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WINNERS AND LOSERS IN THE MODERN REGULATORY SYSTEM MUST THE CONSUMER ALWAYS LOSE?

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A. THE POLITICS OF CONSUMERISM

Is modern consumerism simply a fad — just another passing protest movement of the sixties — or is it a serious social movement here to stay? A Canadian senator once claimed that consumerism is simply an outlet for the energies of frustrated women unable to keep their husbands under control.[1] An American ad man recently diagnosed it as "a contagious inflammation of the consumer interest portion of the brain often resulting from political ambition or desire to derive favor from groups of consumers through personal publicity. Symptoms include a strong tendency to invent issues where no real issues exist. If not treated severe cases may lead to demagoguery."[2] These views do not portend a healthy future for the consumer movement; once the dilettantes and demagogues have found new diversions, the cause will presumably wither unattended on the vine.

A somewhat more positive definition of consumerism might be that it is a movement which, in an age of bigness and bewildering technological

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[1] Quoted in J. Ziegel, *The Future of Canadian Consumerism* (1973), 51 Can. B. R. 191 at 192.

[2] Quoted in J. Bishop and H. Hubbard, *Let the Seller Beware* (Washington: National Press, 1969) at 10, 11.

complexity and change, demands for consumers the right to influence significantly economic behaviour in the consumer marketplace — the right of consumers to be sovereign in a marketplace that exists, so classical free-market theory teaches us, only to serve their needs. So defined, consumerism means a share of political power and it implies the emergence of a political movement. For no movement that seeks to change the way things are done can succeed unless ultimately it can bring effective influence to bear on the political process.

Unfortunately for most politicians in this pluralistic age of interest group liberalism, decision-making means little more than harmonizing as far as possible the conflicting claims of competing interest groups. As Charles Reich puts it, in the context of regulatory agencies:

> As the agencies have sought a meaning for the public interest they have come to this: the public interest is served by agency policies which harmonize as many as possible of the competing interests present in a given situation . . . . Thus the agencies have evolved a meaning for their charters which makes them both philosopher-kings searching for the good and practical politicians trying to please a multi-voiced rabble.[3]

In a heavily regulated society, the doctrine of pluralism envisages competition amongst groups as a self-corrective mechanism analogous to Adam Smith's "invisible hand" in an unregulated marketplace.[4] Unless consumers as an interest group can find mechanisms for counting themselves in on this process of political decision-making by competition amongst groups,[5] they are likely to have minimal impact on the political process or its regulatory arms. However, some formidable obstacles stand in the way of consumerism sustaining itself as, or developing itself into, a major political force.

1. *Diffusion of the Consumer Interest*

Consumer concerns are diffused across the 50,000 or so products and services that each of us typically consumes in our life-time. An individual consumer's interest in any one product or service will usually be so small that it will not be worth his while registering his dissatisfaction with the item to business, government, or a government's regulatory agencies. At the same time, business interests concerned with the manufacturing or merchandising of that product have a sufficiently concentrated stake in any prospective regulation of it to make their views known very forcefully to government.

Professor Milton Friedman, a leading free-market economist, gives a homely but pointed example of the way the regulatory process acquires a pro-industry bias. He takes the case of the ever-escalating occupational licensing standards set by U.S. barber licensing bodies. The effect of the increasing rigour of entrance standards, as well as the frequent direct setting of minimum

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[3] *The Law of the Planned Society* (1966), 75 Yale L. J. 1227 at 1234; cf. R. V. Presthus, *Elite Accommodation in Canadian Politics* (London: Cambridge Univ. Press, 1973) at 348-49.

[4] See T. Lowi, *The End of Liberalism* (New York: Norton, 1969) at 71.

[5] The important question of whether this is a defensible form of planning, with or without additional interest group inputs, will be considered later in this article.

charges, is, of course, to increase the costs to all consumers. Friedman explains:

> The declaration by a large number of different state legislatures that barbers must be approved by a committee of other barbers is hardly persuasive evidence that there is in fact a public interest in having such legislation. Surely the explanation is different; it is that a producer group tends to be more concentrated politically than a consumer group. This is an obvious point often made and yet one whose importance cannot be overstressed. Each of us is a producer and also a consumer. However, we are much more specialized and devote a much larger fraction of our attention to our activity as a producer than as a consumer. We consume literally thousands if not millions of items. The result is that people in the same trade, like barbers or physicians, all have an intense interest in the specific problems of this trade and are willing to devote considerable energy to doing something about them. On the other hand, those of us who use barbers at all, get barbered infrequently and spend only a minor fraction of our income in barber shops. Our interest is casual. Hardly any of us are [*sic*] willing to devote much time going to the legislature in order to testify against the iniquity of restricting the practice of barbering. The same point holds for tariffs. The groups that think they have a special interest in particular tariffs are concentrated groups to whom the issue makes a great deal of difference. The public interest is widely dispersed. In consequence, in the absence of any general arrangements to offset the pressure of special interests, producer groups will invariably have a much stronger influence on legislative action and the powers that be than will the diverse, widely spread consumer interest.[6]

Professor Anthony Downs, in his well-known book *An Economic Theory of Democracy*,[7] provides a powerful analytic rationale for the widely-held "capture" theory of regulatory agencies, and indeed the political process at large, by relating the concept of information costs to the intensity of the interest that a group has in a particular legislative or regulatory issue. It is worth quoting him at some length:

> Clearly, the cost of acquiring information and communicating opinions to government determines the structure of political influence. Only those who can afford to bear this cost are in a position to be influential.
>
> A striking example of this fact is the failure of consumers-at-large to exercise any cogent influence over government decisions affecting them. For instance, legislators are notorious for writing tariff laws which favor a few producers in each field at the expense of thousands of consumers. On the basis of votes alone, this practice is hardly compatible with our central hypothesis about government behaviour. But once we introduce the cost of information, the explanation springs full-armed from our theory. Each producer can afford to bring great influence to bear upon that section of the tariff law affecting his product. Conversely, few consumers can bring any influence to bear upon any parts of the law, since each consumer's interests are spread over so many products. In fact, most consumers cannot even afford to find out whether tariffs are raising the price they pay for any given product. Yet without such knowledge they cannot have policy preferences for the government to pay attention to.
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> Under these conditions, government is bound to be more attentive to producers than consumers when it creates policy. This is true even though (1) government formulates policy so as to maximize votes and (2) more voting consumers are affected by any given policy than voting producers. As a result, such devices as tripartite industrial control boards with representatives from labor, management and consumers are doomed to failure. The consumer representative never has effective forces behind him comparable to those of labor and management. Hence

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[6] *Capitalism and Freedom* (Chicago: Univ. of Chic. Press, 1962) at 143.

[7] (New York: Harper and Row, 1957).

> these boards practically always seize any opportunities for labor and management jointly to exploit consumers. Even giant labor unions acting for their members' interests as consumers have to spread their influence across too many products to be truly effective as counterweights to producers in each field. Economically speaking, government policy in a democracy almost always exhibits an anti-consumer, pro-producer bias. And this bias in our model exists not because the various agents concerned are irrational, but because they behave rationally. This fact has tremendous implications for economic predictions in almost every field . . .[8]

Illustrations of Downs' analysis are readily found in Canada. On simple, relatively unimportant, issues such as abnormal bacteria counts in hamburger — "hockey helmet law" as a colleague calls it — the media are easily able to disseminate the facts, generate public concern, "widen the scope of the conflict",[9] and provoke a governmental response. But on more complex, and infinitely more important, issues, such as tax reform, competition, food, energy or housing policy, the information and re-communication costs for low-intensity groups, like consumers, are too high for them to engage in the interest group "bargaining" that surrounds each issue.[10]

A particularly striking feature of the views of those who hold that legislative and regulatory decision-making processes are, *in the nature of things,* skewed to reflect a pro-producer, anti-consumer bias, is that they come from all points on the political spectrum from Milton Friedman to Charles Reich, although the prescriptions for the disease vary radically, from massive deregulation[11] to much greater central planning.[12]

2. *The Fragmentation of the Consumer Interest*

Unlike the position generally with highly concentrated producer interests, the consumer interest is not homogeneous. Most consumers are also producers, and as producers we will often see things differently from the way we see them

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[8] *Id.* at 255, 256.

[9] For a discussion of the importance of this element in the process of legislative change, see M. Nadel, *The Politics of Consumer Protection* (Indianapolis: Bobbs-Merrill, 1971), Chap. 5, and at 243 *et seq.*

[10] The systematic dismemberment of the Carter Commission's proposal for tax reform in Canada is instructive. Prime Minister Trudeau has been unusually frank in acknowledging the pressures that overwhelmed the proposals: "... I concede ... that it's likely we heard more from the vested interests than we did from the little taxpayer who didn't have . . . the high-paid lawyers to speak for him . . . I suppose in a participatory democracy there will always be some whose voice is louder than others . . .". (CTV, Dec. 28, 1971; cited in David Lewis, *Louder Voices: The Corporate Welfare Bums* (Toronto: Lewis & Samuel, 1972) at iv.) For recent general studies of interest groups in Canada, see Presthus, *supra,* note 3, and *Elites in the Policy Process* (London: Cambridge Univ. Press, 1974); A. P. Pross, ed., *Pressure Group Behaviour in Canadian Politics* (Scarborough: McGraw-Hill Ryerson, 1975).

[11] Apart from the citations already given, see also *e.g.* G. Stigler, *The Theory of Economic Regulation* (1971), 2 Bell J. Econ. and Mgmt. Sci. 3; R. Winter, in the M. Green, R. Nader, R. Winter debates on *Economic Regulation v. Competition* (1973), 82 Yale L. J. 871-919; R. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972) at 329 *et seq.*; Engman, Chairman, U.S. Federal Trade Commission, Speech to the Fall Conference of the Financial Analysists Federation, Detroit, Oct. 7, 1974.

[12] See *e.g.* H. Kariel, *The Decline of American Pluralism* (Stanford: Stanford Univ. Press, 1961); Lowi, *supra,* note 4.

as consumers. If we come from an oil-producing province, we see things differently from consumers from an oil-importing province. If we work on an automobile production line, we may see questions of public transit, pollution and safety standards, and lower tariffs on imported cars differently from other consumers.[13] As environmentalists, we may favour underground wires but as consumers we may not be prepared to pay the cost. A higher-income consumer may be prepared to pay $500 for a safer, cleaner car but a lower-income consumer may not be able to afford the "luxury" of more safety and less pollution. Even in the case of inflation, role confusion causes problems for consumers. Whatever the relative contributions of "cost-push" or "demand pull" to the fact of inflation, consumers in demanding action against inflation in the first case are fighting their own expectations as wage-earners and in the second case their own expectations as consumers.

There is also a range of ideological issues pertaining ultimately to questions of life-style, such as the role and regulation of advertising, rules governing the availability of credit and product proliferation, and the relationship between expenditures in the private and public sectors about which wide consensus is unlikely to be forthcoming. The non-materialist ethic upon which the writings of many critics of the modern consumer marketplace, such as Galbraith and Packard, are premised is reflected in Packard's dedication to his book, *The Waste-Makers*:[14] "To my mother and father who have never confused the possession of goods with the good life", and his idolizing, in the same book, of the life-style of an old woman in a lonely New England coastal cottage, without worldly possessions, who spends her time making greeting cards out of sea-weed.[15] It is not clear that most consumers share these life-style ambitions, or that if they do they would be prepared to see them imposed on everyone by state fiat, which of course, would call into question the very nature of our existing social and economic order.

On yet another level, controversies over appropriate government policies toward the exploitation and allocation of finite resources carry the potential for deep divisions within consumer ranks over issues of distributive justice. Proponents of the "limits to growth" philosophy[16] take the view that the expansion of the present level of industrial activity, particularly to sustain burgeoning populations in under-developed nations, will soon exhaust our depletable resources. Only a modern-day *potlatch,* a new social ascetism, can stave off disaster. As Heilbroner points out,[17] in a "steady-state" economy, the only way one social class can improve its material position is at the expense of another social class, in contrast to the pattern of the recent past where all

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[13] As evidenced by the recent request by the leadership of the United Auto Workers Union for a moratorium on cost-increasing pollution and safety standards for automobiles until the automobile market returns to buoyancy.

[14] (New York: Pocket Books, 1963).

[15] See generally, M. Trebilcock, *Consumer Protection in the Affluent Society* (1970), 16 McGill L. J. 263.

[16] See *e.g.* D. Meadows *et. al., The Limits to Growth* (New York: Signet, 1972); R. Heilbroner, *An Inquiry into the Human Prospect* (New York: Norton, 1974).

[17] *Id.*

social classes have tended to become more affluent by continued economic growth, while largely retaining their positions relative to one another. If increased affluence for all classes ceases to be a realistic social goal, Heilbroner predicts greatly exacerbated class divisions and tensions as the focus of public debate shifts from economic efficiency to economic equity.

The critics of the "limits to growth" thesis[18] rightly point out that these forecasts of doom largely over-look the function of price as a rationer of scarce resources. As resources become more scarce and thus more valuable in the future, their future value is discounted back to appropriately higher present values which will be sufficiently high to ensure that resources are not prematurely utilized. Higher present prices will also provide increased incentives to develop alternative technology and resources. This analysis, however, at best ensures that we may never run out of scarce resources or appropriate substitutes. But it leaves unresolved the question of economic equity, both as regards economically disadvantaged social classes domestically, and economically disadvantaged nations internationally, who simply will be squeezed out of a rationing game governed by price. While ends of economic efficiency may be served by allowing resources to be bid away to their highest-value use, consumers or consuming nations who cannot bid at all are unlikely to find efficiency an acceptable surrogate for equity. Thus, if it is in fact the case that the era in North America of ever-increasing affluence for everybody is over, consumers may find it increasingly difficult to cohere as a single interest group, marching to a single drum beat, when the question of non-market distribution of economic output is required to be urgently addressed.

All of these considerations bear on the fragmentation of the consumer interest and increase the difficulty of achieving a substantial, on-going coalition of consumer support around basic consumer issues. As organized consumer lobbies seek, on the one hand, to agree on a set of collective goals, and, on the other hand, to maximize numerical membership, like major political parties they will tend to drift to some fuzzy, middle-of-the-road position on the spectrum of consumers' value preferences, which will tend to confine them to taking relatively non-controversial positions on issues on an *ad hoc* basis, and eschewing any radical, and potentially divisive, critique of fundamental dysfunctions in the system.[19]

3. *The "Free Rider" Problem*

Even if a group of concerned consumers concert their efforts in order to promote their collective interests, the movement will never be as strong as the number of its potential beneficiaries would imply it should, because a number of potential contributors of money, time and expertise either need, or are able, to take a "free ride" at the expense of existing members.

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[18] See *e.g.* Solow, *Notes on 'Doomsday Models'* (1972), 69 Proc. Nat. Acad. Sci. at 3832-33; M. Roberts, "The Limits of the Limits to Growth", in E. W. Erickson and L. Woverman, eds., *The Energy Question* (Toronto: Univ. of Toronto Press, 1972) at 351 *et seq.*

[19] For an analysis of the analogous behaviour of major political parties, see Downs, *supra*, note 7.

In a penetrating economic analysis of the nature of different kinds of interest groups, Olson draws an analogy between a member of a "latent" interest group and a seller in a perfectly competitive market:

> Some critics may argue that the rational person will, indeed, support a large organization, like a lobbying organization, that works in his interest, because he knows that if he does not, others will not do so either, and then the organization will fail, and he will be without the benefit that the organization could have provided. This argument shows the need for the analogy with the perfectly competitive market. For it would be quite as reasonable to argue that prices will never fall below the levels a monopoly would have charged in a perfectly competitive market, because if one firm increased its output, other firms would also, and the price would fall; but each firm could foresee this, so it would not start a chain of price-destroying increases in output. In fact, it does not work out this way in a competitive market; nor in a large organization. When the number of firms involved is large, no one will notice the effect on price if one firm increases its output, and so no one will change his plans because of it. Similarly, in a large organization the loss of one dues payer will not noticeably increase the burden for any other one dues payer, and so a rational person would not believe that if he were to withdraw from an organization he would drive others to do so.[20]

Olson points out that the nation state, as the extreme example of a large, latent group, cannot survive on voluntary dues or payments but must resort to coercive taxes.[21] His central thesis is that unless the number of individuals in a group is quite small, or unless there is some other special device or incentive to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests. Olson suggests that, in the absence of coercion, the explanation for membership in existing large pressure group organizations lies not primarily in the collective goods these organizations provide to their members but rather in the non-collective goods they provide to members. The pursuit of collective goods, *i.e.* common or group interests, is merely a by-product of the provision of non-collective goods.

Applying this analysis to consumer organizations in North America, it is clear as a matter of both theory and observation that the reason most people have become members of the Consumers Union in the United States or the Consumers Association of Canada (C.A.C.) in Canada is the provision of non-collective rather than collective goods. The associations' magazines, containing product tests etc., are of sufficient value, presumably, to individual members in each case to justify the expenditure of a membership fee. To the extent that some of the revenues from memberships are diverted to the pursuit of collective goods, this is strictly a by-product function. That these by-products exist at all, applying Olson's central thesis rigorously, seems inconsistent with rational self-interested behaviour by members, and would seem to imply "sleight-of-hand" cross-subsidization of collective goods at the expense of non-collective goods from membership revenues, which if revealed as such to members might rationally be repudiated.

These considerations largely explain the difference in the size of the membership of consumer groups, such as C.A.C., which offer to members

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[20] *The Logic of Collective Action* (Cambridge: Harvard Univ. Press, 1971) at 12.

[21] *Id.* at 13, 14.

both non-collective goods and collective goods, and groups such as the Canadian Civil Liberties Association which offer almost exclusively collective goods.[22] The difference in membership in no way provides evidence that Canadians value consumerism as a collective good any more highly than civil libertarianism as a collective good.[23]

Assuming that most members join an organization out of self-interest, each member will have to countenance the fact that collective benefits generated by his and other members' fees will flow to all consumers, whether members or not. He will be making an indirect wealth transfer to non-members with whom he will have to share the returns on his investment in a membership. The returns will be spread so thinly across all consumers that the return to the individual member on his membership dues will not rationally justify his investment.[24] The only possible response to this impasse is to do what, for example, professional associations have done, and legislatively coerce all beneficiaries from association activities to become members so that the cost of the collective benefits will be spread as thinly as the benefits. In the case of consumer organizations the only practical instrument of coercion is the tax system: by the government paying grants to these organizations by subventions out of revenue, all taxpayers in the country are, in effect, compelled to become members of the organization so that all beneficiaries of the collective goods produced by the organization bear a share of the cost of obtaining them. In Canada, C.A.C. receives about $250,000 (about 40% of its budget) each year by way of grant from the federal government. This form of coercion raises important implications for theories of pluralism to which we will return shortly.

Dr. George Stigler concludes, from a recognition of these various political disabilities of consumerism, that *"we can't construct — and I know of no historical example of — a viable continuing broad based consumer political lobby"*.[25] The existing disabilities are impossible to gainsay; is there

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[22] The difference in membership is presently something in the order of 100,000 to 3,000.

[23] Certain small groups, with highly concentrated memberships and the prospects of obtaining collective goods of very great value (*e.g.* the imposition of a protective tariff) will find it rational to pursue collective goals (see Olson, *supra*, note 20, chap. 1). Also, the transaction costs of organizing large groups, relative to the collective benefits achievable, are much greater than in the case of certain small groups (see Posner, *supra*, note 11 at 330).

[24] However, Stigler has recently pointed out that a free rider's ride is never entirely free, merely cheap, because by not participating in the pursuit of collective goods from which he will benefit, he increases the risk that the collective action will not be undertaken or at least undertaken as effectively, thus reducing the possibility of obtaining the expected "free" gain: *Free Riders and Collective Action* (1974), 5 Bell J. of Econ. and Mgmt. Science 359. Stigler, in the same article, suggests that a partial explanation, at least, of some large, latent interest group organizations may lie in considerations of "asymmetry" of interests. For example, if a group of farmers with special interests were to abstain from membership in a general Farmers Association, there may be a serious risk that their interests would be abandoned altogether by the Association.

[25] In G. Stigler and M. Cohen, *Can Regulatory Agencies Protect Consumers?* (Washington: American Enterprise Institute, 1971) at 49 (my italics).

anythng in the contemporary political experience to provide a justification for a more optimistic prognosis? By way of exploring whether Stigler's prognosis can be confounded, it is now proposed to examine the treatment accorded to the consumer interest in a specific class of public decisions, those made by state regulatory agencies. In the final part of this article, we will abstract ourselves from this particular body of experience and venture to generalize from it to some observations about the future role of the consumer interest in public decision-making at large.

B. THE CONSUMER INTEREST IN THE REGULATORY PROCESS: RECENT POLICY RESPONSES

Three myths surrounding the present nature of public regulation widely persist. The first is that our economy is largely unregulated and is disciplined mainly by competitive forces. In fact, in Canada, there are over one hundred Federal regulatory agencies and in most provinces more than fifty regulatory agencies.[26] This does not include, of course, government Departments directly administering regulatory statutes or subsidy programmes. Agencies and Departments regulate everything from telephone, rail and air-line rates, foreign investment, capital markets, broadcasting licences, product tariffs, agricultural produce prices, food, drug and safety standards to the licensing of various classes of merchants, from insurance agents to door-to-door salesmen. Few areas of our lives are untouched by public regulation.

The second myth is that most regulation involves technical questions of little interest or relevance to the average citizen. Nothing could be further from the truth. While many regulatory decisions may involve initially an analysis of technically complex facts, once these facts have been ascertained, the ultimate decision to be made will often be of an immensely important political and social character, for example, highways versus public transport, energy resources versus the environment, foreign investment versus economic sovereignty.[27]

The third myth is that most major forms of regulation are forced on unwilling producers by hostile non-producer groups. In fact, the contrary is the truth. Most of the extensively regulated industries, at least, prefer being regulated to competing and actively seek and sustain accommodating regulatory regimes. As Stigler remarks,[28] "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[29] The sheltered life of a regulated protectorate is likely to be more comfortable than life in a vigorously competitive market-place. As Stigler elsewhere remarks:

> Competition, like other therapeutic forms of hardship, is by wide and age-long consent, highly beneficial to society when imposed upon — other people. Every

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[26] See Inventory of Provincial and Federal Regulatory Agencies prepared by the Canadian Consumer Council, 1971.

[27] Cf. Reich, *supra*, note 3.

[28] *Supra*, note 11.

[29] For a critique of Stigler's thesis, in terms of its ability to explain the emergence of regulation in all its contexts, see R. Posner, *Theories of Economic Regulation* (1974), 5 Bell J. of Econ. and Mgmt. Science 335.

> industry that can afford a spokesman has emphasized both its devotion to the general principle, and the over-riding need for reducing competition within its own markets because this is the one area in which competition works poorly.[30]

Regulatory issues have massive impacts on many more interests than those of the regulatees, and the case for these other interests being represented in this form of regulatory decision-making is, on the face of it, undeniable. The consequences of a failure to be represented and heard are stated as follows by a former Canadian Minister of Consumer and Corporate Affairs, the Hon. John Turner (former Minister of Finance):

> I've looked at a lot of regulatory agencies, and the longer I'm around here, the more I believe that every one of these tends, in a period of time, to reflect the interests of the industry it is supposed to be regulating.[31]

The failure of government in the past to recognize that merely setting up regulatory agencies to protect the public interest is not in itself enough is vividly described by Rod Sykes, Mayor of Calgary, in Winnipeg, October 12, 1973:

> In those cases where protest has been organized within the neighbourhood, there is no funding to enable the residents to oppose the experts, the high-priced engineers, and the real estate dealers. The government, in effect, has all the power on its side. It sets up a public hearing format and says, now look, here you are, a fair deal, a public hearing. We're going to hear from both sides and deliver our verdict on the merits. That is exactly what Roman Emperors used to say to Christians when they invited them into the lion's den. One lion, one Christian, and may the best lion win.[32]

The same phenomenon has been the subject of longer and more intense concern in the U.S. As Roger C. Cramton, formerly Chairman of the U.S. Administrative Conference recently stated:

> The cardinal fact . . . is that governmental agencies rarely respond to interests that are not represented in their proceedings. And they are exposed, with rare and somewhat insignificant exceptions, only to the view of those who have a sufficient economic stake in a proceeding or succession of proceedings to warrant the substantial expense of having lawyers and expert witnesses to make a case for them. Non-economic interests or those economic interests that are diffuse in character tend to be inadequately represented ....[33]

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[30] Stigler & Cohen, *supra*, note 25 at 9.

[31] Cited by Sack & Sack, *Citizen's Advocates and Poverty Lawyers*, Canadian Forum, May, 1972 at 37. See also the comments of the Hon. Robert Andras, now Minister of Manpower and Immigration, (formerly Minister of Consumer and Corporate Affairs):

> It is commonly observed phenomenon that sooner or later a regulating body tends to identify with the interests of those it is regulating, unless there is strong pressure either internally or externally to resist this tendency.
> (Address to 25th Annual Meeting of C.A.C. 1972.)

[32] Canadian Council on Urban & Regional Research, (1973) 5 Urban Research Bulletin, no. 3 at 3.

[33] *The Why, Where & How of Broadened Public Participation in the Administrative Process* (1972), 60 Georgetown L. J. 525 at 529; see also William O. Douglas, *Go East, Young Man* (New York: Random House, 1974) at 216, 217; see generally M. Bernstein, *Regulating Business By Independent Commission* (Princeton: Princeton Univ. Press, 1955).

The problem of the "empty consumer's chair"[34] in regulatory proceedings has now begun to elicit a variety of government responses, as governments have come to recognize that, as the creators of these agencies, they carry the primary responsibility for ensuring that their functions are effectively discharged.

1. *The U.S. Response: An Office of the Consumer Advocate*[35]

Early experiments, particularly during the New Deal of the Thirties when the regulatory ideal was central to programmes for economic reconstruction, tended to involve appointing consumer advisory committees to certain major agencies. Most of these quite quickly melted away as lack of independence, lack of resources, and lack of definition of role reduced them to little more than window-dressing.[36]

However, beginning in 1959 with the introduction of a bill by Senator Estes Kefauver, a new adversarial model for representing the consumer interest in regulatory proceedings began to emerge. Following Senator Kefauver's death in 1963, Congressman Benjamin Rosenthal began refining this model in a series of bills. Today a bi-partisan proposal with wide support has emerged in the form of a statutory, government-funded Consumer Protection Agency to represent the consumer interest before regulatory agencies and government departments exercising regulatory powers. In early debates on this proposal, the central idea itself attracted enormous controversy. Ralph Nader described the Consumer Advocate bills as "the most important consumer legislation ever considered by the U.S. Congress".[37] On the other hand, already entrenched interest groups were less enthusiastic. In a circular to its members in 1971, the Chamber of Commerce said that Rosenthal's bill (H.R. 16) would help "destroy the free enterprise system"[38] (although in earlier Congressional hearings they had described it as a "thoughtful bill"). The Grocery Manufacturers of America described the same bill to its members as "one of the most blatant anti-business bills ever introduced".[39] The National Small Business Association became even more excited. In a Congressional Committee brief, the Association said:

> Programs set forth by the international consumer movement in seeking to substitute a 'co-operative' society for our 'free enterprise' society are easily recognized

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[34] See Congressman Benjamin S. Rosenthal in *Hearings on S. 1177 and H.R. 10835 Before the Subcommittee on Executive Reorganization and Government Research* of the U.S. Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

[35] The details that follow pertaining to the U.S. response are drawn from a paper by the writer, *The Case for an Office of the Consumer Advocate,* prepared for the Canadian Consumer Council in 1972, and reproduced as Exhibit 36 of the *Joint Hearings on S. 707 and S. 160 of the Senate Committee on Government Operations and Committee on Commerce,* 93d Cong. 1st Sess. (March, April, June, 1973), to which all subsequent citations relate.

[36] See P. Campbell, *Consumer Representation in the New Deal* (New York: A.M.S. Press, 1968).

[37] See Trebilcock, *supra,* note 35 at 883.

[38] *Id.* at 871.

[39] *Id.*

> by the legislation pending before this subcommittee today. A campaign to make the business community look as though it operates only in order to steal from the poor has been successful.... Much that is being proposed today is based upon experience in countries dominated by the co-operative consumers movement. The blueprint for taking over private enterprise has been prepared. It is now being followed.[40]

As the central idea has won a measure of political acceptance, the focus of recent debates has shifted to the powers that should attach to the new Advocacy Office: for example, which agencies the Consumer Advocate should be entitled to appear before; whether he should be entitled to intervene as a full party in all agency proceedings, or whether his role should be that of *amicus curiae* only; whether he should be entitled to intervene in agency proceedings of a penal nature; what rights of access the Consumer Advocate should have to information held by other agencies and by the businesses regulated by those agencies; whether the Consumer Advocate should be able to participate in, or be able to monitor, informal agency activity, for example, hitherto *ex parte* informal communications, or decisions between regulators and regulatees; and whether the Consumer Advocate should have the usual rights to appeal to the Courts from agency decisions if he did not participate in the initial proceedings. Disputes between the executive and legislative branches on issues of independence, such as mechanisms for hiring and firing the Consumer Advocate, and for insulating him from budgetary pressures have also produced controversy. Finally, the issue of the extent of government funding to be committed to the Office has produced divergent views, with different sponsors' bills making provision for sums ranging from $7 million to $25 million a year.

However, by the time this article appears, it seems almost certain that a *Consumer Protection Agency Act* will have been passed by Congress, subject to a Presidential veto, and an Office of the Consumer Advocate created.[41]

2. *The United Kingdom Response: A Departmental National Consumers' Agency*

In September, 1974, the U.K. Secretary of State for Prices and Consumer Protection tabled in the House of Commons a document called *National Consumers' Agency* indicating the intention of the government to set up a government-funded, non-statutory agency, with members appointed by the

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[40] *Id.*

[41] For the bill passed by the House, see H. R. 1316, 93d Cong. 2d. Sess. (April 4, 1974). For the bill before the Senate, see S. 707, 93d Cong. 2d. Sess. (February 1, 1973). For recent House Hearings, see *Hearings on H.R. 14, H.R. 21 and H.R. Before the House Committee on Government Operations*, 93d Cong. 1st Sess. (September & October, 1973). For recent Senate hearings, see *Joint Hearings on S. 707 and S. 1160 Before the Senate Committee on Government Operations and Committee on Commerce*, 93d Cong. 1st Sess. (March, April, and June, 1973). See also the House Committee on Government Operations Rep. No. 93-962 on H.R. 13163, 93d Cong. 2d Sess. (March 29, 1974); the Senate Committee on Government Operations Rep. No. 93-883 on S. 707, 93d Cong. 2d Sess. (May 28, 1974); the Minority Report of the same Committee (May 29, 1974), and the Senate Committee on Commerce Rep. No. 93-792 on S. 707, 93d Cong. 2d Sess. (April 11, 1974).

Minister, to represent the consumer interest on all consumer issues before all levels and agencies of government. Few further details were provided in the government's announcement but clearly the principal functions of the agency will be of an advocacy character.

3. *The Canadian Response: C.A.C.'s Advocacy Programme*

During the tenure of the Hon. Ron Basford as Minister of Consumer and Corporate Affairs, the Canadian Consumer Council, a citizens' advisory agency to government, was asked in 1971 to commission independent research over a four year period into the status of the consumer interest in proceedings of independent regulatory agencies, decisions by agricultural marketing boards, the conduct of the self-governing professions, and the operations of Crown corporations. The first two stages of this research have been completed and the last two stages are now proceeding under the aegis of the new Consumer Research Council.

In June, 1973, the Hon. Herb Gray, then Minister of Consumer and Corporate Affairs, announced that as an interim experiment the Government was making a special unconditional grant of $100,000 to the Consumers Association of Canada to enable it to intensify and expand its advocacy activities. Of this sum, $35,000 was allocated by C.A.C. to formal advocacy activities before regulatory agencies. Early in 1974, the Federal Government announced that it was extending the experiment a further year with a grant of $116,000, all of this money to be used in regulatory proceedings, appeals therefrom and test cases in the courts. For 1975-76, the grant has been increased to $215,000 to permit more fundamental policy research on the regulated industries to be undertaken. With these grants, C.A.C. has set up an advocacy unit in its Ottawa office, staffed by three lawyers, three secretaries and assisted by outside technical experts and counsel on retainer paid for out of the balance of the grant. Most of the activities of the programme have been directed at the regulatory arena.

While it is not the purpose of this article to explore the finer intricacies of public utility regulation and related regulatory issues, it may be useful to survey quickly the principal initiatives of the programme since it was implemented in September, 1973.

The first regulatory initiative by C.A.C.'s advocacy programme was taken in late 1973 following an application by Ontario Hydro (a Crown corporation) to the National Energy Board (N.E.B.) for a licence to export hydro-electric power to the United States. The particular proposal envisaged the importation of coal from Appalachia in the U.S. for firing coal-burning generators located in Ontario near major metropolitan centres and the exportation of the power so produced back to the U.S. (the U.S. was to get the power, Ontario the pollution). Ontario Hydro estimated that the net gain to Hydro from this proposal was of the order $6 to $8 million annually. C.A.C. and Pollution Probe, an environmental group, jointly intervened in the hearing before the N.E.B., objecting that the estimated net economic worth of the proposal failed to take into account substantial social costs in the form of environmental degradation which witnesses for the intervenors estimated at

$8.5 million per annum, and which Ontario Hydro was, in effect, attempting to disregard by imposing on the public at large. Ontario Hydro submitted no serious evidence on this issue. The N.E.B., in the result, found that these estimates of environmental costs were too speculative and granted the licence application. The decision was later confirmed by the federal Cabinet. C.A.C. and Pollution Probe then sought leave to appeal to the Federal Court of Appeal, asserting that the N.E.B. had failed to follow its own regulations and previous decisions in not requiring Ontario Hydro to carry the burden of satisfying the Board on the environmental impact of its proposal, and asserting further that the Board's submission of its decision to the Cabinet for confirmation before making it public allowed persons to participate in its decision who had not heard the evidence and were not members of the Board. Leave to appeal was refused by the Court.

On the face of it, the outcome of the case represented an unqualified loss for C.A.C. However, in this kind of advocacy, wins and losses are not so easily calculated. For example, both Ontario Hydro and the N.E.B. have subsequently hired social cost analysts to assist in future applications, and in similar cases that have since come before the Board much more rigorous requirements as to environmental impact considerations have been imposed. Moreover, the considerable media publicity that attended the case may have contributed to a heightened public consciousness about social costs — a consciousness needed, for example, to prompt decisions like that of the federal government to set up the Berger Commission to assess the impact of the Mackenzie Valley pipe-line on the Northern environment and native peoples.[42]

Early in 1974, the Bell Canada "B" rate application hearings before the Canadian Transport Commission commenced. The telephone rate increase sought would have given Bell an additional $51.8 million during 1974, had it been granted on January 1 of that year. The hearing lasted 47 days. Bell spent nearly $1 million on its case (all tax deductible and included in its rates). The outcome of the case was disappointing for C.A.C., which devoted a great deal of its time and limited resources to it. All but $4 million of the requested increase was granted. The $4 million reduction did, on the other hand, occur in areas where C.A.C. had placed some emphasis — the proposed across-the-board increases in charges for pay telephones, which were denied in institutions with a predominance of low-income consumers. Other issues which were argued with less success focussed on whether cross-subsidization of business subscribers by residential subscribers was involved; definition of the quality of service to be received for a given tariff; whether the company's huge construction programme really was needed (or might involve an element of rate base padding) and really would benefit consumers (as opposed to other classes of service user); whether Bell could be intelligently regulated when many of its most profitable activities had been spun off to unregulated subsidiaries, such as Northern Electric, enabling Bell to argue, in relation to its regulated activities, perpetual pending financial doom;

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[42] Order-in-Council, 1974-641, March 21, 1974, pursuant to s. 19(h) of the *Territorial Lands Act*, R.S.C. 1970, c. T-6.

and whether some part of Bell's monopoly could be deregulated and exposed to market forces, for example, the provision of terminal equipment.

Again, however, it is difficult to make a long-term assessment of this kind of intervention by C.A.C. The hearings attracted considerable media publicity. Bell rate cases have long been matters of major public contention in Canada, and perhaps partly in response to a continuing climate of public concern at ever more frequent rate increases and partly, no doubt, as an attempt at rationalization, the federal government, shortly after this case, announced its intention to transfer all telecommunications regulation to the Canadian Radio and Television Commission, one of the most socially responsive federal regulatory agencies.[43]

On June 21, 1974, Air Canada (a Crown corporation), Canadian Pacific Airlines, and five regional air carriers filed simultaneously before the Canadian Transport Commission (C.T.C.) for a 9.5% average across-the-board air passenger fare increase. This followed only five months after a 10% increase in February, compounding to a 20% increase within that period. By simply filing a piece of paper containing the proposed rate increases and waiting thirty days the airlines automatically receive the increases unless the Commission decides to stop the increase. The C.T.C. has never exercised this power. At very short notice, C.A.C. decided to intervene before the C.T.C., asking the Commission for an injunction to hold up the rate increases long enough to allow a full hearing of the case. The C.T.C., after a preliminary hearing on the question of an injunction, decided on Friday, July 12 to grant a full hearing to commence on the following Tuesday. A request for a two-week adjournment by C.A.C. and the Government of Saskatchewan to consider the evidence of the airlines and to brief appropriate expert witnesses was refused, as was a request that the airlines be required to furnish relevant cost information to the intervenors.

On Tuesday, July 16, the Commission, in a preliminary ruling, held that the case would be heard under s. 10 of the *Aeronautics Act*,[44] rather than s. 23 of the *National Transportation Act*,[45] which had the effect of placing on C.A.C. the burden of proving that the proposed rates were not reasonable, rather than the airlines having to prove the converse. With no substantial evidence ready at that point, for C.A.C. the result was a foregone conclusion. The hearing concluded on Friday of the same week (47 days to analyze Bell, 4 days to master the airlines). The Commission intimated that it would reach its decision quickly so that the airlines would not have to wait for their increases (the 30 days had not run out), and the following Monday granted the rate increases in full, at the same time heavily criticizing C.A.C. for what it apparently regarded as a close-to-frivolous intervention.

However, demonstrating the importance of Nadel's "widening the scope of the conflict" theory of consumer effectiveness,[46] C.A.C. was able very

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[43] See Bill C-5, October 2, 1974.

[44] R.S.C. 1970, c. A-3.

[45] R.S.C. 1970, c. N-17.

[46] *Supra*, note 9.

effectively to utilize the media during these proceedings, and in reportage and editorials, both the airlines and the Commission received heavy criticism — the airlines for the cumulative magnitude of their fare increases, for the apparent complicity that had occurred before the new rates were filed, and for their arrogance in charging the new rates before the Commission had confirmed them; the Commission because of its passivity toward the airlines, when in an era of runaway inflation each rate increase ought to be meticulously scrutinized and exactingly proved, and because of its patronizing attitude to consumers impertinent enough to disturb the tranquil regulatory waters by asking some pertinent questions. A more concrete result of the case and the publicity attending it is that while the airlines announced at the time of the hearing that they would need to file for further rate increases in the late fall of 1974, they did not deem it expedient to return to the regulatory bar for further public replenishment until May, 1975 — at a saving to consumers of perhaps $10 million a month.

The treatment of C.A.C. by the Commission in a passenger rail rate application further demonstrates the Commission's pro-industry passivity. C.A.C., in a preliminary hearing in April, 1974, asked for a full hearing on the merits on proposed new railway tariffs for Canadian National and Canadian Pacific. Five months later the Commission had still not decided whether to grant such a hearing on the merits. Because of the thirty day rule, the new rates had been in effect during most of the period and even if the Commission had decided that they were not justified, there was no practicable way of reimbursing consumers who, in the meantime, paid the higher tariff. Moreover, by the time of a hearing on the merits, the rate increases might well have been justified, if they had not been five months before, and, as well, the next rate application would be shortly pending. In protest at the Commission's handling of the case, C.A.C. in September withdrew its intervention, thus terminating proceedings, and in an open letter to the Minister of Transportation[47] drew attention to the "shocking" disparity in the way the Commission had handled the airline and rail rate cases.

In January, 1975, leave to appeal new rate increases by the railways was granted to C.A.C. and other consumer groups by the C.T.C. and a full, month's long inquiry ordered into all aspects of the passenger rail mode in Canada. An interim order to hold up the rate increases until the outcome of this inquiry is known was refused, but nevertheless the decision of the C.T.C. to institute, for the first time, a full-scale inquiry represents a substantial potential advance of the consumer interest in this area. A further application by the airlines for another 10% rate increase came before the C.T.C. in May, 1975, which, after an eight day hearing on the merits was granted in full, despite unrefuted evidence that economy-class passengers are massively subsidizing first-class passengers, passengers on western air-routes are subsidizing those on eastern air-routes, and expert evidence that Air Canada is substantially less efficient than Canadian Pacific. The C.T.C. took a week-end to arrive at a verbal decision. C.A.C. and several provincial governments have appealed the decision to the Federal Cabinet.

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[47] The Hon. Jean Marchand, reported in the *Ottawa Journal*, Sept. 9, 1974.

The Federal Minister of Transport recently declared transportation policy in Canada to be "a mess"[48] and on June 16, 1975 tabled in Parliament a Green Paper proposing major changes to existing policy which would give much more direct authority to the Minister in inter-modal co-ordination and rationalization of transportation resources.

Several other regulatory initiatives should be briefly mentioned. Early in 1974, C.A.C. presented a brief at the National Energy Board hearings on oil export quotas, arguing that industry data on which the N.E.B. had previously relied vastly over-stated realistic oil reserves and asking for a rapid phasing-out of U.S. oil exports with a view to developing long-term self-sufficiency in Canada. C.A.C. presented similar arguments at recent hearings before the N.E.B. on natural gas export quotas. Gratifyingly, perhaps in part as a result of the intervention of C.A.C. and other similar organizations, the N.E.B. and the federal government have now dramatically revised their estimates of oil reserves and the federal government has announced a programme to scale down oil exports.

Several major non-regulatory initiatives by C.A.C.'s advocacy programme provincial regulatory arenas. Interventions have taken place before the Alberta Public Utilities Board in a Calgary Power hydro-electric rate hearing; before the Nova Scotia Public Utilities Commission in a Maritime Telegraph and Telephone rate hearing; before the New Brunswick Public Utilities Commission in a New Brunswick telephone rate hearing; before the British Columbia Energy Commission in a Pacific Northern Gas rate hearing; and in an Ontario Hydro rate hearing before the Ontario Energy Board. In both the latter two cases, substantial concessions were won for the consumer on the issue of cross-subsidization of high-volume industrial users (who had previously been given large volume discounts) by low-income residential users. On the regional advocacy front, several provincial governments are now actively considering funding consumer advocacy programmes.

Several major non-regulatory initiatives by C.A.C.'s advocacy programme have been taken. Late in 1973, in response to the Ontario Government's Green Paper on Consumer Warranties, C.A.C. presented a very detailed brief to the provincial Minister of Consumer and Commercial Relations pointing out that all the new substantive rights in the world would be of no value to the consumer without the introduction of realistic enforcement mechanisms. The brief developed an integrated set of proposals for utilizing arbitration mechanisms, reformed Small Claims Courts, superior courts, and class action procedures, relating these procedural instruments to defined categories of consumer complaints. At the same time C.A.C. commissioned a substantial, independent research paper from Professor Neil Williams of Osgoode Hall Law School on the law relating to consumer class actions in Canada, together with proposals for reform and a Model Consumer Class Actions Act. Now completed, the report has received wide currency within federal and provincial governments across Canada and is under active consideration by several who have reform of their class action rules under review.[49]

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[48] *Financial Post*, November 2, 1974, p. T-1.

[49] See N. Williams, *Consumer Class Actions in Canada: Some Proposals for Reform* (1975), 13 O.H.L.J. 1.

In the civil test case area, C.A.C.'s major initiative has been to support with money, staff and outside expertise a $5 million class action commenced by a private law firm on behalf of 5,000 Firenza owners against General Motors claiming loss of resale value resulting from the bad reputation acquired by the cars as a model because of the abnormally high incidence of defects exhibited by an allegedly large number of units. This action will test a number of important substantive points of warranty and products liability law as well as important procedural points pertaining to consumer class actions. Even if the case is ultimately lost, it may well serve to dramatize the shortcomings of the present law and precipitate legislative action. Importantly, the economic case for collective consumer representation mechanisms in a civil context is similar to that for collective representation of the consumer interest in regulatory and legislative contexts: a single supplier may stand to make substantial gains from violation of consumers' civil rights but the damage to individual consumers will often be so thinly spread that collective, not individual, suit is the only rational avenue of redress.

How should we evaluate the aggregate impact of this flurry of specialized advocacy on behalf of the consumer? Have consumerism's political disabilities been effectively denied?

C. AN INTERIM STOCK-TAKING

1. *Short Run Lessons*

(i) In the immediate context, the need for sustained, systematic consumer advocacy before regulatory agencies is unanswerable. Sensitizing regulators to interests other than those of the regulatees is not a short-term exercise and is not a matter that can be allowed to depend on fortuitous, sporadic interventions by the odd concerned citizen or group of citizens. Appropriate institutional forms need to be devised to ensure a consistent consumer presence.

(ii) The essentially political nature of the regulatory process must be recognized by both regulators and legislators. The argument that regulatory agencies should be "independent" of the political process misconceives their function. Because of the immensely important economic and social decisions that agencies make, strong emphasis must be placed by governments in searching out high calibre personnel for appointment to the boards and staff of these agencies. The tendency to retread retired political warriors and reward party bagmen by appointing them to positions on agencies, and the added tendency to appoint personnel with back-grounds, directly or indirectly, related to the regulated industries, on the grounds that they alone possess the requisite expertise, discounts the need to find appointees of high intellectual calibre with a wide range of social sensitivities.

A substantial increase in the quantity and quality of research as opposed to administrative resources available to an agency is needed if agencies are to become less dependent on industry data and analyses. Regulators also have to be educated to understand the fundamental difference between highly concentrated and thinly spread interest groups. In connection with the previous political anlysis of interest groups, regulators must be made to realize that to take the view that consumers should not be concerned about a $52 million

telephone rate increase because it only costs them 20 or 30 cents more each a month (although, obviously, it costs them in aggregate $52m) is subversive of the need ever to take the consumer interest into account in public decision-making. Without that recognition, consumers will systematically be "nickelled" and "dimed" into economic oblivion, dying the death of a thousand near-invisible cuts.

(iii) Low-intensity groups embarking on this form of advocacy need to recognize the importance of advocating their cause not only in relevant regulatory forums but also before the public, by proper utilization of the relatively costless media. By "widening the scope of the conflict", an appropriate climate of public concern in the regulatory outcome can be created which forces the regulators to address the matters about which the public is concerned. This involves advocacy skills which traditional professional training does not provide for public interest advocates. These have to be consciously learned. Also, new strategic criteria for assessing "wins" and "losses" have to be learned as alternatives to the way the traditional practising lawyer makes such an assessment in a case-to-case setting.

(iv) There is a powerful case for establishing a set of minimum procedural standards for guiding the conduct of regulatory proceedings. For example, there should be consistent rules applying to most agencies governing the amount and nature of notice to other parties; the right to a hearing on the merits; who carries the onus of proof; the right to issue interrogatories to, and cross-examine, parties and obtain relevant information from them; the right to standing both before an agency and before the courts on an appeal from an agency's decision; and the right of non-business intervenors to a free transcript. Also, agencies should be given a discretion at the outset of a hearing to award the costs of an intervention, out of the projected rate increase, or public funds in non-rate cases, to serious low-intensity, non-subsidized intervenors. This will help keep the process as open as possible. Either an omnibus Act, similar in concept to the Ontario *Statutory Powers Procedures Act*[50] or the U.S. *Administrative Procedure Act*[51] but emphasizing ease of access as much as due process, or at least amendment of individual regulatory statutes with a view to the same end, is badly needed.[52]

In addition, the much larger question of the right of public access to government information, whether within regulatory agencies or elsewhere within government urgently calls for a response. The continuing refusal of the Foreign Investment Review Agency, under the *Foreign Investment Review Act*,[53] to give more than derisory reasons for its decisions is a contemporary example of this need.

With government expenditures now comprising 40% of Canada's G.N.P., increasingly consumers are consuming, and paying for, public rather than private goods. Government has been very willing to impose packaging, label-

[50] S.O. 1971, c. 47.

[51] 5 U.S.C. Para. 551.

[52] See generally, Cramton, *supra*, note 33; S. Lazarus and J. Olek *The Regulators and the People* (1971), 57 Virginia L. Rev. 1069; G. Gellhorn, *Public Participation in Administrative Proceedings* (1971), 81 Yale L.J. 359.

[53] S.C. 1973-74, c. 46.

ling and other informational requirements on the private sector but has been much more reticent in imposing similar requirements on itself so that the public can more efficiently evaluate the worth of government programmes. Legislation similar to the U.S. *Freedom of Information Act*[54] should be developed and enacted in each legislative jurisdiction as a matter of the highest priority.[55] If these matters are attended to, the attaching of sweeping special powers to a Consumer Advocacy programme, as envisaged in the U.S. proposals, becomes less necessary and smacks of a special status for one interest group, which is hard to justify. Consistent with the previous political analysis, most of the foregoing suggestions involve ways of reducing information and participation costs (*i.e.* opportunity costs) to the public.

The teaching of Administrative Law in the law schools also needs to adjust to the real dynamics, and problems, of the regulatory process. Judicial review and the prerogative writs — favourite pre-occupations of administrative lawyers — are mostly irrelevant to the issues raised by the activities of major regulatory agencies today.

(v) It is important from the point of view of political legitimacy that any consumer advocacy programme, even though state subsidized, be under citizen control so that broad priorities and positions reflect the views of those on whose behalf they are presented. Without this, such a programme is likely to degenerate into a highly paternalistic, elitist, personal power play, in which an oblivious constituency is illegitimately co-opted to provided the professional advocates with the appearance of a populist platform. The absence of this safeguard appears to be a major weakness in the U.S. proposals. The sentiments expressed by Peter Newman, in an editorial in *Macleans* magazine of April, 1974, need to be nurtured:

> Many of the really important decisions that will fundamentally affect and transform our future are being made not by parliament but by regulatory agencies .... If [they] are to take the public interest seriously into account, [they] must provide a mechanism for hearing directly from the people. That will require the funding of third party interventions which represent no vested interests.....
> Politicians and particularly bureaucrats get feeling edgy and threatened whenever they're faced by real people with live opinions. They shouldn't be. They are being threatened only with enlightenment.

2. *Long-run Problems*

While we have been focussing our attention on C.A.C.'s experience in the regulatory arena, the long-run issues raised by it are not confined to the regulatory arena but relate to the political process at large, and are not restricted to the consumer movement but relate to the role of any large, latent, interest group in the political process. Some serious long-run problems are exemplified by C.A.C.'s experience in the regulatory arena:

(i) Being funded by the party in power by executive grant, C.A.C.'s

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[54] 5 U.S.C. para. 552.

[55] For rudimentary discussions of the U.S. *Administrative Procedure Act* and *Freedom of Information Act*, see B. Schwartz and H. W. R. Wade, *Legal Control of Government* (Oxford: Clarendon Press, 1972) at 108ff, 77ff 329ff, and 339ff. For a more detailed discussion of these two Acts, see generally K. C. Davis, *Administrative Law Text* (3rd ed. St. Paul: West Pub. Co., 1972).

advocacy programme faces the danger of compromising its independence through concern over funding continuity. This has not proved to be a problem to date, but as the programme becomes more effective, as government departments find their regulatory policies called into public question, and as other, entrenched, interest groups begin to find life less comfortable than formerly, it is reasonable to assume that this danger will not always be hypothetical. This problem would not seem insuperable and would seem to require a legislative framework for the programme that carries insulating elements designed to ensure its independence from party politics in matters of priorities, policies, personnel and budget. At least, then, changes would be effected through parliamentary, and thus public, debate.

(ii) The question of the constituency for whom consumer advocates speak poses more fundamental problems. Just as disproportionately few citizens will find it worthwhile to join a consumer organization offering mostly collective goods, so also will most of those who do join find that it is unlikely to be worthwhile to participate extensively in collective goods decision-making. Thus, in C.A.C., only a handful of members find it worth the effort even to vote for membership of the association's small Board of Directors, let alone involve themselves further in the formulation of the association's policies. This might have been predicted from Olson's analysis and is confirmed by Kariel,[56] who stresses the essentially oligarchical character of large, latent, interest groups.

Compounding this factor, in the case of C.A.C.'s advocacy programme, is the fact that every taxpaying citizen in the country has, in effect, been coerced into membership of the association, with all the massive role conflicts that this entails. Was C.A.C. speaking for the President of Bell Telephone and the Presidents and shareholders of the airlines and railways (all contributors to its programme) in its recent interventions? Who was it in fact speaking for, and with what mandate? Where all members of all interest groups are coerced into becoming members of one oligarchically controlled interest group, theories of pluralism and interest group liberalism start to look a little shaky.[57]

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[56] *Supra*, note 12, chap. 14.

[57] The problem is, in fact, much more pervasive than this. Business lobby groups may deduct their lobbying expenses from income for tax purposes and thus, in effect, transfer some of the cost of their lobbying activities to the general body of taxpayers, who are not voluntarily part of their constituency. The financial figures involved in this form of coercion dwarf the government's grant to C.A.C. but collectively call into question the rationality of the whole theory of interest group pluralism when groups can no longer be clearly identified or delineated. As a matter of interest, should not every citizen who expends time and money in pursuing any collective good be able to claim the expenses as a tax deduction, if business can? Alternatively, should nobody be able to claim them? (cf. D. Bond, "Consumerism and Consumer Protection," in L. Smith, ed., *Issues in Canadian Economics* (Toronto: McGraw-Hill Ryerson, 1974) at 98). On a similar point, should not every consumer with a justified individual complaint against business be able to recover "aggravation" damage (transaction and opportunity costs) in pursuing the complaint to equalize business's ability to treat such costs on its side as costs of doing business? (cf. *Jarvis* v. *Swan Tours*, [1973] 1 All E.R. 71 (C.A.).)

For an argument favouring coerced support of collective goods decision-making to solve the free-rider problem, see J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971) at 267.

(iii) Even if the constituency issue can somehow be resolved, pluralist concepts of interest group liberalism themselves are coming under increasing question as operational philosophies for intelligent government of modern mixed economies. Critics of pluralist philosophies point out that the open-ended delegations of power by legislatures to regulatory agencies which have become typical are antithetical to rational planning of societal priorities and policies. Lowi asserts bluntly: "Interest group liberalism renders government impotent. Liberal governments cannot plan".[58] Substituted both for the allocative function of a competitive marketplace and that of central planning is interest group bargaining through an almost infinite number of largely autonomous regulatory agencies under no compulsion to act in concert in furtherance of more general collective policy goals. Thus, *participation, organization, structure* and *process* become ends in themselves. Let students, women, workers, the poor, ethnic groups, consumers, etc. *organize,* and all problems (if any are agreed upon) will go away. The rationality and over-all coherence of substantive outputs become subordinate to these new means-ends.

A further objection sometimes urged against a pluralist approach is that it is impossible to ensure participation by all affected interest groups, present and future, in public decision-making processes affecting them. As Charles Reich writes:

> The very concept of balancing is in one sense a contradiction of the concept of planning. Fashioning values and goals out of existing interests prevents any really long-range policy-making or planning from ever being done. It equates policy-making with satisfying the majority or the most powerful interest, although the country might benefit more from policies which favour weaker or minority interests, or interests not yet in existence. It tends to place emphasis on those interests which have a commercial or pecuniary value as against intangible interests such as scenery or recreation. The most fundamental infirmity of the present concept of the public interest as a guide for planning is that it defeats planning by responding only to immediate pressures.[59]

To bring all affected, extant groups into the political process would involve massive state support.[60] This might create in turn several new problems, albeit of a lesser kind, such as the emergence of groups looking only for new, paid occupations (a new kind of unemployment insurance), and the further paralysis of regulatory proceedings as participants multiply. In the case of future interest groups (for example, the interest of people as yet unborn in present decisions affecting their environment), it is difficult to see any solution.

In addition to these pragmatic problems, there is the more fundamental question of the ideological stake which supporters of the doctrine of pluralism (particularly those who gain substantially from it) have in perpetuating the

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[58] *Supra,* note 4 at 288; see also Kariel, *supra,* note 12; Presthus, *supra,* note 3 at 348.

[59] *Supra,* note 3 at 1239.

[60] The conscious creation by the State of necessary new countervailing power groups is explicitly urged by a number of commentators: see *e.g.* J. K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton, Mifflin, 1956), chap. X; Kariel, *supra,* note 12 at 272.

pluralist philosophy and not admitting or encouraging groups who will expose the philosophy to fundamental challenge. As Wolff writes:

> Pluralism is not explicitly a philosophy of privilege or injustice — it is a philosophy of equality and justice whose *concrete application* supports inequality by ignoring the existence of certain legitimate social groups. This ideological function of pluralism helps to explain one of the peculiarities of American politics. There is a very sharp distinction in the public domain between legitimate interests and those which are absolutely beyond the pale. If a group or interest is within the framework of acceptability, then it can be sure of winning some measure of what it seeks, for the process of national politics is distributive and compromising. On the other hand, if an interest falls *outside* the circle of the acceptable, it receives no attention whatsoever and its proponents are treated as crackpots, extremists, or foreign agents.[61]

In other words, "plural" has a tendency to become strictly limited. The implication of this restricted interpretation of pluralism for citizens' advocacy programmes is that apart from problems of internal group dynamics which tend in the same direction, continued state support of such programmes over the long-term appears likely to be contingent on broad acceptance by the groups concerned of the parameters of the regulatory *status quo*. Funding for established groups is also likely to be used as an excuse for not supporting other groups who wish to challenge political and regulatory policies in very fundamental or radical ways. Public participation in the regulatory process is likely to be seen as lending new legitimacy to, and thus re-inforcing and perpetuating, what may be inherently illegitimate or irrational processes. Strategically, in terms of an interest group's public posture, it may be very difficult simultaneously to opt in and opt out. The danger of co-optation by the *status quo* is a critically serious one. Its costs will be more fully explored below in the discussion of the rationale of regulation.

One final objection to subscribing to a doctrine of pluralism that is sometimes urged is that the doctrine implies a fundamentally uncivilized view of society. Collectivists such as Wolff see it as involving a form of government by guerilla warfare. Wolff writes:

> We must give up the image of society as a battleground of competing groups and formulate an ideal society more exalted than the mere acceptance of opposed interests and diverse customs. There is need for a new philosophy of community.[62]

The dilemma raised by this view is that even if we wish to move to a more collectivist approach to decisions about resource allocations, how does one interest group detach itself from the adversary ethic without making itself highly vulnerable to the depredations of other groups? How do we reach for "Consciousness III" without becoming Uncle Toms? On the other hand, if the solution lies in a spontaneous shift in community-wide values, does this leave us waiting, perhaps forlornly, for the Apocalypse?

(iv) The possibility, through participation in the regulatory process, of being co-opted into accepting and endorsing its essential forms carries serious

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[61] *The Poverty of Liberalism* (Boston: Beacon Press, 1968) at 154; cf. Presthus, *supra*, note 3 at 349.

[62] *Id.* at 161.

potential costs. First, it involves the consumer movement acquiescing in the incoherence and decisional dysfunctions produced by the random outputs of the fragmented, proliferating regulatory regimes of the modern state.[63] A related cost is acquiescence in the increasing paralysis of the total apparatus, in terms of its ability to respond quickly, rationally, and decisively, to rapidly changing social challenges and crises.[64] The inability of government in Canada to evolve coherent national or even regional policies in such key sectors as energy, food, transportation and housing, exemplifies these costs of the modern regulatory state.

Another cost goes to conventional considerations of economic efficiency raised by the fact of regulation itself. A growing group of commentators from Ralph Nader,[65] on the one hand, to Lewis Engman, the Nixon-appointed Chairman of the Federal Trade Commission, on the other, are now urging massive de-regulation of the economy and an attempt to restore vigorously competitive markets, wherever possible. At least in such a market, a consumer has to decide that it is worth his while to incur the transaction costs entailed in participating in a transaction before his interests can be affected. In other words, he will have to be privy to most market decisions which affect his economic interests as a consumer, unlike most regulatory decisions which affect those interests. In Canada, prime sectors for substantial de-regulation and enforced competition might include transportation, communications, banking, agriculture, and the professions. As a society, we can no longer operate effectively the elaborate, intricately interwoven regulatory

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[63] A current example of this kind of incoherence is that, despite the declared goal of the Federal Government of national self-sufficiency in oil, the unco-ordinated attempts of the Federal Government, Provincial Governments and assorted Energy Boards and Commissions to tax and otherwise regulate the oil industry may produce exactly the opposite result.

A further example of regulatory confusion is the history of the 45-foot height limit by-law regulating development in downtown Toronto passed two years ago by the Toronto City Council and evolved and implemented through endless Council Committees. In its application, random exceptions were increasingly made and in late 1974, it was overturned by the Ontario Municipal Board (O.M.B.) from whose decision the City appealed to the Provincial Cabinet — in the meantime total confusion as to who is running Toronto, how, and towards what goals. Another interesting insight from this case is that in two municipal elections, a substantial percentage of citizens had felt it worthwhile to incur the information and opportunity costs entailed in voting in a "control development" council. In the lengthy hearings on the by-law before the O.M.B., a non-elected body of technocrats (who described the Council's decision as "political" — what else should it have been?), only 36 developers and the City Council itself found it rational to incur the much higher costs of participating. No citizens seriously participated. The outcome was predictable.

[64] A current example of this paralysis is the housing sector. While the federal government has made large sums of money available in an attempt to alleviate the acute shortage of low-income housing, various municipalities have refused the funding on the ground that the restricted property tax base given them by senior levels of government does not enable them to raise the revenues to service lower priced housing. The federal government, provincial government and municipalities seem incapable of co-ordinating all the pieces of a compatible policy capable of decisively addressing the housing crisis.

[65] See Green, Nader, & Winter, *supra,* note 11.

infra-structure that we have developed. Daniel Patrick Moynihan made this point simply but poignantly in a speech to a NATO meeting in 1970:

> . . . modern government must learn to respond to technologically induced difficulties with something of the same economy of talent that technology has devised. We cannot go on devising government arrangements that only extraordinary men can make work. Most of the work of the world has to be done by men of average endowment, energy, and social vision.

Where competitive markets are not possible, increasingly we must accept the stark alternative of much more direct, explicit, unashamed, central planning. A major political advantage of greater use of central planning instruments is that interest group inter-action is more focussed, more circumscribed, and more visible, and outcomes are subject to more political accountability.[66] Effective central planning entails, at a minimum, much greater use than at present of central regulatory instruments, such as tax, tariff, and competition policies. However, as the experience with competition policy and tax reform in this country has shown, a bold range of additional steps must be contemplated if the ideal of a more coherent, widely responsive central planning process is to be seriously pursued. An agenda for future research might focus on issues such as the following: Where regulatory agencies are found indispensable, would much more detailed, frequent, legislated policy directions to the agencies be desirable and feasible?[67] Should the central government, or, where appropriate, regional government, have the power to over-rule the decisions of major agencies on the basis of published reasons open to parliamentary and public debate? Should all major agencies and Crown corporations be accountable, through a Cabinet Minister, to Parliament? Should much greater research support from general revenues be provided to opposition parties (also large, latent, interest groups), individual M.P.'s and Parliamentary Committees, in the hope that the central political process might then exercise a more effective, direct, oversight role in relation to the agencies, Crown Corporations, and government subsidy programmes? Should the heads of these agencies and programmes be personally and regularly accountable to Parliament in Parliamentary Committee debates on estimates? Should traditional Anglo-Canadian concepts of civil service tenure be preserved, or should there be a much greater ability in the central political authority to hire (from anywhere) and fire (at any time) regulators, Deputy Ministers, Assistant Deputy Ministers and other senior civil servants influential in policy formulation to prevent dissonance and foot-dragging in the command structure.[68] Another line of inquiry which bears exploration is whether regulatory officials (and thus, indirectly, government) should, in some contexts (for example, food, drug, product safety, securities regulation, and welfare entitle-

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[66] See Lowi, *supra*, note 4; Kariel, *supra*, note 12; Heilbroner, *supra*, note 16; G. Myrdal, *Beyond tha Welfare State* (New Haven: Yale Univ. Press, 1960).

[67] Cf. Lowi, *id.*, Chap. 10; Bernstein, *supra*, note 33 at 284-86.

[68] As to arguments for the need for appropriate lines of political accountability for regulatory decision-makers, see Bernstein, *id.* Chap. 5; The President's Advisory Council on Executive Organization, (the Ash Council), *Report on Selected Independent Regulatory Agencies*, January 1971 at 14 *et seq*; Kariel, *supra*, note 12, Chap. 15; Lowi, *id.*, Chap. 10.

ments) be held civilly liable for negligence to aggrieved citizens, thus attaching private costs to those who make bad public decisions and creating additional incentives for a more responsive regulatory environment?[69] Effective central planning may also entail a much more effective over-sight function by the Courts in relation to legislative and regulatory activity. For example, within the interstices of the law left open to judicial interpretation (for example "inter-provincial trade and commerce") should the courts more consciously promote substantive rationality of economic outputs, and retreat less into legal formalism?[70] In the case of the Federal Court of Appeal and the Supreme Court of Canada, is there a case for appointing to the Court two or three luminous non-legal intellects, with a pervasive sense of the larger social and economic fabric in which particular issues arise, and not merely the limited technical considerations raised by those issues? Should litigants be more actively encouraged to address issues of policy rationality in their submissions? Should Brandeis briefs be invited from interest groups indirectly affected by the outcome of major judicial decisions? Should legislation limit or prescribe corporate campaign contributions and provide for the funding of election campaigns out of public funds, so that the participation rate of high-intensity and low-intensity groups in the political process is more equal?[71] What rights of access should the public be given to government information? What additional forms of assistance should be given to citizens to facilitate participation in legislative and regulatory decision-making? The potential impact of something as seemingly trivial as the broadcasting and televising of parts of the Parliamentary process, so that information costs to the public about public decision-making are reduced, also requires assessment.

The costs of over-regulation and under-government have been eloquently articulated in a recent speech by Lewis Engman:

> Though most government regulation was enacted under the guise of protecting the consumer from abuse, much of today's regulatory machinery does little more than shelter producers from the normal competitive consequences of lassitude and inefficiency . . . . The consumer for whatever presumed abuse he is being spared is paying plenty in the form of government sanctioned price fixing.[72]

Engman proceeds to give a number of examples from the regulated industries of state-sanctioned monopoly profits, and estimates that in the transportation field alone hidden regulatory subsidies may cost consumers in excess of $16

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[69] Cf. G. Tullock, *Public Decisions as Public Goods* (1971), 70 J. Pol. Ec. 913.

[70] As to the difficulties faced by courts making rational decisions in this area without the relevant economic data before them, see the observations of Laskin, J. in *A. G. for Manitoba* v. *Manitoba Egg & Poultry Association* (1971), 19 D.L.R. (3rd) 169 at 181, 182.

[71] Cf. *Election Expenses Act*, S.C. 1973-74, c. 51; *Election Finances Reform Act*, S.O. 1975, c. 12. Both Acts require disclosure of contributions and limit permissible expenses to a proportionate amount based on the number of registered electors in a constituency. Only the Ontario legislation (s.19(1)), actually limits *contributions* by any person or corporation to a cumulative maximum of $6,500.

[72] Speech to Fall Conference of the Financial Analysts Federation, Detroit, October 7, 1974.

billion a year ($80 per annum per man, woman and child in the U.S.).[73] He continues:

> To me, the most distressing development is the pervasive and well-accepted dishonesty that pervades the government's approach to regulation. The existing crazy quilt of anti-consumer subsidies embodied in the intricately woven fabric of federal and state statutes and regulations is pernicious because: (1) the subsidies are deliberately hidden from public view; (2) the government had irresponsibly lost track of the actual cost of these subsidies;[74] (3) in most, if not all cases, we have adopted the least efficient form of subsidy with the purpose of hiding the subsidy from the public and obfuscating its true cost . . . .[75]
>
> From time to time, proposals have been made to provide direct cash subsidies in lieu of the patchwork of regulatory subsidies that now pervade our economy. Opponents rise indignantly to object that hardworking individuals and businesses do not want handouts. Well, a rose by any other name . . . . Our airlines, our truckers, our railroads, our electronics media and countless others are on the dole. We get irate about welfare fraud. But, our complex systems of hidden regulatory subsidies make welfare fraud look like petty larceny . . . . The fact of the matter is that most regulated industries have become federal protectorates, living in the cozy world of cost-plus, safely protected from the ugly spectres of competition, efficiency and innovation.

Engman concludes that unless the whole regulatory apparatus can be radically rationalised, "our regulators will continue to stumble around in an increasingly expensive game of blind man's bluff".

His remarks are equally applicable to the Canadian regulatory scene. Apart from the regulated industries, which in many cases are effectively administering their own markets with the complicity of the State, other occupations have won the right from the State explicitly to administer their

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[73] Canadians are estimated to spend one dollar in five on transportation costs, how much on subsidies nobody knows.

[74] A typical Canadian example of this kind of "dysfunction" is the current prosecution (the second in recent years) of sugar refiners for price-fixing by the Department of Consumer and Corporate Affairs, while the Department of Finance insists on maintaining a customs tariff on imported, refined sugar.

[75] Recent notable examples of this last point in Canada are the egg marketing boards, where, in the alleged interest of the marginal farmer, a producer-determined subsidy is levied on all consumers of eggs indiscriminately, whether they can afford it or not (i.e. a regressive tax) and distributed to all producers indiscriminately, whether they need it or not. This produces bizarre wealth redistribution effects, and is also inconsistent with the Federal Government's declared intention of bringing down food prices by increasing supply rather than through controls, as witness the destruction in the summer of 1974 of 28 million eggs by the central egg marketing agency (CEMA). If an income transfer to marginal family farmers is thought socially desirable, why not a direct selective, transfer through the progressive income tax system? If the problem is also fluctuating farm incomes, why not better tax averaging provisions?

Another example concerns airlines regulation whereby in order to receive a profitable route, an airline has to agree to fly some unprofitable routes. This creates irrational cross-subsidy effects between passengers on high-traffic routes and those on low-traffic routes. Why not let all regional, national and international carriers compete on all routes as they please and if some are abandoned as uneconomic, let the government let out to competitive tender the right to fly these routes in return for a direct cash subsidy paid out of general revenues? We would have more competition, and in the case of subsidized routes, we would know, and decide, who is to pay what to whom (cf. address by J. W. Pickersgill to the Air Transport Association of Canada, Vancouver, Oct. 30, 1974).

own markets. For example, in Schedule I to the Quebec *Professional Code*,[76] 38 professions are listed, including social workers, agronomists, denturologists, industrial relations counsellors, vocational guidance counsellors, and town planners, all of whom are given some degree of monopoly power by the State. The medical profession has, of course, been given a State-sanctioned right to administer its own market with the helpful adjunct of being able to make its own subventions out of public revenues. Proving that State-sanctioned monopolies are contagiously attractive, most parts of the agricultural sector, drawing expressly on the precedent of "professional" marketing boards, have either received or are demanding the right to create producer-controlled agricultural marketing boards with comprehensive supply management powers. Add to this the emergence of international supply and price management cartels in oil, sugar, coffee and other staples, beyond the reach, of course, of domestic anti-trust laws, and the economic order in the world seems bent on a retreat from nineteenth century *laissez-faire* capitalism to thirteenth century feudalism, back from contract to status. Business (with the aid of government) has now emerged as the chief subverter of the competitive economy which it claims to remember so fondly.

It is submitted that the general form of the antidote to be urged by consumerism that emerges from the foregoing analysis is this: *As a first priority,* we should preserve or re-activate vigorously competitive markets wherever possible and not succumb to producer pleas to substitute accommodating regulatory regimes.[77] *As a second best solution,* in the event of demonstrated and significant market failure, or in the event of undesirable social outputs from admittedly competitive markets, we should invoke central planning instruments such as competition, tariff and tax policies or legislated direct subsidies, through a more publicly accountable central political process. On the level of more specific and limited legislative programmes that significant market imperfections might elicit, a substantial consumer consensus might be found for stronger laws sanctioning misleading advertising and sales practices so as to reduce the amount of misinformation given to consumers, disclosure requirements (for example, true interest rates, informative labelling, unit pricing), public product and service grading, public price comparisons, and business complaints rating services, whenever the potential benefits to consumers from possessing this information exceed the costs of providing it. Expanded consumer education programmes, and, very importantly, vastly improved access to effective civil grievance-solving mechanisms might also attract similar consumer support. These programmes would focus on the complementary concepts of feeding better information into the market-place and elevating the importance of civil enforcement mechanisms over criminal and administrative enforcement mechanisms thus seeking to squeeze as much non-competitive slack as possible out of the market. These twin approaches would try to ensure that consumers have instruments placed at their disposal which make them the principal agents in their own protection, and reduce

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[76] Bill 250, July 6, 1973, S.Q.

[77] Cf. A. Phillips, ed., *Promoting Competition in Regulated Markets* (Washington, Brookings Institution, 1975).

their dependence on public regulatory responses. *Only as a third best solution,* where delegation of regulatory authority is unavoidable, should delegated regulatory agencies be utilized, provided, however, that they are much more publicly accessible and politically accountable than at present. In some situations, of course, a mix of all three approaches may be dictated but even here we should not lose sight of where, presumptively, the relative policy emphases should lie.

D. CONCLUSION

This article has sought to identify some of the larger issues in the modern regulatory state that consumerism must constantly confront, if in Heilbroner's words, it is to claim a role as one of "the sentries of society"[78] For consumerism, in the last analysis, is about the fundamentals of our economic system. To eschew this role can only mean that consumerism will become part of the flotsam and jetsam of the modern regulatory state, adrift in a fathomless sea of regulatory dross, carried wherever the dictates of the tides and winds of the moment decree.

To come full circle to the opening political analysis of this article, two specific challenges now face modern consumerism. First, recognizing the diffusion of the consumer interest and the free rider problem, can the consumer movement overcome the organizational, and thus political, disabilities that afflict large, latent interest groups? Secondly, as the consumer movement seeks to mobilize substantial political support, is it at the same time possible for it to play the role of a fearless and far-sighted social critic by forging a broad-based coalition of citizens around a set of collective goals that embrace new and relevant concepts of economic justice? Or will the consumer interest always be too fragmented to allow of such a coalition? Does Dr. Stigler's prognosis express an eternal verity? As the analysis in this article has sought to show, these are daunting challenges, but to leave them unanswered may be also to have abdicated on many other seemingly more pressing questions about the future of our existing economic order.

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[78] *Supra,* note 16.