "action" columns attest to the consumer's concerns and vulnerability. It is not simply a matter of protecting him against outright frauds, although fraudulent transactions of all types still abound. The much greater challenge is to redress the serious imbalance in all aspects of the modern marketplace—a marketplace that encompasses the public sector no less than the private sector and the supply of services no less than the supply of goods—and this requires a magnitude of government involvement far transcending the modest levels experienced in earlier periods of Canadian history.

Despite these easily documentable facts, there are still many who question the vitality and the authenticity of the consumer movement. To some it is an ephemeral phenomenon—like the craving for striptease or the attraction of miniskirts—or, as a Canadian senator once claimed, an outlet for the energies of frustrated women unable to keep their husbands under control. These exotic views may be left to the judgment of history. Others see the consumer movement as a left wing political plot in which consumer grievances are used as a Trojan horse to undermine the free market system. This view too will not bear the test of serious analysis. The leading consumer advocates on both sides of the border are drawn from all parts of the political spectrum or have no known political affiliations of any kind. Consumer concerns are as acute, perhaps more so, in communist countries as in countries enjoying a mixed type of economy. Consumerism is no more a political ideology than is labour law or poverty law although solutions to particular problems may be influenced by one's conceptions of the role of the modern marketplace.

A more challenging criticism comes from those who deny that there is a functional or intellectual unity to the proliferating variety of causes that are espoused by consumerists. In their view they are often only old problems represented under new labels such as the problems of landlord and tenant relations, warranty problems in the sale of goods and services, and the issue of safety, first, in the realm of food and drugs and, now, with respect to motor vehicles and other hazardous household products. There is some substance to this argument but not enough to tilt the balance. Some overlapping occurs between many disciplines and it is no more harmful here than it is there.

Functionally, the thread that binds all consumer problems

together is the perception that they affect the individual as a purchaser of goods and services for his personal use or consumption. Analytically, I believe it will be found that every consumer problem exhibits one or more of the following characteristics. First, a disparity of bargaining power between the supplier of goods or services and the consumer to whom they are being offered; secondly, a growing and frequently total disparity of knowledge concerning the characteristics and technical components of the goods or services; and, thirdly, a no less striking disparity of resources between the two sides, whether that disparity reflects itself in a consumer's difficulty to obtain redress unaided for a legitimate grievance or in a supplier's ability to absorb the cost of a defective product as part of his general overhead as compared to the consumer to whom its malfunctioning may represent the loss of a considerable capital investment.

Two other attacks on consumerism may be briefly noted. One is the self-serving argument that "we are all consumers". If this means no more than that consumerists have no monopoly of interest or concern, it is a legitimate point. But usually the protestation is offered by the suppliers of goods or services or their spokesmen, the inference being that their dual role as suppliers and consumers ensures automatic fair play when they appear as suppliers. This is palpably fallacious. The dominant interest of a supplier is to promote his business interests as he sees them; if he has any consumer concerns (which are in any event unlikely to coincide with his professional interests) they will quickly be suppressed in favour of those considerations that provide his profit or his livelihood.

The same fallacy underlies the other line of contention. It is in the interest of business, it is argued, to keep the consumer happy because only satisfied consumers make good customers. Thus, the argument proceeds, this self-regulating rule of the marketplace protects the consumer and ensures an automatic type of equilibrium. That there may be, and in the long run often is, a common identity of interest may be readily conceded. The same no doubt could be said of other areas in which daily conflicts are common, such as labour relations or the confrontation between political parties.

But the self-operating character of the identity principle is far from self-evident. The evidence indeed points very much in the opposite direction. Almost every important piece of post-war consumer legislation has been opposed by some segment of the business community. However much that opposition may have been disguised in rhetoric about Big Brotherism and unjustifiable interference with the mechanism of the marketplace, the truth is that on those occasions the affected industries did not see regula-

tion as being in *their* own best interests, whatever may have been the position from the consumer's point of view. There is nothing reprehensible about this pursuit of group interests. We take it for granted in all other spheres in our pluralistic society. What is surprising is that it should be thought that consumer-supplier relations are somehow exempt from this basic axiom of political and economic life.

## II. *What Has Been Accomplished to Date.*

In the last analysis what count are not theories of consumerism but the effectiveness with which consumer problems are being diagnosed and resolved. The process is an ongoing one as new areas of consumer concerns are exposed and old ones tend to fade away. The problems, procedural no less than substantive, are infinite in their variety and attempts to force them into procrustean beds must be eschewed. Nevertheless, classifications are helpful because they indicate the elements that are common to groups of problems or the approach most suitable for their solution. One of the earliest efforts was contained in President Kennedy's famous Consumer's Bill of Rights Message of 1962. Viewed in the perspective of history its scheme is seen to be too simplistic and seriously incomplete. Nevertheless, it provides a suitable starting point for a description of the more important consumer legislation and other programmes that have been adopted by the provinces and the federal government during the past twenty years.

1. *The Right to Safety.* This rubric covers an ever-expanding list of goods and services, ranging from food and drugs, insecticides, motor vehicles and indeed all potentially hazardous products, to safety in the air and at sea. Food and drugs legislation goes back to the early days of Confederation, and Canada's Act<sup>1</sup> and its administration are reputed to be among the best in the Western world. However, as the thalidomide tragedy illustrated in the early '60's, constant vigilance is necessary to keep pace with the complexity of modern drugs and their rapidly proliferating numbers. Canada was also among the first countries to adopt a comprehensive Hazardous Products Act<sup>2</sup> and this has been followed by the Motor Vehicle Safety Act.<sup>3</sup>

2. *The Right to Honesty.* This right did not figure separately in President Kennedy's message. It strikes nevertheless at the heart of the modern marketing system. Senator Magnuson has estimated<sup>4</sup> that Americans lose several billion dollars annually

<sup>1</sup> R.S.C., 1970, c. F-27.

<sup>2</sup> R.S.C., 1970, c. H-3.

<sup>3</sup> R.S.C., 1970, c. 26 (1st Supp.).

<sup>4</sup> Magnuson and Carper, *The Dark Side of the Marketplace* (1968), p. 8.

in fraudulent selling schemes. Comparable figures are not available for Canada but, judging by the variety and frequency of the complaints, they must be substantial.

Canadian legislation in this field is both federal and provincial in origin and is directed at specific practices and the general prohibition of economic deceptions. Apart from the long-standing provisions in the Criminal Code, the federal government's contribution includes important provisions in the Food and Drugs Act,<sup>5</sup> the Weights and Measures Act,<sup>6</sup> the Combines Investigation Act<sup>7</sup> and, more recently, the Consumer Packaging and Labelling Act.<sup>8</sup> Post-war provincial legislation has struck at the high pressure tactics of door-to-door sellers through licensing and cooling-off provisions and has also considerably extended the scope of licensing legislation to include mortgage brokers, auto dealers, collection agencies, and other trades found to be in need of public regulation. "Referral sales" have been prohibited in a substantial number of the provinces and pyramid forms of franchising are also being brought under control.

3. *The Right to Fair Agreements.* This right is missing from President Kennedy's message, yet it is no less important than the consumer's right to honesty. The phenomenon of the contract of adhesion and the average consumer's inability to understand the fine print in the documents which he signs so readily has made him an easy victim of unfair bargains. Canadian reaction to these problems has been uneven. At the provincial level, insurance contracts were among the first to be regulated. The exposure of necessitous borrowers has aroused federal and provincial concern since at least the turn of the century and now finds expression in the Small Loans Act<sup>9</sup> and the provincially enacted Unconscionable Transactions Relief Acts.

In the post-war period attention has tended to focus on consumer credit practices and, most recently, the use of disclaimer clauses in all types of consumer sales. "Cut off" clauses in consumer credit agreements are now prohibited in most of the provinces. The efforts to preserve the buyer's rights have been augmented at the federal level by the addition of the important provisions in Part V of the Bills of Exchange Act.<sup>10</sup> The modest beginnings that have been made in several provinces to regulate the contents of

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<sup>5</sup> *Supra*, footnote 1, ss 5, 9, 20.

<sup>6</sup> R.S.C., 1970, c. W-7, rep. and re-enacted S.C., 1970-71-72, c. 36, ss 43, 44.

<sup>7</sup> R.S.C., 1970, c. C-23, ss 36-37.

<sup>8</sup> S.C., 1970-71-72, c. 41. The Act is still awaiting proclamation.

<sup>9</sup> R.S.C., 1970, c. S-11, as am.

<sup>10</sup> R.S.C., 1970, c. B-5, as am. R.S.C., 1970 (1st Supp.), c. 4.

consumer warranties<sup>11</sup> may be substantially enlarged if the recommendations of the Ontario Law Reform Commission<sup>12</sup> for the adoption of a comprehensive Consumer Products Warranties Act are implemented in that province and copied elsewhere. Though this list of legislative efforts, actual and potential, is significant, it is important to note that so far no province has adopted an unconscionability doctrine comparable to article 2-302 of the Uniform Commercial Code or section 5 of the Federal Trade Commission Act. Nor, with one exception,<sup>13</sup> have the provinces conferred a general power on their consumer protection officials to enjoin unfair or deceptive market practices.

4. *The Right to Know.* If the consumer is to shop wisely and efficiently, then he must be put in possession of those facts which will enable him to realize this goal. And they must be in a readily assimilable and comparable form. With other Western countries, Canada has long possessed grading and informational legislation affecting such products as food and vegetables, dairy products, and meat and poultry. In the '60's, much effort was expended to extend the disclosure principle to two new areas, truth in lending and truth in packaging. Both were ultimately successful though the victories were in some cases more apparent than real. To these measures there should be added two others, both federal in origin, the Textile Labelling Act<sup>14</sup> and the revised Weights and Measures Act.<sup>15</sup>

5. *The Right to Choose.* A large part of our economy is still predicated on the assumption that there is a free marketplace in which suppliers of goods and services will compete vigorously for the consumer's custom. Given this assumption, the consumer obviously has a heavy stake in any competition policy that is designed to foster and maintain the free market model. He has not fared particularly well so far. Reputable scholars question whether Canada even has a serious competition policy and, if the reaction to the draft Competition Bill<sup>16</sup> is any guide, it is going to be a long and uphill struggle to obtain a significant improvement over the existing Combines Investigation Act.<sup>17</sup> Consumers are particularly affected by the failure to bring services within its scope.

The consumer's stake is at least as great in the regulated

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<sup>11</sup> See *e.g.*, The Ontario Consumer Protection Act, R.S.O., 1970, c. 82, as am., s. 44a.

<sup>12</sup> Report on Consumer Warranties and Guaranties in the Sale of Goods (1972).

<sup>13</sup> The Department of Consumer Affairs Act, 1972, S.S., 1972, Bill No. 97, ss 8, 11.

<sup>14</sup> R.S.C., 1970, c. 46 (1st Supp.).

<sup>15</sup> *Supra*, footnote 6.

<sup>16</sup> Bill C-256, 1971.

<sup>17</sup> *Supra*, footnote 7.

areas of the economy and in protectionist legislation involving marketing schemes, tariffs, quotas, and anti-dumping orders. By and large the consumer's voice has been even less effectual in this area than in the area of competition policy.

6. *The Right to Privacy; the Right to Correct; and the Right to Security of Employment and Peace of Mind.* This congeries of themes did not figure in President Kennedy's Bill of Rights. They might well have been since all three are outgrowths of the tremendous post-war explosion in the use of consumer credit and the threat represented by the computer's capacity for effortlessly ingesting and reproducing the consumer's life history with varying degrees of accuracy and relevance.

Canadian efforts to grapple with the ensuing problems are still in their formative stages. In 1971, Manitoba adopted a strong Personal Investigations Act<sup>18</sup> and Saskatchewan has followed suit with a more modest measure.<sup>19</sup> Ontario has announced its intention to enact similar legislation in 1973.<sup>20</sup> It is also conceivable that the federal government may adopt a national privacy policy in the foreseeable future.<sup>21</sup>

The right to security of employment and peace of mind refers not to a guaranteed income but to our antiquated collection laws and the havoc frequently caused when a debtor's salary is garnished and the debtor is threatened with dismissal by his employer. Provinces such as New Brunswick, Ontario and British Columbia have made some progress in civilizing their collection laws but in many provinces the position is still far from satisfactory.<sup>22</sup>

7. *The Right to be Heard.* President Kennedy's message deservedly gave high importance to this item and the reluctance (or difficulty) which his successors have encountered in implementing the goal merely underscores its pivotal role in a proper framework of consumer rights. We have fared somewhat better in Canada. Our federal Department of Consumer and Corporate Affairs was one of the first to be established in the Western world and it has proved to be an important catalyst for sparking action at the provincial as well as the federal levels. The provincial representational response has been less glamorous and, on the whole,

<sup>18</sup> S.M., 1971, c. 23.

<sup>19</sup> Credit Reporting Agencies Act, 1972, S.S., 1972, Bill No. 78.

<sup>20</sup> A bill (Bill 23) was introduced in 1971, but was allowed to lapse. Another bill, Bill 229, was introduced on Nov. 23rd, 1972, and received second reading before the Legislature was prorogued. It is expected to be re-introduced at the spring session of the Legislature.

<sup>21</sup> Based presumably on the Report on Privacy and Computers (Dept. of Communications/Dept. of Justice, Ottawa, 1972).

<sup>22</sup> See generally, Ziegel, Consumer Credit and Debtor-Creditor Relations, a paper read at a Conference on Consumer Protection, Law Society of Upper Canada, Toronto, Feb. 10th, 1973.

less effective, but this could change. Saskatchewan has established a separate Department of Consumer Affairs. In Manitoba, Ontario, and Quebec, ministerial portfolios have been created with substantial consumer protection responsibilities. In addition, many of the provinces have established consumer protection bureaux or appointed consumer affairs officers with similar functions.

### III. *The Pitfalls of Legislation.*

There is a widespread assumption that legislation, once adopted, disposes of a problem. It is a view that serves the purposes of governments, for legislation creates an image of concern and response. And it costs very little. Nevertheless, it is often an erroneous view.

There are at least three main areas of concern. One is the unconscionable delay that often occurs between the appearance of a problem and the legislative response. The evils of referral sales have been well-known since the late '50's, yet Ontario only enacted remedial legislation in 1972.<sup>23</sup> Holder in due course problems in financed sale transactions have been a perennial source of litigation since the early '20's. The legislative response here was glacially slow and relief only came in 1970.<sup>24</sup> Some problems are better known for their longevity than the celerity of the legislative solutions. The contract of adhesion is a classical example.

It is nearly twenty years since the Royal Commission on Banking and Finance recommended raising the ceiling on loans subject to the regulation of the Small Loans Act from \$1,500.00 to \$5,000.00.<sup>25</sup> Two other bodies have made a similar recommendation.<sup>26</sup> The federal government has so far ignored the recommendations without troubling to explain its neglect or its disagreement with the recommendations if this is the basis of its inaction. These and many other examples that could be cited refute the notion that the consumer is king and that his interests receive meticulous attention.

The second major difficulty is that distressingly often the legislation is defectively drafted or fragmentary in character. The provinces tend to copy each other's legislation or to copy the legislation of other jurisdictions. This is a healthy phenomenon and one that promotes uniformity if the prototype is carefully con-

<sup>23</sup> S.O., 1972, Bill 108, s. 1, adding s. 46a to the Consumer Protection Act, *supra*, footnote 11.

<sup>24</sup> *Supra*, footnote 10.

<sup>25</sup> Report of the Royal Commission on Banking and Finance (Ottawa, 1964), p. 382.

<sup>26</sup> Special Jt. Com. of Sen. & House of Commons on Consumer Credit & Cost of Living, Report on Consumer Credit (Feb. 1967), p. 5; Can. Consumer Council, Report to the Minister of Consumer & Corp. Affairs on Consumer Credit (Dec. 1969; mimeo.), p. 4.



ceived. When it is not, the result merely perpetuates a bad precedent. Ontario, which was one of the earliest provinces to enact a general consumer protection act, provides some striking examples of all these characteristics. The Act provides<sup>27</sup> for a two day cooling-off period in door-to-door sales, yet there is no requirement that the consumer must be advised by the seller of his right of cancellation. In instalment sale transactions, the seller is required to obtain a court order to repossess the goods where two-thirds or more of the purchase price has been paid.<sup>28</sup> It has been held however<sup>29</sup> that he commits no offence when he repossesses without a court order. The crowning absurdity appears in section 44a, which was intended to outlaw disclaimer clauses in consumer sales.<sup>30</sup> Once again there is no penal provision or effective civil sanction, with the entirely predictable result that the section so far has been ignored with impunity by sellers of every description.<sup>31</sup>

The third and perhaps most serious difficulty is that much of the legislation is not being enforced or enforced adequately—and in some cases is not enforceable. This phenomenon may be a reflection of poor draftsmanship, inadequate resources, or lack of motivation. Often all three may be contributing causes. The consumer affairs officer in the Attorney General's Department of British Columbia started his official career with a desk in one of the passages in the legislative building. No doubt this is an extreme example, but it is easy to prove that the consumer protection bureaux in many of the provinces are seriously understaffed given the magnitude of the tasks they are expected to perform. Part II of the Ontario Consumer Protection Act provides an example of legislative overkill. It requires every "executory contract" for goods or services involving more than \$50.00 to be reduced to writing and to contain prescribed particulars.<sup>32</sup> Not surprisingly the requirement is more honoured in the breach than by its observance. Such results do little to ensure respect for the legislative process.

The misleading advertising provisions<sup>33</sup> in the Combines Investigation Act provide more complex examples of the problem of suppressing deceptive or unfair practices. Exclusive reliance on the criminal law sanction, the heavy burden of proof incumbent on the Crown, and the expense and sometimes difficulty of procuring the requisite evidence result in long drawn out trials which often end in the anti-climax of a paltry fine of a few hundred dollars.

<sup>27</sup> *Supra*, footnote 11, s. 33(1).

<sup>28</sup> *Ibid.*, s. 35.

<sup>29</sup> *R. v. Industrial Acceptance Corp. Ltd.*, [1970] 2 O.R. 407.

<sup>30</sup> The section was adopted in 1971.

<sup>31</sup> Report on Consumer Warranties, *op. cit.*, footnote 12, pp. 60-61.

<sup>32</sup> S. 31.

<sup>33</sup> Ss. 36-37, formerly ss. 33C and 33D.

The relative paucity of reported convictions<sup>34</sup> has encouraged the advertising industry to infer that the miscreants also are few and exceptional in number.<sup>35</sup> In this field however the rigidities and inadequacies of the enforcing machinery are not exclusive factors. An equal object for concern is the failure by some lower court judges to appreciate the gravity of white collar consumer crimes.

#### IV. *Interdepartmental Conflicts.*

The solutions for some of these weaknesses are obvious enough—more careful legislative research, larger staffs, a greater variety and more flexible remedies better tailored to the problems they are designed to solve. But not all the difficulties can be ascribed to legislative pitfalls and weak law enforcement. Formidable hurdles are created through the proliferation of government departments and agencies, most of which have some jurisdiction in areas of consumer concern.

No one ever assumed that the creation of departments of consumer affairs would automatically solve the problems. They were not expected to become superministries. But one was at least entitled to assume that they would act as spokesmen on consumer affairs before other government departments and agencies, whether in cabinet debate or at public hearings. The record has been disappointing. Time and again important issues involving the consumer's welfare have arisen which have been resolved with scant regard for his interests. This has been true of tariffs, of agricultural marketing legislation, and the numerous boards and tribunals entrusted with rate fixing functions at the federal and provincial levels.

The Economic Council of Canada envisaged<sup>36</sup> the establishment of an interdepartmental committee to handle consumer issues involving more than one government department. Obviously this solution is only practicable in a limited number of circumstances—those in which the issues are large enough, of a medium or long term character, and where jurisdiction is more or less evenly divided. In practice the device appears to have been used sparingly. Federal-provincial conferences and meetings of ministers and their officials concerned with consumer problems have been more successful, but the community of interests at this level is greater and

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<sup>34</sup> The Trade Regulation Branch of the federal Dept. of Consumer and Corporate Affairs has greatly intensified its efforts during the past few years.

<sup>35</sup> This point was repeatedly made at a Symposium on Misleading Advertising held in Montreal on Dec. 4th-5th, 1970, under the auspices of the Canadian Consumer Council.

<sup>36</sup> Economic Council of Canada, *Interim Report: Consumer Affairs and the Department of the Registrar General* (Ottawa, July 1967), p. 20.

there are fewer entrenched interests than there are at the single levels of government.

The need for more effective representation of the consumer's constituency before the independent agencies and government departments with important regulatory functions has been the subject of intensive hearings before the United States Congress.<sup>37</sup> The proposed solution is the establishment of an office of consumer advocate, whose main function would be to argue the consumer's case before other government organs. The proposal presents constitutional and functional difficulties especially if sought to be implemented in a Canadian context. However, the difficulties are not insuperable<sup>38</sup> and it should be possible to introduce the concept on a modified basis at the federal and provincial levels. Almost any solution would be an improvement on the present position.

#### *V. Access to the Courts and the Search for New Remedial Solutions.*

Disappointment over the performance of governmental protection agencies and the realization that excessive reliance on their resources is unhealthy and frustrating has led to the search for alternative channels for the ventilation of consumer grievances and the enforcement of consumer rights. At the same time such agencies as the Federal Trade Commission have made imaginative use of administrative powers in order to make their sanctions more effective.

A logical recourse for an aggrieved consumer should be the courts, but for a variety of reasons the two have become increasingly estranged from one another. The cost of litigating is probably the most important deterrent but it is not the only one. The strict rules of evidence, the dilatoriness of judicial proceedings, and unfamiliarity with legal procedures are also important factors. The early hopes entertained for the small claims courts have not been realized. As several recent studies have shown,<sup>39</sup> "the people's court" has largely become a collection agency for creditors. Perhaps it always was naive to believe that they would serve the citizen's purpose in the absence of a legal aid office attached directly to the court and readily available to offer guidance and assist-

<sup>37</sup> See Hearings before a Subcommittee of the Committee on Government Operations, H.R., 92d Cong. 1st Sess., on H.R. 16 and Related Bills, H.R. 3809 and Related Bills, and H.R. 254 and H.R. 1015 (April 27th, 28th; May 6th, 24th; and July 12th, 1971).

<sup>38</sup> For an admirable study of the problems from a Canadian point of view, see Edward Belobaba, Jack Berkow, Mark Denhez, and Ellen Macdonald, *On the Question of Consumer Advocacy—A Working Paper* (Canadian Consumer Council, Aug. 1972).

<sup>39</sup> Thomas Vickers, *Small Claims Survey 1970* (Vancouver; mimeo); Gerbrandt, Hague & Hague, *Preliminary Study of Small Claims Court Procedure in Manitoba* (Winnipeg, Oct. 1972; mimeo).

ance. At any rate, it seems clear that these are the minimum steps necessary to revitalize the small claims courts. Neighbourhood law offices and community legal centres are also important new tools in the delivery of legal services to the underprivileged but they are neither designed nor are they equipped to provide corresponding services to consumers at large. Some attempts have been made in a number of jurisdictions to establish community or industry sponsored dispute settlement machinery, but the durability of these experiments still has to be proven.

Industry self-regulation is an attractive slogan but the difficulties of advancing it beyond this point are formidable. The professions are not necessarily a suitable precedent. However effective they may be in disciplining their members for the grosser forms of misconduct, they have not traditionally shown themselves sensitive in protecting the consumer's welfare in other respects. Some have suggested the introduction of public representatives on the governing councils of professional and para-professional bodies.<sup>40</sup> Whether this will amount to more than tokenism remains to be seen. In any event, it is not a technique that can be readily applied to more loosely knit segments of the economy.

Thus industry self-regulation, while to be encouraged, should be regarded as an adjunct to and not as a substitute for enforcement of consumers' rights through the more traditional channels.

An important weapon that has recently been refurbished in the United States and is beginning to make its appearance in Canada<sup>41</sup> is the consumer class action. The theory of the action, which has its origin in equity, is that an ascertainable class of consumers with a common cause of action can be represented by a single member of the class. Its great attractions are that it enables an individual claim for a trifling amount to be transformed into a claim for many thousands and even millions of dollars. In the United States, class actions have been resorted to in such cases as a claim against a taxi cab company for overcharging, against a sales finance company to hold it responsible for the fraudulent conduct of a dealer with whom it was closely associated, and against a large department store for making improper credit life insurance charges. The class action is widely regarded as one of the most important new weapons for securing consumer justice.<sup>42</sup> No

<sup>40</sup> Ontario has implemented the suggestion with respect to the Law Society of Upper Canada. See S.O., 1970, c. 19, s. 26. See also Royal Commission Inquiry into Civil Rights, Report No. 1, Vol. 3 (1968), c. 79.

<sup>41</sup> See e.g., *Chastain et al. v. B.C. Hydro & Power Authority* (1973), 32 D.L.R. (3d) 443 (B.C.).

<sup>42</sup> For some of the voluminous American literature, see Kalven & Rosenfield (1941), 8 U. Chi. L. Rev. 684; Starrs (1969), 49 Boston U. L. Rev. 211 and 407; Eckhardt (1970), 45 Notre Dame Law 663. For two Canadian Studies see Trebilcock (1972), 22 U. of T. L.J. 1 and Belobaba *et al.*, *op. cit.*, footnote 38, Part II.

doubt, like other representative actions, it is capable of being abused but adequate safeguards can readily be built into the enabling legislation.

The legitimacy of class actions is recognized in Canada in the federal and provincial rules of courts,<sup>43</sup> but have hardly begun to be used for consumer litigation purposes. The reasons are several. One is the judgment of Lord Justice Fletcher Moulton in *Markt & Co. Ltd. v. Knight Steamship Company, Ltd.*<sup>44</sup> which is often regarded as fatal to any class action whose members have suffered different amounts of damages. A second reason is the danger of the plaintiff being mulct in heavy costs if the action is unsuccessful, even assuming his lawyer is willing to handle the case on a contingency fee basis in a jurisdiction where such arrangements are permitted. Finally, there is an intangible element: the reluctance to pioneer in a new procedural and substantive area of law where the pitfalls are many and the judicial reaction may be expected to be more than usually unpredictable.

Only time and precedent can remove the psychological barriers. There is every reason however why the rules of court should be modernized to remove the millstone of the *Markt* doctrine, to clarify the issue of costs, and to introduce safeguards along the lines of Rule 23 of the American Federal Rules of Procedure to prevent abuse of the new remedy.

#### VI. *Consumer Education.*

As governments are confronted by a rapidly escalating number of consumer problems and demands for more and more legislation, so the temptation becomes almost irresistible to look for a simple and comprehensive solution. Consumer education appears to fill this need. As a solution it is particularly attractive because it is non-controversial, non-legislative, and hopefully inexpensive. It also accords with a still deeply ingrained ethic that the ultimate responsibility for protecting his interests should fall on the consumer.

Even if one were to accept the initial premise, the difficulties would be formidable. Who is to provide the education? To whom should it be directed and at what stage? What should be its content? What methods and what media should be used and how is one to measure the results of the efforts, and can they ever match in volume and effectiveness the daily stream of commercial advertising? An analysis of these and related questions shows that they contain the seeds of discord as acute as any legislative solution.

<sup>43</sup> See e.g., Rule 75, Rules of Practice & Procedure of the Supreme Court of Ontario.

<sup>44</sup> [1910] 2 K.B. 1021. Cf. *Farnham v. Fingold et al.*, [1973] 2 O.R. 132, esp. at pp. 136-137 (C.A.).

There are other and no less serious difficulties. Consumer education will not enable a consumer to determine whether an advertisement is true or false, whether a product is safe to use or what ingredients it contains. Nor will it enable a poor consumer to shop more effectively for consumer credit if only one type of credit grantor is willing to do business with him. No amount of consumer education will strengthen the consumer's bargaining position in a contract of adhesion. Many products and services are so complex that their characteristics cannot be accurately reduced to the simple terms necessary for mass understanding. Others only become meaningful if they are subjected to a common grading system, as in the case of fruits and vegetables and fresh meat.

These and numerous other examples that could be cited show that consumer education is no universal solvent, no magic wand that effaces the harsh realities. It is only one of the weapons (though no doubt an important one) to be deployed in the consumer's favour, and it is no substitute for legislation and other remedial forms of action.

No discussion of this subject would be complete without some reference to the need to educate the leaders of the private and public sectors of the economy about the legitimate demands and aspirations of the consumer. Significant progress has been made in the past decade, and businessmen in particular have become much more sensitized to the consumer's voice. But much remains to be done, in both sectors, before we can talk of a reasonable equilibrium between the interests of suppliers and the interests of consumers.

## VII. *The Legal Profession, Consumerism, and the Common Law.*

Lawyers on both sides of the border have played leading roles in the post-war consumer movement. This is as it should be because the law is still the most important source of norms in our economy. It would be a mistake however to suppose that the legal profession has discharged its obligations by supplying a few volunteer workers or underpaid lawyers for neighbourhood legal offices and government departments.

Further changes are needed in at least two important directions. First, consumer law in all its far-flung ramifications must be recognized as a permanent and respectable branch of the law. It must not be looked upon as a poor cousin to be humoured because it is expedient to do so, but otherwise not to be taken too seriously. Many of our law schools have already discerned this truth and offer the subject as an optional course. At least one law society<sup>45</sup> has recently organized a well attended conference on

<sup>45</sup> The Law Society of Upper Canada.

consumer protection—an initiative which would scarcely have been conceivable even so recently as five years ago. Despite these encouraging signs, it remains true to say that for most members of the bar consumer law remains *terra incognita*. Secondly, an important onus devolves on members of the corporate bar to avoid drawing consumer contracts of Draconian severity.<sup>46</sup> In the long run they do their clients no favour. Sooner or later, the documents are bound to attract judicial or legislative hostility and a reaction much more harmful to their clients' interests than some modest restraint in the initial drafting. Not every business lawyer can be expected to don the mantle of a Brandeis but none need fear the reproach of his client if he endeavours to point out where his own enlightened interests lie.

An even greater challenge confronts our courts. It has long been evident that many of the common law rules that impinge heavily on the consumer's daily activities are obsolete and in need of overhaul. Often they postulate a non-existent model. The rules of contract are one example, but by no means the only one. The American courts have grasped the nettle firmly<sup>47</sup> and have not hesitated to cast aside the "clanking chains" of the past when they have interfered seriously with the demands of justice.

The response of our own courts has been disappointing. With a few notable exceptions,<sup>48</sup> they have generally accepted uncritically the fiction that courts do not legislate and that only Parliament can change unsatisfactory rules. As a result, all too often they appear to sanction unconscionable bargains or to perpetuate legal anachronisms. The weakness about the traditional philosophy is its excessive reliance on legislative intervention and the failure to grasp that the common law cannot remain a vital force without responding constructively to contemporary needs. Our Lady of Justice may be blindfolded, but she is not blind.

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<sup>46</sup> A not atypical example is provided by the following clause which appears in type not larger than this footnote in the contract of a large Toronto high volume carpet outlet: "THE FOLLOWING PROVISIONS ARE HEREBY EXCLUDED FROM OPERATION IN THIS CONTRACT: R.S.A., 1955, c. 295, ss. 15, 16, 17 & 18; R.S.B.C., 1960, c. 344, ss. 18, 19, 20 & 21; R.S.M., 1954, c. 233, ss. 14, 15, 16 & 17; R.S.N.B., 1952, c. 199, ss. 13, 14, 15 & 16; R.S.Nfld., 1952, c. 222, ss. 13, 14, 15 & 16; R.S.N.S., 1954, c. 256, ss. 14, 15, 16 & 17; R.S.O., 1960, c. 358, ss. 13, 14, 15 & 16; R.S.P.E.I., 1951, c. 144, ss. 14, 15, 16 & 17; Civil Code of Quebec, Section III, Ch. 4; R.S.S., 1965, c. 388, ss. 14, 15, 16 & 17."

<sup>47</sup> Their willingness to apply concepts of unconscionability to consumer contracts is one example; their now well established willingness to breach the walls of privity to hold manufacturers liable for defective products is another. Under both these headings see the classic judgment of Francis J. in *Henningsen v. Bloomfield Motors* (1960), 161 A. 2d 69 (N.J. S. Ct.).

<sup>48</sup> E.g., disclaimer clauses, "penalty" clauses in hire-purchase agreements and equipment leases, and the denial of holder in due course status in consumer negotiable instruments.

### VIII. *Conclusion.*

In its purely legal setting the striking feature about consumerism is the pervasiveness of its problems and their interdisciplinary character. Consumer law is no respecter of traditional boundaries; public and private law principles, no less than procedural and substantive rules, fall within its sweep and all demand reassessment as they are found inadequate to respond to the needs of the last quarter of the twentieth century.

The realignment of legal rules and the institutional machinery through which they receive expression merely reflect a realignment of underlying economic and social forces. In Toynbeeian terms, our ability to adapt to rapidly changing technological and human conditions will determine our ability to survive as a civilization. Since our will to survive is strong, I expect the body politic will accommodate itself to the demands of consumerism. This does not mean that there will be a one-way traffic with business and all the other opposing interests in headlong retreat. Rather there will be a series of continuing debates and a reassessment of traditional attitudes. I do not regard this prospect with dismay. A healthy democracy always vibrates with constructive tension as competing interests measure each other's strength. My concern is that the Davids and the Goliaths will be reasonably evenly matched and be allowed to engage in fair and open combat.

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