

Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection

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UNFAIR TRADE PRACTICES LEGISLATION: SYMBOLISM AND SUBSTANCE IN CONSUMER PROTECTION

By EDWARD P. BELOBABA*

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There is a widespread assumption that legislation, once adopted, disposes of a problem. It is a view that serves the purposes of governments, for legislation creates an image of concern and response. And it costs very little. Nevertheless, it is often an erroneous view.¹

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¹ Ziegel, *The Future of Canadian Consumerism* (1973), 51 Can. B. Rev. 191 at 198.

A. INTRODUCTION AND OVERVIEW

1. *Introduction*

Protecting the consumer against unfair and deceptive business practices has been a matter of intermittent governmental concern for several centuries.² In Canada, sporadic federal and provincial consumer-oriented legislative initiatives have resulted in fragmentary and disparate consumer protection laws.³ However, a concerted legislative effort to provide a more comprehensive regulatory approach has recently materialized. Omnibus consumer trade practices legislation has now been enacted by at least three provincial legislatures⁴ and there are indications that other provinces will soon follow their lead.⁵

This increased legislative activity on behalf of the Canadian consumer has not been confined to the provinces. The federal government, having recently implemented the Phase I amendments to the *Combines Investigation Act*,⁶ is continuing to show keen interest in the area of consumer unfair trade practices. Several studies released by the federal Department of Consumer and Corporate Affairs reflect the federal government's commitment to consumer protection at the national level. One such study provides an excellent analysis

² In 1481, for example, King Louis XI of France achieved an oft-forgotten stature as a mediaeval consumer advocate when he promulgated the following legislative edict:

Anyone who sells butter containing stones or other things [to add to the weight] will be put into our pillory; then the said butter will be placed on his head and left until entirely melted by the sun. Dogs may come and lick him and people offend him with whatever defamatory epithets they please without offence to God or the King.

Quoted in Breeden and Lovett, *Louisiana's New Unfair Trade Practice and Consumer Protection Law* (1973), 20 La. B.J. 307, n.4. A concise history of consumer protection efforts from biblical times onwards is provided in Geis and Edelhertz, *Criminal Law and Consumer Fraud: A Sociological View* (1972-73), 11 Am. Crim. L.R. 989 at 989-996.

³ At the federal level, the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as amended by S.C. 1975, c. 76, provides some regulation of misleading advertising, double-ticketing, pyramid and referral selling, bait and switch sales practices and promotional contests. See generally Ziegel, *Recent Developments in Consumer Law* (Toronto: Canadian Bar Association, 1976) at 2-10. Also see Cohen, *Bill C-7: Its Proposed Amendments to the Law of False Advertising* (1974), 13 Can. P.R. (N.S.) 197. The consumer protection efforts at the provincial level have generally been directed at particularized marketplace abuses, e.g., door-to-door sales methods, truth-in-lending disclosures, and registration schemes. For an example of the former, see the Ontario *Consumer Protection Act*, *infra*, note 89. For examples of the latter see the registration statutes itemized, *infra*, note 295.

⁴ The British Columbia *Trade Practices Act*, S.B.C. 1974, c. 96 (as amended by S.B.C. 1975, c. 80); the Ontario *Business Practices Act*, S.O. 1974, c. 131; and the Alberta *Unfair Trade Practices Act*, S.A. 1975, c. 33 (as amended by S.A. 1976, c. 54).

⁵ "It is rumoured that Manitoba, Saskatchewan, Quebec, and Newfoundland are not far behind." Cohen and Ziegel, *The Political and Constitutional Basis for a New Trade Practices Act* (Ottawa, Department of Consumer and Corporate Affairs, Bureau of Competition Policy, 1976) at 7. Hereinafter the *Cohen and Ziegel Study*.

⁶ R.S.C. 1970, c. C-23. The Phase I amendments were enacted as *An Act to Amend the Combines Investigation Act 1975*, S.C. 1975 c. 76. See generally Kaiser, *The New Competition Law: Stage One*, (1976), 1 C.B.L.J. 147. At time of writing the second stage amendments had just been introduced; see *Globe and Mail*, March 17, 1977 at 1.

of the regulation of misleading and unfair trade practices;⁷ another evaluates the political and constitutional basis for federal legislative involvement;⁸ and a third considers the question of federal-provincial relations in the consumer protection field.⁹ The nature and extent of these suggested federal initiatives with respect to the regulation of consumer trade practices are issues that will undoubtedly prove to be of continuing interest to students of consumer and constitutional law. Before any satisfactory evaluation of the regulatory potential of a dual-jurisdictional approach to trade practices regulation can be made, however, attention must be directed to a critical analysis of the recent provincial efforts.

This article attempts such a critique. Its primary purpose is to provide both a comparative analysis and a critical evaluation of the recently enacted provincial trade practices statutes. An underlying motivation for this fairly extensive statutory analysis is the realization that symbolic or "name-only" legislation, particularly in the area of consumer protection, is frequently confused with substantive reform.¹⁰ The challenge for the proponents of Canadian consumerism is to be alert to those legislative efforts that provide nothing more than symbolic protection. In my view, the recent provincial trade practices legislation provides valuable lessons in this regard. These lessons are relevant not only to consumers generally, but to the legislative draftsmen who would undoubtedly agree with Professor Leff's observation that "it is easy to say nothing with words."¹¹

2. *The Provincial Trade Practices Legislation*

It was only three years ago that British Columbia became the first Canadian jurisdiction to enact comprehensive legislation to protect consumers against unfair and deceptive business practices. The *B.C. Trade Practices Act*¹² received first reading on May 8, 1974, and was proclaimed in force July 5, 1974.¹³ In Ontario, the *Business Practices Act*¹⁴ was read for the first

⁷ Trebilcock et al., *A Study on Consumer Misleading and Unfair Trade Practices* (Ottawa, Department of Consumer and Corporate Affairs, Bureau of Competition Policy, 1976) (hereinafter the *Trebilcock Study*). This two-volume study provides an excellent analysis of various questions relating to the regulation of consumer fair trade practices at the federal level. There is considerable reference to the *Trebilcock Study* proposals, *infra*.

⁸ Cohen and Ziegel Study, *supra*, note 5.

⁹ Romero, *Federal-Provincial Relations in the Field of Consumer Protection* (Ottawa: Consumer Research Council, 1975).

¹⁰ Furness, *The Time is Now*, Trial, Aug.-Sept., 1968 at 197. Ralph Nader has also urged that consumers not confuse "verbal and symbolic momentums—such as new, toothless laws with no funding and enforcement—with true progress." *Fake Reforms?* Trial, Feb.-March 1970 at 55. Quoted in Eovaldi and Gestrin, *Justice for Consumers: The Mechanisms of Redress* (1971), 66 Nw. U.L.R. 281, n.3.

¹¹ Leff, *Unconscionability and the Code—The Emperor's New Clause* (1967), 115 U.Pa. L.R. 485 at 559.

¹² S.B.C. 1974, c. 96, as amended by S.B.C. 1975 c. 80. Hereinafter the B.C. Act.

¹³ With the exception of ss. 2(3)(n) and 2(3)(p). At time of writing these sections have not been proclaimed in force. See, *infra*, note 157 and accompanying text.

¹⁴ S.O. 1974, c. 131. Hereinafter the Ontario Act.

time on May 9, 1974; however, the Ontario Act was not proclaimed in force until May 1, 1975. The third province to enact a trade practices statute was Alberta, where the *Unfair Trade Practices Act*¹⁵ became effective on January 1, 1976. The fourth and final provincial statute that is relevant to this study is the Saskatchewan *Trade Practices Act*.¹⁶ Although the Saskatchewan Act is still in bill form at the date of writing, its passage is expected in the spring of 1978.¹⁷

The four provincial trade practices statutes, which provide the basis for this article, are not mere duplicates. Even a superficial reading of these enactments will reveal significant differences in the scope of the legislation, the range of prohibited practices, the choice and availability of remedies, the nature and extent of the administrative powers of the enforcing authority, and the availability and utilization of the criminal sanction. Parts B and C of this article are devoted to an exploration and an evaluation of these differences. There are, nonetheless, certain fundamental similarities both in concept and content.

The conceptual similarity is indicated by the statutory titles. Each of the enactments is intended as a comprehensive measure designed, on the one hand, to protect consumers from certain specified marketplace abuses and, on the other hand, to provide effective procedures for the recovery of consumer losses. The legislative strategy has been to create an integrated framework of governmental enforcement mechanisms, consumer-initiated redress procedures and, as a last resort, recourse to the criminal sanction.

Although the content of the provincial trade practices legislation is far from uniform, the various statutory provisions reflect a general commitment to the idea that a substantial reform of the common law was a critical prerequisite for even a minimally effective trade practices enactment. Consequently, each of the statutes has substantially altered common law notions regarding the scope of the contract, the doctrine of privity, the admissibility of parol evidence, and the availability of remedies.¹⁸ There is also reflected in the provincial legislation a structural uniformity that suggests some common starting point. It seems clear that this starting point was the conscious adoption of a legislative model already implemented in another jurisdiction. The provincial trade practices enactments, in my view, reflect a significant American influence. Before commencing a comparative analysis of the provincial legislation, it may be worthwhile to explore the extent of this influence and its implications for the provincial draftsman.

¹⁵ S.A. 1975, c. 33, as amended by S.A. 197, c. 54. Hereinafter the Alberta Act.

¹⁶ The Saskatchewan *Trade Practices Act, 1977* was still in bill form at time of writing. See *Proposal for a Bill on Trade Practices 1976* (Saskatchewan Department of Consumer Affairs). For the sake of convenience this bill will hereinafter be cited as the Saskatchewan Act.

¹⁷ Conversation with the Saskatchewan Deputy Minister of Consumer Affairs, March 22, 1977.

¹⁸ Discussed, *infra*, in Part B.

3. *The American Influence*

The American experience in the regulation of unfair and deceptive trade practices is an extensive one, both at the federal and state levels.¹⁹ At the national level, the Federal Trade Commission has become "a formidable consumer protection agency."²⁰ Armed with a wide range of administrative and rule-making powers,²¹ the FTC has assumed the predominant jurisdiction over nationally significant marketplace abuses.²² It has also played an important role in the development of state trade practices legislation. To date, forty-eight states have enacted legislation to deal with unfair and deceptive trade practices.²³ There is considerable variance among the legislation both as to structure and style, but four basic models are discernible: "little FTC Acts," consumer fraud statutes, deceptive trade practices legislation, and the *Uniform Consumer Sales Practices Act*.

The "little FTC Act" designation is somewhat of a misnomer. Although the model was a consequence of the collaboration of the FTC with the Committee on Suggested Legislation of the Council of State Governments,

¹⁹ There is also a considerable involvement in trade practices regulation at the local or municipal levels, the best example being New York City. See generally Lefkowitz, *Some Reflections on Consumer Protection in New York* (1975), 10 Gonzaga L.R. 381; Note, *New York City's Alternative to the Consumer Class Action: The Government as Robin Hood* (1971-72), 9 Harv. J. Legis. 301; Comment, *Deceptive Practices in the Marketplace: Consumer Protection by New York Government Agencies* (1974-75), 3 Fordham Urban L.J. 491.

²⁰ Kintner and Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency* (1975), 26 Mercer L.R. 651 at 688. But cf. Posner, *Do We Really Need an FTC* (1969), 3 Antitrust L. & Econ. R. 65.

²¹ In January, 1975, Congress passed the *Magnusson-Moss Warranty—Federal Trade Commission Improvement Act*, expanding FTC powers in areas of investigation, rule-making and civil penalties for knowing violations. See generally *Trebilcock Study*, *supra*, note 7 at 116 and 113.

²² The literature on the FTC is enormous. Four very helpful recent articles are Kintner and Smith, *supra*, note 20; Erxleben, *The FTC's Kaleidoscopic Unfairness Statute: Section 5* (1975), 10 Gonzaga L.R. 333; Kaplan, *The Federal Trade Commission and Equitable Remedies* (1975), 25 Am. U.L.R. 173; Nelson, *The Politicization of FTC Rulemaking* (1976), 8 Conn. L.R. 413.

²³ Note, *Non-Traditional Remedies for the Settlement of Consumer Disputes* (1976), 49 Temple L.Q. 385 at 408, n. 148. Also see *Trebilcock Study*, *supra*, note 7 at 115. The two states lacking such laws are Alabama and Tennessee. Both, however, have established consumer complaint clearing-houses to receive complaints, provide advice, represent consumer interests before state bodies, and recommend legislation. See Sebert, *Enforcement of State Deceptive Trade Practices Statutes* (1975), 42 Tenn. L.R. 689 at 703, and Harrison, *Consumer Protection in Alabama—Its Status and a Proposal* (1975), 5 Cumb.-Sam. L.R. 404. For a general history of state unfair trade practices legislation see Lovett, *State Deceptive Trade Practice Legislation* (1972), 46 Tul. L.R. 724. Other helpful analyses are found in Kazanjian, *Consumer Protection by the State Attorneys General: A Time for Renewal* (1973), 49 Notre Dame Law. 410; Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act* (1971), 2 Pac. L.J. 1; Jeffries, *Protection for Consumers Against Unfair and Deceptive Business* (1974), 57 Marquette L.R. 559; Note, *An Act to Prohibit Unfair and Deceptive Trade Practices* (1970), 7 Harv. J. Legis. 122; Tennyson, *The Deceptive and Unfair Trade Practices Act: A New Approach to Trade Regulation in Florida* (1974), 2 Fla. State U.L.R. 223; Symposium, *The Developing Law of Consumer Protection* (1975), 10 Gonzaga L.R. 319 *et seq.*

and to this extent carried the FTC's encouragement for state adoption, the "little FTC Act" is considerably broader and more effective in its remedial provisions than the federal act, providing private enforcement remedies as well as administrative measures. The formal title of the model bill is the *Uniform Trade Practices and Consumer Protection Act (UTPCPA)*,²⁴ but most American commentators prefer the more colloquial designation. "Little FTC Acts" have been passed by at least fifteen states.²⁵ They are particularly attractive for those jurisdictions which require both anti-trust and consumer trade practices protection. To accommodate state preferences, the *UTPCPA* provided three alternative formulations of the prohibited conduct provision.²⁶

Consumer fraud laws are the primary vehicle for state enforcement in at least thirteen states.²⁷ Providing protection against deceptive or unconscionable commercial practices, these statutes are substantially similar to the "little FTC Acts" with one important exception. The "little FTC" model encompasses all unfair methods of competition whereas the consumer fraud statutes focus only upon consumer transactions.

The third legislative model utilized in state trade practices regulation is a variation of the *Uniform Deceptive Trade Practices Act (UDTPA)* that was promulgated in 1966 by the National Conference of Commissioners on Uniform State Laws.²⁸ In lieu of the broad definitions of deceptive practices found in the first two models, the *UDTPA* lists twelve specific prohibitions relating to problems of trade names, quality misrepresentation, and "bait and switch" selling.²⁹ Some states have added a thirteenth provision prohibiting "any other act or practice which is unfair or deceptive to the consumer."³⁰ The *UDTPA*

²⁴ Originally published by the Council of State Governments' Committee on Suggested State Legislation in 1967 and amended in 1969 and 1970. See, *Suggested State Legislation*, Vol. 29 (Chicago: Council of State Governments, 1970) at 141, and Haemmel, George and Bliss, eds., *Consumer Law* (St. Paul, Minn.: West, 1975) at 111.

²⁵ Sebert, *supra*, note 23 at 699. The most recent survey of the "little FTC" legislation is found in Schulman, *Little FTC Act: The Neglected Alternative* (1976), 9 John Marshall J. of P.P., 351. Schulman concludes at 375 that the little FTC Act is an act which is "necessary to the administration of justice in the field of consumerism."

²⁶ Alternative Form No. 1 utilizes the broad language of s. 5 of the *Federal Trade Commission Act* (15 U.S.C., s. 45 *et seq.*) and prohibits "unfair methods of competition and unfair or deceptive trade practices."

Alternative Form No. 2, which made "false, misleading or deceptive acts or practices in the conduct of any trade or commerce" unlawful, was intended for those states that can deal with anti-competitive practices under other legislation.

Alternative Form No. 3 itemizes twelve prohibited practices and provides a catch-all clause to reach other non-specified forms of deception.

See generally Haemmel, George and Bliss, *supra*, note 24 at 112 and the *Trebilcock Study*, *supra*, note 7 at 115-119.

²⁷ Sebert, *supra*, note 23 at 699; Note, *supra*, note 23 at 409.

²⁸ Note, *supra*, note 23 at 409. The *UDTPA* is evaluated in Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act* (1967), 76 Yale L.J. 485. Also see Dole, *Consumer Class Actions under the Uniform Deceptive Trade Practices Act*, [1968] Duke L.J. 1101.

²⁹ Note, *supra*, note 23 at 409, n. 159.

³⁰ *Id.* at 410.

is deficient insofar as it provides only for private remedies and contains no provision for public enforcement. Some states have amended their version of the Act to include an administrative enforcement procedure and at least one state with a *UDTPA* history has opted for the "little FTC" model.³¹ To date, fourteen states retain the deceptive trade practices statute as their primary legislative vehicle for the regulation of marketplace abuse.³²

The fourth and final model, the *Uniform Consumer Sales Practices Act (UCSPA)*,³³ was approved by the Commissioners on Uniform State Laws in 1970 and by the American Bar Association in 1972. Although similar in form to the "little FTC Act,"³⁴ the *UCSPA* differs from the other models in two significant respects. First, its coverage is limited to "consumer transactions"³⁵ whereas two of the other models, the "little FTC Act" and the *UDTPA*, extend to all commercial transactions. Secondly, although the *UCSPA* adopts the style of the *UDTPA* in listing specifically certain proscribed practices,³⁶ it goes beyond the *UDTPA* in providing a general prohibition of both deceptive and unconscionable acts or practices.³⁷ The *UCSPA* or a variation of it has been adopted in four states: Kansas, Ohio, Utah, and Nebraska.³⁸

Which of the four legislative models has had the greatest impact in the drafting of the Canadian trade practices enactments? Because of the substantial overlap in style and structure among the American models, any attempt to select one would prove impracticable. Indeed, the difficulty is compounded by the fact that there is a wide divergence in several respects among the provincial enactments.³⁹ However, two pronouncedly American influences are evident in each of the provincial trade practices statutes. The first is the provincial draftsman's decision to combine a general, open-textured prohibition of unfair or deceptive trade practices with a non-exhaustive "shopping list" of specifically proscribed practices.⁴⁰ The second is the uniform structural preference accorded to the administrative and civil remedies, and the consequent relegation of the criminal sanction to a supplementary position of last resort.⁴¹ Both features are particularly evident in the *Uniform Consumer Sales*

³¹ *Id.* at 409-410; Sebert, *supra*, note 23 at 700.

³² Sebert, *supra*, note 23 at 700.

³³ 7 Uniform Laws Ann. 212 (master ed. Supp. 1975). For a panel discussion on the *UCSPA* see (1971-72), 27 Bus. Law. 139. One commentator has suggested that the *UCSPA* has become nothing more than a "model act for the preservation of the status quo": see Rice, *Uniform Consumer Sales Practice Act—Damages Remedy: The NCCUSL Giveth and Taketh Away* (1972), 67 Nw. U.L.R. 369 at 384.

³⁴ *Supra*, notes 24 to 26 and accompanying text.

³⁵ *UCSPA*, *supra*, note 33, ss. 2-4.

³⁶ Sebert, *supra*, note 23, at 702; Haemmel, George and Bliss, *supra*, note 24 at 112.

³⁷ *Id.* Also see *Trebilcock Study*, *supra*, note 7 at 116.

³⁸ Sebert, *supra*, note 23 at 702, n. 62; Haemmel, George and Bliss, *supra*, note 24 at 112.

³⁹ See the analysis, *infra*, Part B.

⁴⁰ B.C. Act, ss. 2-3; Ontario Act, ss. 2-3; Alberta Act, s. 4; Saskatchewan Act, ss. 3-4. And see, *infra*, Part B.

⁴¹ See, *infra*, Part B and the discussion of the criminal sanction.

Practices Act and thus persuade me that the *UCSPA* was in many respects the most influential American model. Regrettably, some of the more progressive aspects of this Uniform Act were conscientiously ignored in the drafting of the Canadian legislation. The nature and extent of the deviation from the American model provides a highly relevant backdrop to the analysis and evaluation of the provincial statutes.

B. A COMPARATIVE ANALYSIS OF THE PROVINCIAL LEGISLATION

1. *Application and Scope*

The ostensible concern of each of the provincial enactments is the protection of the consumer against deceptive, unconscionable, and generally unfair sales practices. To this end, the provincial legislatures have provided what is, in their view, the appropriate mix of private and public enforcement and reparative mechanisms that will best achieve this primary objective. Given the inevitability of provincial idiosyncracies regarding questions of administrative or institutional structure, it is not surprising that there is a wide divergence in the legislation with respect to the range of remedies and the strategies of enforcement. What is surprising, however, is the extent of variance with respect to questions of legislative ambit and application. Even though the four trade practices statutes were drafted within three years of each other and were readily available to successive draftsmen, the definitional differences are striking. These are most evident in the following areas: (a) the focal point of the legislation; (b) the scope of scrutiny; (c) the identity of the parties; (d) the types of goods and services; and (e) the necessity for actual agreement. Each of these will be considered in turn.

(a) The Definitional Focus

Every consumer sales practices statute, indeed any regulatory statute, requires a reasonably precise definitional focus. To the extent that the provincial trade practice statutes are concerned with deceptive and unconscionable consumer sales practices, one would think that the most appropriate definitional focus would be any "consumer transaction"; that is, any disposition of goods or services, whether by sale, lease, lottery or otherwise, wherein the goods or services are to be used for purposes that are primarily personal, family, or household. Where certain commodities, whether tangible or intangible, are already subject to legislative regulation — for example, land transactions, securities and insurance — appropriate exclusions could be made.⁴²

The B.C. Act speaks of the "consumer transaction" as the focal point for the regulation of deceptive and unconscionable trade practices.⁴³ How-

⁴² All of the provincial trade practices enactments have expressly excluded securities; all but the B.C. Act have also excluded all money-lending transactions; the B.C. and Saskatchewan Acts have excluded contracts of insurance as well. See B.C. Act, s. 1(1); Ontario Act, s. 1(f); Alberta Act, s. 1(f) and Saskatchewan Act, s. 2.

⁴³ B.C. Act, ss. 2(1) and 1(c).

ever, unlike the legislation in Alberta or Saskatchewan which limits the definition of "consumer transaction" to the disposition of personal property or provision of services to an individual for purposes that are primarily personal, family, or household,⁴⁴ the B.C. definition is significantly wider, extending to consumer "business opportunities" and supplier advertising as well.⁴⁵

The Ontario approach is less precise. While certain specified unfair sales practices are proscribed, the focal point of the legislation is the "consumer representation" itself which has been defined as follows:

"consumer representation" means a representation, statement, offer, request or proposal,

- (i) made respecting or with a view to the supplying of goods or services, or both, to a consumer, or
- (ii) made for the purpose of or with a view to receiving consideration for goods or services, or both, supplied or purporting to have been supplied to a consumer;⁴⁶

The difficulty with this approach is twofold. The first is the "bafflingly opaque language"⁴⁷ employed in the definition of consumer representation. A second and related difficulty is one of definitional structure. In order to discover the intended ambit of the Ontario Act, the concerned consumer or supplier must plod through no less than four definitional sections⁴⁸ clouded by arcane legal terminology.⁴⁹ The approach taken by B.C., Alberta, and Saskatchewan with their focus on "consumer transaction" provides a more comprehensible definitional direction.

(b) The Scope of Scrutiny

The question of legislative scope, at least in relation to modern consumer trade practices legislation, is more properly a question of legislative response to common law absurdities. Every student of commercial law is painfully familiar with the artificiality and the anomalies that have plagued the

⁴⁴ Alberta Act, s. 1(c); Saskatchewan Act, s. 2.

⁴⁵ B.C. Act, s. 1(1) defines "consumer transaction" as follows:

- (i) a sale, lease, rental, assignment, award by chance, or other disposition or supply of any kind of personal property to an individual for purposes that are primarily personal, family, or household, or that relate to a business opportunity requiring both expenditure of money or property and personal services by that individual and in which he has not been previously engaged, or
- (ii) a solicitation or promotion by a supplier with respect to a transaction referred to in subparagraph (i);

Note the influence of the *Uniform Consumer Sales Practices Act*. See *UCSPA*, *supra*, note 33, s. 2(1).

⁴⁶ Ontario Act, s. 1(c).

⁴⁷ Ziegel, *supra*, note 3 at 12.

⁴⁸ Ontario Act, ss. 1(b)(c)(f) and (i) for the definition of "consumer," "consumer representation," "goods," and "services."

⁴⁹ For example, see Ontario Act, s. 1(g). The draftsman's use of "chattels personal" and other arcane legal concepts was vigorously criticized in the Ontario Legislature during the debate on the Ontario Act. Mr. James Renwick M.P.P. suggested that the House was "involved in a kind of marshmallow world of traditional legal conceptions that aren't going to help the consumer at all." *Ont. Leg. Debates* (November 28, 1974) at 5849. Also see, *infra*, note 354 and accompanying text.

Anglo-Canadian judiciary as a consequence of its general reluctance to extend the scope of the contract to include all of those statements and representations that are properly a part of the bargain.⁵⁰ The distinctions between a "mere representation" and a contractual term, or between a warranty and a condition, have no place in a modern consumer trade practices statute.⁵¹ Whatever civil or administrative remedies are statutorily provided, they should be available whenever a deceptive or unconscionable sales practice has resulted in consumer dissatisfaction.⁵² It is submitted that the operative concept in a consumer sales context must be detrimental reliance.⁵³ Whether the seller or supplier intended his representation to carry a contractual consequence is irrelevant. The loss suffered by the consumer is the same.⁵⁴ The statutory language ought to acknowledge this reality.

It is submitted, therefore, that the scope of any meaningful consumer trade practices enactment must include any representation or conduct that is deceptive, misleading, or unconscionable without regard to outmoded common law categorizations. Nor should scrutiny be restricted to those acts or practices that occurred *before* or *during* the consumer transaction. To adequately regulate post-contractual collection practices⁵⁵ and to clarify the inter-relationship of tort and contract remedies in a post-contractual misrepresentation situation,⁵⁶ the legislative scope must also extend to any unfair practices that occur *after* the consumer transaction has been completed. Related

⁵⁰ An excellent analysis is provided in Allan, *The Scope of the Contract* (1967), 41 Austral. L.J. 274. Professor Allan argues persuasively at 288 that "any statement made in the course of negotiations which becomes part of the basis of the bargain in the sense that its natural tendency would be to induce the other party to enter into the contract should be a term of the contract." Also see the Uniform Commercial Code, s. 2-313(1).

⁵¹ *Trebilcock Study, supra*, note 7 at 199-202. Every student of commercial law quickly realizes that the method of classifying various representations or statements as contractual or non-contractual largely depends on the kind of remedy that the court feels is appropriate. Lord Denning candidly conceded this result-oriented process in a comment in (1967), 41 Austral. L.J. 293 at 293:

Whenever a judge thinks that damages ought to be given, he finds that there was a collateral contract rather than an innocent misrepresentation. In practice when I get a representation prior to a contract which is broken and the man ought to pay damages, I treat it as a collateral contract. (Quoted in *Trebilcock Study, supra*, note 7 at 202).

⁵² These remedies should be available in cases where the sales practice had the "capability" or "tendency" of deceiving or misleading a consumer as well as in the case where actual deception had occurred. See, *infra*, notes 59 to 75 and accompanying text.

⁵³ *Trebilcock Study, supra*, note 7 at 207.

⁵⁴ *Id.*

⁵⁵ See Comment to *UCSPA, supra*, note 33, s. 3(a).

⁵⁶ The waters have been muddied by *J. Nunes Diamond Ltd. v. Dominion Electric Protection Co.* (1972), 26 D.L.R. (3d) 699 (S.C.C.). The majority of the court was of the view that intra-contractual misrepresentation was not actionable in tort "unless the negligence relied on can properly be considered an independent tort unconnected with the performance of the contract." (at 727-8) Cf. *Esso Petroleum v. Mardon* [1976] 2 W.L.R. 583 (C.A.) and see Ziegel, *Tortious Liability for Pre-Contractual and Intra-Contractual Misrepresentations* (1976), 1 C.B.L.J. 259.

to this question of scope is the important issue of non-disclosure. The common law, traditionally, did not impose upon the seller any affirmative duty to disclose all the material facts.⁵⁷ In recent years, however, Canadian courts have imposed liability where the non-disclosure was shown to be negligent.⁵⁸ The situation needs to be clarified. A consumer trade practices statute should expressly include material non-disclosure within its ambit of actionable misrepresentations.

Finally, if the proper scope of scrutiny should be any conduct, including non-disclosure, occurring before, during or after a consumer transaction, that is deceptive, misleading or unconscionable, what should be the standard of deceptiveness?⁵⁹ Should the court require proof of deception in fact or merely a capacity to deceive? The latter test is clearly appropriate in cases of preventative litigation involving actions for injunctive or declaratory relief.⁶⁰ Whether this lower standard ought to apply in money-loss consumer litigation is a more difficult question. One commentator has argued that the adoption of the "capacity to deceive" standard of proof would at least provide consumers with the necessary incentive to seek redress for losses suffered.⁶¹ However, this "easier proof" rationale is not nearly as persuasive as the simple fact that the imposition of a "capacity to deceive" standard would not seriously burden the marketing practices of most honest businessmen.⁶²

The consumer trade practices enactments of British Columbia and Saskatchewan provide commendable coverage. In the B.C. Act, a deceptive act or practice is defined as "any oral, written, visual, descriptive, or other representation, including *non-disclosure*, or *any conduct* having the *capability, tendency* or *effect* of deceiving or misleading a person."⁶³ The Act expressly provides that liability will attach to any deceptive or unconscionable act or practice whether it occurs "before, during or after the consumer transaction."⁶⁴ The Saskatchewan Act gives similarly extensive coverage by defining unfair acts or practices as including any representation or conduct, including failure

⁵⁷ *Trebilcock Study, supra*, note 7 at 204.

⁵⁸ See *Fines Flowers v. General Accident Assurance Co.* (1974), 49 D.L.R. (3d) 641; *Walter Cabott Construction Ltd. v. The Queen*, (1974), 44 D.L.R. (3d) 82; *Bango v. Holt* (1972) 21 D.L.R. (3d) 66. These cases and others are discussed in *Trebilcock Study, supra*, note 7 at 204-206.

⁵⁹ With respect to federal misleading advertising regulation, see Minter, *Misleading Advertising: The Standard of Deceptiveness* (1976), 1 C.B.L.J. 435.

⁶⁰ It is surely justifiable to use the "capacity to deceive" test where the remedy is a preventative one, i.e., an injunction. One should not have to wait for actual injury or actual loss where the capacity for such is evident.

⁶¹ Shea, *Toward Effective Consumer Law Enforcement: The Capacity to Deceive Test Applied to Private Actions* (1975), 10 Gonzaga L.R. 457 at 477.

⁶² Indeed most businessmen would probably be surprised that there is even a controversy about the appropriate standard of deceptiveness in the area of consumer trade practices. To require vendors to refrain from engaging in acts or practices that are capable of deceiving reasonable consumers is not an undue imposition.

⁶³ B.C. Act, s. 2(1). (Emphasis added)

⁶⁴ *Id.*, ss. 2(2) and 3(1).

to disclose,⁶⁵ that has the "tendency, capability or effect"⁶⁶ of deceiving or misleading an ordinary consumer. Coverage is also expressly extended to unfair or unconscionable acts or practices occurring before, during, or after a consumer transaction.⁶⁷

The scope of scrutiny is less than adequate in the Alberta Act and wholly inadequate in the Ontario Act. Both the Alberta and Ontario enactments are concerned only with the unfair practices that occur prior to contract.⁶⁸ The Ontario Act is even more deficient in this respect since it only provides protection against certain representations and not against deceptive conduct generally.⁶⁹ As to non-disclosure, the Ontario Act has specified "failing to state a material fact" as one of its itemized deceptive practices.⁷⁰ The specification approach is found in the Alberta Act which limits non-disclosure protection to non-disclosure of a defect in the goods or of an inability to provide all of the promised services.⁷¹ The B.C. and Saskatchewan approach which includes non-disclosure within the general concept of deceptive or unfair practices is to be preferred. Over-specification is unjustifiable where general prohibition is plainly required.⁷²

The standard of deceptiveness implemented by the Ontario and Alberta enactments also merits discussion. The Ontario Act requires deception in fact,⁷³ whereas Alberta has adopted a compromise position defining an unfair act or practice as, *inter alia*, any representation or conduct that "has the effect or might reasonably have the effect of deceiving or misleading a consumer."⁷⁴ One might speculate as to the probable success of a legal argument which suggested that the B.C., Saskatchewan, and Alberta standards are conceptually indistinguishable. Or, was the Alberta draftsman

⁶⁵ Saskatchewan Act, s. 3(1). This Act imposes liability with respect to non-disclosure of material facts or information "irrespective of whether or not the facts or information were known to the supplier." See s. 3(1)(c).

⁶⁶ *Id.*

⁶⁷ *Id.*, s. 3(2).

⁶⁸ Alberta Act, s. 4(1) and (2); Ontario Act, s. 4(1).

⁶⁹ Ontario Act, s. 2;

⁷⁰ *Id.*, s. 2(a)(xiii).

⁷¹ Alberta Act, s. 4(1)(c). Protection against non-disclosure of defects or of an inability to supply services is limited to cases where such defect or failure to provide services "substantially impairs or is likely to impair substantially the benefit or benefits reasonably anticipated by the consumer under that transaction." The caution of the legislative draftsman is evident.

⁷² Consumer protection against non-disclosure of material facts is indisputably justifiable. A general prohibition of such practices would appear sensible. What additional benefits are provided by overly specific provisions such as s. 4(1)(c) in the Alberta Act, *supra*, note 71? If anything, the Alberta approach runs the risk of being unnecessarily restrictive.

⁷³ Ontario Act, s. 2(a).

⁷⁴ Alberta Act, s. 4(1)(d).

consciously attempting to avoid protecting the "ignorant, the unthinking and the credulous"?⁷⁵

(c) The Identity of the Parties

In each of the four provincial enactments, "consumer" is defined as an individual or natural person who participates in a consumer transaction,⁷⁶ or is the target of a consumer representation,⁷⁷ wherein goods or services are provided for purposes that are primarily personal, family, or household.⁷⁸ The B.C. and Alberta Acts extend the definition to include donees.⁷⁹ It is not clear, however, whether this abolition of horizontal privity is all that significant since, in both of these enactments, consumer-initiated damage remedies require the litigant to be a party to the actual consumer transaction.⁸⁰

The more interesting question related to the definitional identity of the parties is that of vertical privity. In an era where mass advertising and manufacturers' predominance have all but obliterated the traditional rationales for the privity of contract doctrine,⁸¹ it is essential that a trade practices statute plainly state the intention to abolish this "old and out-moded technical rule of law."⁸² As well, the legislation should extend liability to the supplier's assignee.⁸³

The British Columbia, Alberta, and Saskatchewan enactments have responded admirably. Vertical privity has been abolished expressly in the B.C.

⁷⁵ This is the oft-quoted "credulous man test" first enumerated in *Charles of the Ritz Distributors Corp. v. FTC*, 143 F. 2d 676 at 679 (2d Cir. 1944) and applied by Sinclair J. in *R. v. Imperial Tobacco Products Ltd.* (1970), 16 D.L.R. (3d) 470 (Alta. S.C.), *aff'd* 22 D.L.R. (3d) 51. The test is discussed by Minitier, *supra*, note 59, *passim*. The Alberta Act's requirement of reasonability with respect to potential deception in s. 4(1)(d) appears to be a conscious rejection of the "credulous man" test in unfair trade practices regulation. *Cf.* Saskatchewan Act, s. 3(1) which provides protection against any conduct having "the tendency, capability or effect of deceiving or misleading an ordinary consumer"; and B.C. Act, s. 2(1) which scrutinizes any conduct having "the capability, tendency or effect of deceiving or misleading a person." (Emphasis added.)

⁷⁶ B.C. Act, s. 1(1); Alberta Act, s. 1(a); Saskatchewan Act, s. 2.

⁷⁷ Ontario Act, s. 1(b) and (c).

⁷⁸ B.C. Act, s. 1(1); Ontario Act, s. 1(b); Alberta Act, s. 1(f); Saskatchewan Act, s. 2.

⁷⁹ B.C. Act, s. 1(1) "consumer"; Alberta Act, s. 1(a) "consumer."

⁸⁰ B.C. Act, s. 20(1) and Alberta Act, s. 11(1). The availability of injunctive and declaratory remedies and the necessity for actual agreement is discussed, *infra*, in sub-part (e) of this Part. See notes 115-133 and accompanying text.

⁸¹ If the traditional justification for the doctrine of privity was the concern that liabilities should not attach where no consideration has passed between the parties, this rationale is "clearly without meaning in a consumer context where the consideration moving to and from the manufacturer is obvious." *Trebilcock Study, supra*, note 7 at 236. Also see *Report on Consumers Warranties and Guarantees in the Sale of Goods* (Ontario Law Reform Commission, 1972) at 65-77.

⁸² *Randy Knitwear Inc. v. American Cyanamid*, 181 N.E. 2d. 399 (N.Y.C.A., 1962) *per* Field J. at 402.

⁸³ The difficult question is the extent of the assignee's liability. See, *infra*, notes 88-93 and accompanying text.

and Saskatchewan legislation⁸⁴ and impliedly in the Alberta Act.⁸⁵ The Ontario Act, however, is somewhat obscure on this important issue. The "consumer representation" focus is limited to representations, statements, offers, requests, or proposals that are made "respecting, or with a view to the supplying of goods or services, or both, to a consumer" or "for the purpose of or with a view to receiving consideration for goods or services or both, supplied . . . to a consumer."⁸⁶ Although it may be arguable that a manufacturer's advertisements were made with a view to receiving consideration for products or services ultimately "supplied" to a consumer, the actual marketing relationships that may exist in a distribution chain may well preclude such a finding.⁸⁷ Ontario would be well-advised to clarify the privity question, preferably in unequivocal statutory language that would be comprehensible to both consumers and the business community.

The legislative response to the question of assignment has been more uniform. The B.C., Alberta, and Saskatchewan enactments have expressly defined "supplier" to include any assignee of the supplier.⁸⁸ This extension of liability is consistent with earlier federal and provincial legislative responses⁸⁹ to the problem of "cut-off clauses"⁹⁰ in consumer transactions. What should be the extent of the assignee's liability in a situation where there has been a violation of a consumer trade practices statute? The argument can be made that the assignee's position ought to be no better than that of the supplier who had contravened a provision of the trade practices statute. If one objective of consumer protection legislation is to provide effective redress for all reasonably foreseeable losses, then any statutory provision limiting the assignee's liability to the amount that has been paid to the assignee would properly be subject to criticism. It may be economically irrational to burden the assignee with unlimited liability respecting all consequential losses flowing from the supplier's contravention, particularly where the trade practices provision that has been violated incorporates a degree of imprecision

⁸⁴ B.C. Act, s. 1(1) "supplier"; Saskatchewan Act, s. 15(1).

⁸⁵ Alberta Act, s. 1(h).

⁸⁶ Ontario Act, s. 1(c).

⁸⁷ This point is made in the *Trebilcock Study*, *supra*, note 7 at 240.

⁸⁸ B.C. Act, s. 1(1); Alberta Act, s. 1(h); Saskatchewan Act, s. 2.

⁸⁹ See the *Bills of Exchange Act*, R.S.C. 1970, c. B-5 (as amended by R.S.C. 1970, c. 4, 1st. Supp., s. 1), ss. 188-192. Most provincial legislatures have now enacted complementary legislation to protect consumers against assignee "cut-off clauses." The Ontario *Consumer Protection Act*, R.S.O. 1970, c. 82 (as amended by S.O. 1971, c. 24), s. 42a is a typical provision:

The assignee of any rights of a lender has no greater rights than and is subject to the same obligations, liabilities and duties as the assigner and the provisions of this Act apply equally to such assignee.

Other provincial legislation providing similar protection is listed in the *Trebilcock Study*, *supra*, note 7 at 241, n. 166.

⁹⁰ One commentator has argued that "cut-off" clauses are not all that offensive and that legislative abolition of the holder-in-due-course rule in consumer credit transactions "is likely to make the consumer worse off rather than better off by making credit purchases more costly." See Posner, *Reflections on Consumerism*, 20 Law School Record 19 at 22.

through the use of such terms as "tendency to mislead" or "substantial benefit."⁹¹ In the context of unfair sales practices law, it may be justifiable to impose some limit to the assignee's liability. The only enactment that has done so is the Ontario Act, which has limited the liability of the assignee to the "amount paid to the assignee under the agreement."⁹² Although the extent of assignee liability is an issue of some controversy, the better view appears to be that the Ontario Act's limitation represents "a fair balancing of both parties interests."⁹³

(d) The Types of Goods and Services

The four provincial enactments have uniformly focused upon those consumer transactions where goods or services are supplied to an individual for purposes that are primarily personal, family, or household.⁹⁴ Goods have generally been defined so as to exclude, *inter alia*, real property, choses in action, and securities.⁹⁵ The B.C. and Saskatchewan legislation also exclude contracts of insurance.⁹⁶ Where specialized legislation already exists with respect to certain commodities, it is sensible to minimize legislative overlap.⁹⁷ What is not understandable, however, is the decision of the Ontario, Alberta, and Saskatchewan legislatures to exclude consumer transactions involving "money."⁹⁸ Only the B.C. Act has sought to apply the deceptive and unconscionable trade practices protections to money-lending transactions.⁹⁹ This scrutiny of the lender-credit field does not extend, however, to those situations where the credit is extended solely on the security of real property.¹⁰⁰

⁹¹ Both provisions, which appear in the provincial trade practices legislation are highly open-textured. See B.C. Act, s. 2(1) and Ontario Act, s. 2(b)(iii).

⁹² Ontario Act, s. 4(4). This provision limits the assignee's liability to a restitutionary recovery. Section 42a(2) of the *Consumer Protection Act*, *supra*, note 89, permits a wider consumer recovery since the maximum recoverable is "the balance owing on the contract at the time of the assignment." This latter provision has now been superseded by Ontario Act, s. 4(4) which will apply with respect to any claim under this Act.

⁹³ *Trebilcock Study*, *supra*, note 7 at 242. The only other possibility with respect to assignee liability in the context of a trade practices statute is to apply the "balance owing" limitation discussed, *supra*, in note 92. Unfortunately, the preference for s. 4(4) of the Ontario Act was neither explained nor debated in the Ontario Legislature.

⁹⁴ *Supra*, notes 76 and 78 and accompanying text.

⁹⁵ B.C. Act, s. 1(1) "personal property"; Alberta Act, s. 1(f); Ontario Act, s. 1(j); Saskatchewan Act, s. 2.

⁹⁶ *Id.*

⁹⁷ *Supra*, note 42 and accompanying text. Of course, where such exclusions are made, the legislature should be sure that the more specialized regulatory structure that already exists is effective. For example, "[T]he insurance industry should only be exempted from a deceptive trade practice statute where the regulatory tradition and practice of its insurance commissioners reflect a vigorous representation of consumer interests." Lovett, *supra*, note 23 at 734.

⁹⁸ Ontario Act, s. 1(j); Alberta Act, s. 1(j); Saskatchewan Act, s. 2.

⁹⁹ B.C. Act, s. 1(1), "personal property" definition.

¹⁰⁰ *Id.*

Given the limited protection provided by the federal *Small Loans Act*¹⁰¹ and by provincial unconscionable transactions statutes,¹⁰² it is submitted that money-lending transactions should properly be the concern of any comprehensive trade practices enactment. The potential for deception and unconscionability is no less significant in the lender-credit field than in the area of vendor-credit. Yet only the latter transaction is indisputably subject to the provisions of the provincial enactments.¹⁰³

Another equally critical deficiency in three of the enactments is the unrealistically and unjustifiably restrictive definition of "services." Again, only the B.C. Act has unequivocally included all services within its definition of "consumer transaction."¹⁰⁴ The other three enactments, however, have restricted legislative protection to those services that (1) are provided in respect of the maintenance or repair of goods or of an individual's private dwelling,¹⁰⁵ (2) are provided for social, recreational, physical fitness or self-improvement purposes,¹⁰⁶ and (3) are, in their nature, instructional or educational.¹⁰⁷ What about professional services? Should not the consumer be protected against unfair practices by members of a profession? What possible justification can there be for such wholesale exclusion of the sales practices of doctors, lawyers, or real estate agents,¹⁰⁸ to list the more obvious service professionals? When the question was debated in the Ontario Legislature and a member of the Opposition attempted to persuade the government to amend the definition so that "services of every nature and kind"¹⁰⁹ would be included, the refusal to do so was explained by the suggestion that unfair

¹⁰¹ R.S.C. 1970, c. S-11. The "impotence" of the federal *Small Loans Act* is discussed in Trebilcock, *The Pathology of Credit Breakdown* (1976), 22 McGill L.J. 415 at 450.

¹⁰² All ten provinces have unconscionable transactions relief legislation or some form thereof: see S.B.C. 1967, c. 14, ss. 17-20; R.S.A. 1970, c. 377; S.S. 1967, c. 86; R.S.M. 1970, c. U-20; R.S.O. 1970, c. 472; S.Q. 1971, c. 74, s. 118; R.S.N.B. 1973, c. U-1; R.S.N.S. 1967, c. 319; S.P.E.I. 1964, c. 35; and R.S.N. 1970, c. 382. And see Romero, *supra*, note 9 at 1, n. 2.

¹⁰³ Any representation by the vendor with respect to the credit terms arising out of the sale of certain goods or services would be representations in relation to the "consumer transaction" and thus would be governed by the trade practices legislation. See, *supra*, notes 43 to 49 and accompanying text.

¹⁰⁴ B.C. Act, s. 1(1).

¹⁰⁵ Alberta Act, s. 1(g)(i); Ontario Act, s. 1(i)(i); Saskatchewan Act, s. 2, "services" definition.

¹⁰⁶ Alberta Act, s. 1(g)(ii); Ontario Act, s. 1(i)(ii); Saskatchewan Act, s. 2.

¹⁰⁷ Alberta Act, s. 1(g)(iv); Ontario Act, s. 1(i)(iii); Saskatchewan Act, s. 2.

¹⁰⁸ Because the Ontario Act in s. 1(i)(k) provides that "services means services provided in respect of goods or of real property" (emphasis added) there is a possibility that Ontario real estate agents would be subject to the provisions of the Act. During the legislative debate on this point Mr. Frank Drea M.P.P. and Parliamentary Assistant to the Minister of Consumer and Commercial Relations took the position that the reference to "real property" in this definition "has no connection whatsoever with the sale or transfer of real estate. Its only connection concerns renovations, repairs, fixtures and so forth." *Ont. Leg. Debates* (February 6, 1975) at 7347. It will be interesting to see how the courts will interpret this reference to "real property."

¹⁰⁹ A motion to this effect was made by Mr. James Renwick M.P.P. See *Ont. Leg. Deb.* (February 6, 1975) at 7342.

trade practices were already covered by the various statutes that regulate the professions.¹¹⁰ This is simply not true. While statutes regulating the professions do provide some protection against professional misconduct,¹¹¹ there are no comprehensive enforcement and reparation mechanisms such as the public and private redress provisions found in the trade practices legislation.¹¹² Effective lobbying by vested interest groups is the more credible explanation for the restricted definition of "services."¹¹³ The unfortunate consequence of the Ontario, Alberta, and Saskatchewan restrictions was best described by a member of the Ontario legislature who suggested that the legislation might just as well have said "[n]o person shall engage in an unfair practice unless he is a member of a profession."¹¹⁴

(e) The Necessity for Actual Agreement

Can action be taken with respect to deceptive or unconscionable sales practices in a situation where no consumer contract was concluded? Or, is actual agreement a necessary prerequisite for utilization of the remedies provided in the provincial enactments? Certainly the governmental enforcing authority should have the statutory capacity to respond to marketplace prevarication without regard to the existence or non-existence of actual consumer transactions. The preventive aspects of effective consumer trade practices regulation would require and justify government-initiated action whenever a supplier was engaging in, or about to engage in, an unfair sales practice as defined by the legislation. On this point, the four provincial enactments are more or less uniform. The governmental enforcing authority¹¹⁵ may obtain an injunction, or declaration,¹¹⁶ or issue a cease and desist order,¹¹⁷ whenever a supplier is engaging, or "is about to engage"¹¹⁸ in an unfair sales practice. The completion of actual consumer transactions is properly irrelevant to the availability of these administrative remedies.¹¹⁹

The necessity for actual agreement is a more difficult question in the case of consumer-initiated remedies. Should a consumer's right of action

¹¹⁰ Mr. Frank Drea M.P.P. See *Ont. Leg. Deb.* (February 6, 1975) at 7346.

¹¹¹ *Law Society Act*, R.S.O. 1970, c. 238 (as amended by S.O. 1973, c. 49). Sections 33-50 of the Act provide for disciplinary procedures in cases of alleged professional misconduct and s. 51 establishes a Compensation Fund "in order to relieve or mitigate loss sustained by any person in consequence of *dishonesty*" on the part of any Ontario lawyer. (Emphasis added) Whether or not a payment will be made in any particular case is a decision for Convocation which has been given "absolute discretion."

¹¹² See Part B, *infra*, and the discussion of private and administrative remedies.

¹¹³ Ziegel, *supra*, note 3 at 12.

¹¹⁴ Mr. James Renwick M.P.P., *Ont. Leg. Deb.* (Feb. 6, 1975) at 7360.

¹¹⁵ More specifically the "Director of Trade Practices." See, *infra*, note 289 and accompanying text.

¹¹⁶ B.C. Act, s. 16; Alberta Act, s. 12(2); Saskatchewan Act, s. 5 (only declaratory relief).

¹¹⁷ Ontario Act, ss. 6-7; Saskatchewan Act, s. 14.

¹¹⁸ This extra protection to consumers is provided in two provinces: see B.C. Act, s. 16 and Saskatchewan Act, s. 5 (with respect to declaratory relief only).

¹¹⁹ The availability of the criminal sanction is similarly unaffected by an absence of actual agreement. See Part B, *infra*, and the discussion of the criminal sanction.

depend upon the existence of a contract or transaction that was induced by an unfair sales practice? Most of the losses that will arise as a consequence of deceptive or unconscionable sales practices will involve the actual supply of goods or services pursuant to *de facto* agreements. However, there may well be situations where redress ought to be provided even though the aggrieved consumer did not actually conclude an agreement with the supplier, one example being the case of a consumer who takes the time and trouble to visit the supplier's premises, lured by the supplier's advertisement, only to discover that the advertised representations as to quality, performance, price advantage, or product availability were misleading. Is the consumer's reliance loss any less because no actual agreement was concluded? The California *Consumers Legal Remedies Act*¹²⁰ is one illustration of an attempt to provide redress for reasonably foreseeable reliance losses without regard to actual agreement.¹²¹ At the very least, provincial trade practices legislation should permit consumer-initiated actions for injunctive or declaratory relief in any case of an alleged statutory violation. This remedy should be available whether or not the consumer-litigant actually entered into an agreement with the alleged violator. Unfortunately, most of the provincial trade practice enactments have pre-conditioned the availability of consumer-initiated remedies on a finding of actual agreement.

The most restrictive of the provincial provisions on this point is found in the Ontario Act. Any consumer claim for damages must first establish that the supplier's violation of the Act induced the litigant to enter into an actual agreement.¹²² And, with respect to injunctive or declaratory relief at the behest of the consumer, the Ontario Act is silent.¹²³

The Alberta and Saskatchewan provisions are, *prima facie*, more liberal. Both enactments provide that an unfair act or practice may occur notwithstanding that the consumer transaction was not completed.¹²⁴ Both statutes also permit consumer-initiated injunctive or declaratory remedies.¹²⁵ The difficulty is that here again a private action for injunction, declaration, or damages is available only where the consumer has "entered into a consumer transaction."¹²⁶ There is, however, an interesting and unique provision in the Alberta Act which permits an action for injunctive or declaratory relief even in the absence of actual transactions or agreements if the litigant is an in-

¹²⁰ Cal. Stats. 1970, c. 1550; enacted as Cal. Civ. Code, ss. 1750 *et seq.*

¹²¹ An advertisement which prompted the consumer to act would be a "transaction" within the meaning of the California Act. An actual contract is not a necessary condition precedent to consumer action. See Reed, *supra*, note 23 at 10.

¹²² Ontario Act, s. 4(1).

¹²³ This omission in the Ontario Act is returned to in Part B, *infra*.

¹²⁴ Alberta Act, s. 4(2); Saskatchewan Act, s. 3(2)(b).

¹²⁵ Alberta Act, s. 11(2); Saskatchewan Act, s. 15(2)(f) (declaratory relief only).

¹²⁶ Alberta Act, s. 12(2); Saskatchewan Act, s. 15(1) and s. 2 definition of "consumer transaction."

corporated "consumer organization."¹²⁷ While this statutory recognition of the value of consumer group litigation is commendable,¹²⁸ it is difficult to understand why a similar right was denied to the individual or the unincorporated consumer group. If the concern of the Alberta legislature was that the individual injunctive remedy would lead to a multiplicity of actions against the high profile violator, this concern could surely be alleviated by an intervention of the governmental enforcing authority.¹²⁹

The most liberal provisions with respect to the question of actual agreement are found in the B.C. Act. Anyone, whether or not he has a special, or indeed any interest, or is even affected by a consumer transaction, is permitted to seek an injunction or a declaration with respect to a deceptive or unconscionable act or practice engaged in by a supplier.¹³⁰ It is arguable that even actual agreement is not a prerequisite for a consumer-initiated damages claim. The Act provides that damages are recoverable by a consumer where he has "entered into a consumer transaction involving a deceptive or unconscionable act or practice by a supplier."¹³¹ Consumer transaction, however, is defined to include "a solicitation or promotion by a supplier."¹³² Thus, some non-contractual reliance losses may be recoverable by the consumer who responds to the supplier's advertisement and thereby incurs some financial loss only to discover that the representations were misleading or unfair and in violation of the trade practices enactment. If this interpretation of the statute is correct,¹³³ then the B.C. Act clearly emerges as the most liberal of the provincial enactments with respect to questions of application and scope.

2. *The Prohibited Practices*

An important feature of any comprehensive consumer trade practices enactment will be the statutory design of the prohibition provisions. The legislative draftsman has essentially three choices. He may choose to provide simply a general prohibition against all deceptive, misleading, or unconscionable conduct in consumer transactions. This is the approach taken in the *Federal Trade Commission Act*¹³⁴ which provides, *inter alia*, that "unfair or deceptive acts or practices in commerce are declared unlawful."¹³⁵ While this

¹²⁷ Alberta Act, s. 14. "Consumer organization" is defined in s. 1(b) as "any corporation that has as one of its objects the protection or advancement of the interests of consumers and is not incorporated for the purpose of acquiring gain for its members."

¹²⁸ Note the absence of any *locus standi* prerequisite.

¹²⁹ This suggestion would simply be an extension of the existing substituted action provision: see Alberta Act, s. 13. A notice requirement similar to s. 11(4) would be an additional safeguard.

¹³⁰ B.C. Act, s. 16(1).

¹³¹ *Id.*, s. 20(1).

¹³² *Id.*, s. 1(1).

¹³³ The submission that would have to be accepted by a court is that the consumer's action in responding to a "solicitation or promotion by a supplier" [s. 1(1)] constitutes an "entering into" of a consumer transaction within the meaning of ss. 20(1) and 1(1).

¹³⁴ 15 U.S.C., s. 45(a)(1) (1970).

¹³⁵ *Id.*

blanket prohibition is definitionally capable of protecting the consumer against all eventualities, its open-textured quality promotes needless uncertainty and excessive litigation.¹³⁶ A trade practices enactment that is fair to suppliers as well as consumers requires a greater degree of precision.

This concern for specificity may persuade the legislative draftsman to adopt the U.K. *Trade Description Act*¹³⁷ approach, which provides an exhaustive listing of the specific practices that are proscribed by the legislation. Unlike the general prohibition technique, the exhaustive specification method cannot be criticized for lack of clarity. The problem here is one of inevitable under-inclusion. The listing of prohibited practices will invariably fall short of including every conceivable and innovative trade practice abuse.

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin all over again. If [a legislature] were to adopt this method of definition, it would undertake an endless task.¹³⁸

The third approach available to the draftsman is one that combines a general prohibition against unfair practices with a specific listing. This specific itemization of prohibited acts or practices does not limit the generality of the prohibition. This third approach seems to be the most appropriate for the effective regulation of consumer trade practices. The non-exhaustive "shopping list" coupled with a general prohibition provides an optimal combination of specificity and flexibility.

This third alternative was adopted by each of the provinces that have enacted consumer trade practice legislation. Noticeably influenced by the *Uniform Consumer Sales Practices Act*,¹³⁹ each of the four provincial enactments under consideration utilizes both the general prohibition and the "shopping list" of unfair practices.

(a) The General Prohibition

The Ontario Act provides the clearest example of an open-textured general prohibition: "[n]o person shall engage in an unfair practice."¹⁴⁰ Another provision proceeds to itemize those practices that are deemed to be unfair practices, one sub-part being devoted to "false, misleading or deceptive consumer representations"¹⁴¹ and the other to "unconscionable consumer representations."¹⁴² The inter-relationship of the general proscription and the

¹³⁶ The FTC, however, has extensive rule-making powers which enable the agency to inject some precision into the open-textured prohibitions. Rule-making is discussed in Part C and D, *infra*. See notes 375 to 382 and 411 to 413 and accompanying text.

¹³⁷ U.K. 1968, c. 29.

¹³⁸ *Federal Trade Commission v. The Sperry and Hutchinson Company*, 405 U.S. 233, *per* White J. at 240, quoting from H.R. Rep. No. 1142. 63d. Cong. 2d Sess., 18-19 (1914).

¹³⁹ *Supra*, note 33.

¹⁴⁰ Ontario Act, s. 3(1).

¹⁴¹ *Id.*, s. 2(a).

¹⁴² *Id.*, s. 2(b).

“shopping list” of itemized prohibitions is somewhat more complex in the B.C., Alberta, and Saskatchewan enactments. In the B.C. and Saskatchewan legislation there exists a “double-barrelled” general prohibition, one provision providing an open-ended proscription of deceiving or misleading acts or practices,¹⁴³ and another provision providing similar generality with respect to “unconscionable acts or practices.”¹⁴⁴ The only province that lacks an open-ended prohibition of unconscionable acts or practices is Alberta. The Alberta legislation does, however, prohibit any representation or conduct that has the effect “or might reasonably have the effect” of deceiving or misleading any consumer.¹⁴⁵

(b) The Deceptive Practices Shopping List

Why would a provincial legislative draftsman prefer to itemize illustrations of the acts or practices that are deemed to be deceptive or misleading under one heading and those that are suggested as unconscionable acts or practices under another? An ordinary consumer would not really care how the draftsman has characterized the unfair practice. His only concern would be effective redress. Indeed, one might be hard pressed to articulate any meaningful definitional distinction between the so-called “deceptive or misleading acts or practices” and the “unconscionable” ones. Lawyers have tended to explain this dichotomy by reference to the duality of law and equity and the resulting division of responsibility for deception and unconscionability.¹⁴⁶ While a single listing of the deemed prohibitions may be more logical, the provincial enactments have retained the traditional distinction in drafting the “shopping lists.”

Each of the provincial trade practices enactments has a fairly comprehensive listing of the deceptive or misleading acts or practices that are deemed to be unfair practices: sixteen specifications in the B.C. Act, fourteen in the Ontario Act, and twenty-one in the Alberta and Saskatchewan enactments. While the scope of the prohibition and the standards of deceptiveness may differ,¹⁴⁷ there is a uniform proscription of at least these fourteen deceptive practices:

1. A representation that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that it does not have;¹⁴⁸

¹⁴³ B.C. Act, s. 2(1); Saskatchewan Act, s. 3(1).

¹⁴⁴ B.C. Act, s. 3(3); Saskatchewan Act, s. 4(1).

¹⁴⁵ Alberta Act, s. 4(1)(d).

¹⁴⁶ There is a brief but worthwhile discussion of this point in the *Trebilcock Study*, *supra*, note 7 at 196-197.

¹⁴⁷ *Supra*, notes 50 to 75, and accompanying text.

¹⁴⁸ B.C. Act, s. 2(3)(a); Ontario Act, s. 2(a)(i); Alberta Act, s. 4(1)(d)(i); Saskatchewan Act, s. 3(3)(a). Examples: “mileage per gallon” ads where such mileage could only be attained under carefully controlled circumstances by a highly skilled driver. And see *UCSPA*, s. 3(b)(1) and Comment.

2. A representation that the supplier has a sponsorship, approval, status, affiliation, or connection that he does not have;¹⁴⁹
3. A representation that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model if it is not;¹⁵⁰
4. A representation that the subject of a consumer transaction has been used to an extent that is different from the fact;¹⁵¹
5. A representation that the subject of a consumer transaction is new or unused if it is not, or if it is deteriorated, altered, reconditioned, or reclaimed;¹⁵²
6. A representation that the subject of a consumer transaction has a particular prior history or usage if it has not;¹⁵³
7. A representation that the subject of a consumer transaction is available for a reason that is different from the fact;¹⁵⁴
8. A representation that the subject of a consumer transaction has been made available in accordance with a previous representation if it has not;¹⁵⁵
9. A representation that the subject of a consumer transaction is available if the supplier has no intention of supplying or otherwise disposing of the subject as represented;¹⁵⁶

¹⁴⁹ B.C. Act, s. 2(3)(b); Ontario Act, s. 2(a)(iii); Alberta Act, s. 4(1)(d)(ii); Saskatchewan Act, s. 3(3)(b). Example: "factory outlet" or "approved dealer" if such a claim is untrue. And see *UCSPA* s. 3(b)(a) and Comment.

¹⁵⁰ B.C. Act, s. 2(3)(c); Ontario Act, s. 2(a)(ii); Alberta Act, s. 4(1)(d)(iii); Saskatchewan Act, s. 3(3)(c). Example: "Canada Grade A"; product model year representations where such representations are untrue. And see *UCSPA*, s. 3(b)(2) and Comment.

¹⁵¹ B.C. Act, s. 2(3)(d); Ontario Act, s. 2(a)(iv); Alberta Act, s. 4(1)(d)(iv); Saskatchewan Act, s. 3(3)(d). Example: the claim that a car is a "demonstrator — almost new" where such is not in fact the case. And see *UCSPA*, s. 3(b)(3) and Comment.

¹⁵² B.C. Act, s. 2(3)(e); Ontario Act, s. 2(a)(v); Alberta Act, ss. 4(1)(d)(v) and (vi); Saskatchewan Act, s. 3(3)(e). And see *UCSPA*, s. 3(b)(3) and Comment.

¹⁵³ B.C. Act, s. 2(3)(f); the point is not specifically included as a separate itemization in the Ontario Act but might fall within s. 2(a)(v); Alberta Act, s. 4(1)(d)(vii); Saskatchewan Act, s. 3(3)(j). Example: a representation that the automobile was "only driven on Sundays to church and back." There is no equivalent listing in the *UCSPA*.

¹⁵⁴ B.C. Act, s. 2(3)(g); Ontario Act, s. 2(a)(vi); Alberta Act, s. 4(1)(d)(viii); Saskatchewan Act, s. 3(3)(g). Example: "fire sales" or "lost our lease" sales if such circumstances do not exist. And see *UCSPA*, s. 3(b)(4) and Comment.

¹⁵⁵ B.C. Act, s. 2(3)(h); Ontario Act, s. 2(a)(vii); Alberta Act, s. 4(1)(d)(ix); Saskatchewan Act, s. 3(3)(h). Example: claiming that an article is being sold at a special reduction from the regular price where, in fact, the article is part of a special shipment that was ordered strictly for the sale and has never been sold before and particularly not at what is quoted as the "regular price." And see *UCSPA*, s. 3(b)(5) and Comment.

¹⁵⁶ B.C. Act, s. 2(3)(i); Ontario Act, s. 2(a)(viii); Alberta Act, ss. 4(1)(d)(x) and (xv); Saskatchewan Act, s. 3(3)(i). Example: bait and switch selling. And see *UCSPA*, s. 3(b)(6) and Comment.

10. A representation that is such that a person could reasonably conclude that a price benefit or advantage exists, if it does not;¹⁵⁷
11. A representation that a service, part, replacement, or repair is needed if it is not;¹⁵⁸
12. A representation that the purpose or intent of any solicitation of, or any communication with, a consumer by a supplier is for a purpose or intent different from the fact;¹⁵⁹
13. A representation that a consumer transaction involves or does not involve rights, remedies, or obligations if the representation is deceptive or misleading;¹⁶⁰
14. A representation as to the authority of a salesman, representative, employee, or agent to negotiate the final terms of a consumer transaction if the representation is different from the fact.¹⁶¹

Each of the provincial shopping lists provides several important additions to these uniform proscriptions. B.C., Ontario, and Saskatchewan have extended the statutory protection to the hitherto unregulated area of "commercial puffery" by specifically prohibiting any representation using exaggeration, innuendo, or ambiguity.¹⁶² The giving of an estimate or price quotation which is materially less than the final price demanded by a supplier who has proceeded with his performance of a consumer transaction without the consumer's express consent also constitutes a deceptive practice under all but the Ontario enactment.¹⁶³ Finally, the use of advertising copy which gives

¹⁵⁷ B.C. Act, s. 2(3)(j). Example: any misrepresentation as to price reductions, previous prices, or actual price paid. And see *UCSPA*, s. 3(b)(8) and Comment.

¹⁵⁸ B.C. Act, s. 2(3)(k); Ontario Act, s. 2(a)(ix); Alberta Act, s. 4(1)(d)(xii); Saskatchewan Act, s. 3(3)(k). Example: self-evident. See *UCSPA*, s. 3(b)(7) and Comment. The problem of unnecessary repair is particularly evident in the television repair industry. See "Half of TV Repairmen Overcharge in Star Test" (Toronto Star, February 26, 1977, at A-1 and A-11).

¹⁵⁹ B.C. Act, s. 2(3)(1); Ontario Act, s. 2(a)(xiv); Alberta Act, s. 4(1)(xiii); Saskatchewan Act, s. 3(3)(1). Example: such spurious sales pitches as "you have been selected as the lucky winner of a free . . ." or "I am a student working my way through college selling magazines . . ." There is no equivalent listing in the *UCSPA* but see *UCSPA*, s. 3(b)(4): "that the subject of a consumer transaction is available to the consumer for a reason that does not exist." The provincial legislation has a separate listing for this type of practice: *supra*, note 154.

¹⁶⁰ B.C. Act, s. 2(3)(m); Ontario Act, s. 2(a)(xii); Alberta Act, s. 4(1)(d)(xiv); Saskatchewan Act, s. 3(3)(m). Example: the sales pitch that concludes: "just sign on the dotted line . . . no obligation . . . you can get out of the contract anytime you want." If the seller's intention is otherwise there has been a breach of this provision. See *UCSPA*, s. 3(b)(10) and Comment. The potential ambit of this type of provision is discussed in Zysblat, *Amendments to the British Columbia Trade Practices Act; The Refinement of Omnibus Legislation* (1976), 1 C.B.L.J. 99 at 102.

¹⁶¹ B.C. Act, s. 2(3)(o); Ontario Act, s. 2(a)(xi); Alberta Act, s. 4(1)(d)(xvi); Saskatchewan Act, s. 3(3)(o). Example: a salesman represents that he has the "final say" and is able to bind the supplier, when, in fact, he does not have such authority and the supplier later disavows any knowledge of or responsibility for the salesman's representations. There is no equivalent provision in the *UCSPA*.

¹⁶² B.C. Act, s. 2(3)(r); Ontario Act, s. 2(a)(xiii); Saskatchewan Act, s. 3(3)(u).

¹⁶³ Alberta Act, s. 4(1)(d)(xvii); Saskatchewan Act, s. 3(3)(p); the B.C. Act, provision, s. 2(3)(p), has not yet been proclaimed in force.

less prominence to the full price of a consumer transaction than to the price of any unit thereof has been specifically prohibited in the B.C., Alberta, and Saskatchewan enactments.¹⁶⁴

With the exception of two additional inclusions in the Saskatchewan Act dealing with referral selling¹⁶⁵ and the use of the word "free,"¹⁶⁶ the B.C. and the Saskatchewan "shopping lists" of proscribed deceptive practices are comparable and commendable. Both the Ontario and the Alberta listings are deficient in failing to include, in the former case, a specific prohibition of low-balling¹⁶⁷ and unit price prominence,¹⁶⁸ and in the latter case, a specific extension of actionability to commercial puffery.¹⁶⁹

(c) The Unconscionable Practices Shopping List

Although each of the provincial enactments has a separate specification of acts or practices that traditionally can be characterized as relating to unconscionable as opposed to deceptive conduct, there is significant divergence both in form and in substance. The most unusual and indeed most disappointing structural feature is found in the Alberta enactment. With respect to unconscionable conduct, the Alberta Act does not provide a general prohibition. Protection against gross over-reaching is limited to two specified practices: subjecting the consumer to undue pressure¹⁷⁰ and entering into a consumer transaction where the supplier took unfair advantage of a consumer's inability to understand the character or nature of the transaction.¹⁷¹ Why did Alberta choose this restrictive approach to the question of unconscionability? Certainly this minimal specification does not detract or derogate from any remedies with respect to unconscionable conduct that would be available to the consumer at common law.¹⁷² However, the disadvantage in so limiting the specified proscriptions is evident. The range of civil and administrative remedies provided by the trade practices enactment¹⁷³ to both

¹⁶⁴ B.C. Act, s. 2(3)(q); Alberta Act, ss. 4(1)(d)(xviii)-(xxi); Saskatchewan Act, ss. 3(3)(q)(r). Example: "only \$2.00 per visit" when the overall payment obligation may run to several hundred dollars. This requirement that the total price for the goods or services must be displayed as prominently as any unit price is one of the more important protections in the provincial legislation. There is no equivalent provision in the *UCSPA*.

¹⁶⁵ Saskatchewan Act, s. 3(3)(s).

¹⁶⁶ *Id.*, s. 3(3)(t).

¹⁶⁷ *Cf.*, *supra*, note 163 and accompanying text.

¹⁶⁸ *Cf.*, *supra*, note 164 and accompanying text.

¹⁶⁹ *Cf.*, *supra*, note 162 and accompanying text.

¹⁷⁰ Alberta Act, s. 4(1)(a).

¹⁷¹ Alberta Act, s. 4(1)(b). Section 4(1)(c) provides specific protection against non-disclosure relating to a defect in the goods or to the availability of services. This provision has been discussed, *supra*, note 71 and accompanying text.

¹⁷² Alberta Act, s. 20(2).

¹⁷³ The range of private and administrative remedies is discussed, *infra*, in sub-parts 3 and 4.

consumers and consumer organizations, as well as to the enforcing authority, may not be available at common law.¹⁷⁴

This deficiency, fortunately, is not found in the B.C., Ontario, and Saskatchewan legislation. In each of these enactments there is a general prohibition of unconscionable practices¹⁷⁵ followed by a non-exhaustive shopping list of certain circumstances that may be relevant to a finding of unconscionability.¹⁷⁶ The shopping lists contain the following uniform categories:

- (1) that the consumer was subjected to undue pressure to enter into the consumer transaction;¹⁷⁷
- (2) that the consumer was taken advantage of by his inability or incapacity to reasonably protect his own interest by reason of his physical or mental infirmity, ignorance, illiteracy, age, or his inability to understand the character, nature, or language of the consumer transaction, or any other matter related thereto;¹⁷⁸
- (3) that, at the time the consumer transaction was entered into, the price grossly exceeded the price at which similar subjects of similar consumer transactions were readily obtainable by like consumers;¹⁷⁹
- (4) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the price by the consumer;¹⁸⁰

¹⁷⁴ For example: An action by a "consumer organization" (s. 14) or a substituted action by the Director (s. 12) are available by virtue of the statute and only with respect to an unfair act or practice that has been defined as such by the Alberta Act. Neither of the actions would be otherwise available at common law.

¹⁷⁵ B.C. Act, s. 4(3); Ontario Act, ss. 3(1) and 2(b); Saskatchewan Act, ss. 4(1) and (2).

¹⁷⁶ The unconscionability "shopping list" contains certain specified circumstances that may be relevant to a finding of unconscionability if the supplier "knew or ought to have known" about the specified circumstances. In the B.C. and Saskatchewan Acts the court must consider all surrounding circumstances including those specifically listed. B.C. Act, s. 3(2); Saskatchewan Act, s. 4(2). The Ontario Act, however, provides that the court "may" take into account the specified listing: Ontario Act, s. 2(b). The mandatory language in the B.C. and Saskatchewan legislation seems more appropriate as a legislative emphasis that the shopping list is a deliberate listing of marketplace abuses and should always be relevant to any judicial determination of unconscionability under a trade practices statute.

¹⁷⁷ B.C. Act, s. 3(2)(a); Ontario Act, s. 2(b)(viii); Saskatchewan Act, s. 4(2)(e) ("trickery or undue pressure"). Example: high pressure sales tactics.

¹⁷⁸ B.C. Act, s. 3(2)(b); Ontario Act, s. 2(b)(i); Saskatchewan Act, s. 4(2)(f). Example: sales schemes that prey on elderly people or new immigrants who speak very little English. See *UCSPA*, s. 4(c)(1) and Comment.

¹⁷⁹ B.C. Act, s. 3(2)(c); Ontario Act, s. 2(b)(ii); Saskatchewan Act, s. 4(2)(c). Example: such conduct as a home solicitation sale of cookware for \$375 where a set of comparable quality is readily available to the consumer for \$125 or less. See *UCSPA*, s. 4(c)(3) and Comment.

¹⁸⁰ B.C. Act, s. 3(2)(d); Ontario Act, s. 2(b)(iv); Saskatchewan Act, s. 4(2)(a). Example: the sale of goods or services to a low-income consumer whom the salesman knows or ought to know does not have sufficient income to meet all the payments. See *UCSPA*, s. 4(c)(4) and Comment.

(5) that the terms or conditions on, or subject to, which the consumer transaction was entered into by the consumer are so harsh or adverse to the consumer as to be inequitable.¹⁸¹

In addition to the circumstances noted above, the Ontario enactment specifically includes any unconscionable consumer representation wherein the person making the representation knows or ought to know that the proposed transaction is excessively one-sided¹⁸² or that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment.¹⁸³ Both of these additional specifications may be unnecessary. The first is probably redundant given the protection against "inequitable" transactions¹⁸⁴ and the second appears to add nothing to the protections already provided by the deceptive practices shopping list.¹⁸⁵

There is, however, a significant addition in the Ontario and Saskatchewan unconscionability listing that is lacking in the other two enactments. The Ontario and Saskatchewan lists include a protection against the situation where a supplier knew or ought to have known that the consumer would be unable to receive a "substantial benefit" from the subject-matter of the consumer transaction.¹⁸⁶ An example of conduct that would be in violation of this particular provision is the sale of two expensive vacuum cleaners to two low-income families whom the salesman knows share the same apartment and the same rug.¹⁸⁷ Other examples of similar abuses will undoubtedly occur to the reader.

In sum, the unconscionable practices shopping lists provide considerable variance. Ontario's listing consists of eight specific categories, Saskatchewan has six, B.C. five, and Alberta two. The interesting question is whether a comprehensive trade practices enactment even needs this type of listing with respect to unconscionable, as opposed to deceptive, practices. In the case of deception, the "shopping list" is more of a definitional exercise where sufficient precision with respect to such issues as total and unit price prominence, non-availability of product, or prior history and usage, is attainable. A specification of unconscionable arts or practices, however, will invariably result in a listing of generalities. The very concept of unconscionability is a highly open-textured one and any listing of "undue pressure" or "excessive one-sidedness" may add nothing more to the existing common law than codified uncertainty. Indeed the argument could be made that there already is ade-

¹⁸¹ B.C. Act, s. 3(2)(e); Ontario Act, s. 2(b)(vi); Saskatchewan Act, s. 4(2)(d). Example: the one-sided adhesion contract which contains a disclaimer of all warranties clause or other fineprint "boiler plate" clauses that render the bargain harsh and inequitable. See *UCSPA*, s. 4(c)(5) and Comment.

¹⁸² Ontario Act, s. 2(b)(v). A similar protection is included in the Saskatchewan Act, s. 4(2)(d).

¹⁸³ Ontario Act, s. 2(b)(vii).

¹⁸⁴ *Id.*, s. 2(b)(vi).

¹⁸⁵ *Id.*, s. 2(a)(xiii).

¹⁸⁶ Ontario Act, s. 2(b)(iii); Saskatchewan Act, s. 4(2)(b). And see *UCSPA*, s. 4(c)(3).

¹⁸⁷ *UCSPA* Comment to s. 4(c)(3).

quate common law protection against the very practices that would be specified in a statutory "shopping list." The Anglo-Canadian judiciary has not stood idly by when confronted with cases involving sharp practices or gross over-reaching.¹⁸⁸ The courts have, to a large extent, assumed an obligation to police the marketplace and provide relief in cases of undue influence, duress, exorbitant prices, and high-pressure sales practices.¹⁸⁹ Recent developments indicate a revitalization of a generalized principle of unconscionability.¹⁹⁰ Lord Denning, in *Lloyd's Bank v. Bundy*,¹⁹¹ suggested that the principle underlying and ultimately unifying these various categories of actionability was really "inequality of bargaining power."¹⁹² Several Canadian judges have already adopted Lord Denning's perspective of the judicial obligation.¹⁹³

Given this renaissance of common law concern about marketplace unconscionability, is the "shopping list" of suggested unconscionable practices necessary? Why is a general prohibition inadequate?¹⁹⁴ One response might be that any judicial foray into questions of fair dealing or of equality of bargaining power requires precise legislative guidance.¹⁹⁵ Related to this is the concern that, increasingly, courts are acting as "roving commissions" bent on setting aside those agreements whose substantive terms they find objectionable.¹⁹⁶ Professor Richard Epstein has urged that any judicial utilization of the doctrine of unconscionability should be restricted to questions of "procedural unconscionability" such as duress or party capacity and should not be extended into areas of "substantive unconscionability";¹⁹⁷ that any invitation to scrutinize questions of substantive unconscionability should be specified through legislation. In my view, the "shopping lists" of unconscionable practices were in fact necessary not only to codify and clarify the "procedural" abuses that were actionable at common law but also to specify

¹⁸⁸ See generally the *Trebilcock Study*, *supra*, note 7 at 242-260.

¹⁸⁹ See, for example, *Gaertner v. Fiesta Dance Studios Ltd.* (1973), 32 D.L.R. (3d) 639; *Pridmore v. Calvert* (1975), 54 D.L.R. (3d) 133; *McKenzie v. Bank of Montreal et al.* (1975), 55 D.L.R. (3d) 641, *affd.* (1976), 70 D.L.R. (3d).

¹⁹⁰ Waddams, *Unconscionability in Contracts* (1976), 39 Modern L.R. 369.

¹⁹¹ [1974] 3 W.L.R. 501.

¹⁹² *Id.* at 508.

¹⁹³ See, for example, *McKenzie v. Bank of Montreal et al.*, *supra*, note 189, and *Black v. Wilcox* (1976), 70 D.L.R. (3d) 192 (Ont. C.A.).

¹⁹⁴ Examples of the general prohibition approach can be found in the *Uniform Commercial Code*, s. 2-302, the *Uniform Consumer Credit Code*, s. 6.111 and the *Quebec Consumer Protection Act*, S.Q. 1971, c. 74, s. 118.

¹⁹⁵ Kornhauser, *Unconscionability in Standard Forms* (1976), 64 Calif. L.R. 1151 at 1183.

¹⁹⁶ Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. Law & Econ. 293 at 294.

¹⁹⁷ *Id.* at 315: "... when the doctrine of unconscionability is used in its substantive dimension, be it in a commercial or consumer context, it serves only to undercut the private right of contract in a manner that is apt to do more social harm than good." The distinction between "procedural" and "substantive" unconscionability is explored by Leff, *supra*, note 11 at 489 *et seq.* Also see Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition* (1970), 31 U. Pitt. L.R. 349.

new and important "substantive unconscionability" categories such as no probability of full payment¹⁹⁸ or no substantial benefit.¹⁹⁹

If the listing of unconscionable practices is indeed meaningful, can there be any improvement upon the open-textured quality of the itemizations? Or should one be content to rely upon judicial interpretation as the exclusive source of guidance? It may be that much of the anxiety that has developed with respect to judicial interpretation of such open-textured concepts as "undue pressure," "substantial benefit," or "excessive one-sidedness" is unjustified. The judiciary has long been familiar with the challenge of interpreting broadly worded unconscionability provisions. One apposite example has been the judicial effort to carefully articulate those factors that were thought to be relevant to a finding of unconscionability under provincial unconscionable transactions relief legislation.²⁰⁰ There is good reason to believe that similar judicial guidelines could evolve in the interpretation of the trade practices legislation.²⁰¹ This is not to say, however, that judicial fiat should be the only source of guidance for the interpretation of the "shopping list" prohibitions. I would argue that the ideal interpretive vehicle would be a rule-making power that could be vested in the appropriate Minister. This suggestion, however, raises questions of considerable complexity which are explored more thoroughly in the analysis of administrative remedies.²⁰²

(d) Additions and Exemptions

Any "shopping list" of deceptive or unconscionable practices deemed to be unfair and in violation of the trade practices enactment should not be closed. There ought to be some provision delegating to the Lieutenant Governor-in-Council the power to add to it by regulation. This delegation of responsibility to the executive would permit timely response to innovative marketplace abuses.

Only two of the provincial enactments contain provisions to this effect. The B.C. Act permits the Lieutenant Governor-in-Council to prescribe by regulation any new additions to both the "deceptive"²⁰³ and the "unconscionable" practices shopping lists.²⁰⁴ The Ontario Act permits additions only to the "deceptive" listing.²⁰⁵ In the Alberta and Saskatchewan enactments there is no provision for additions through executive regulation. In the latter enactment, however, the Lieutenant Governor-in-Council is empowered to make

¹⁹⁸ *Supra*, note 180 and accompanying text.

¹⁹⁹ *Supra*, note 186 and accompanying text.

²⁰⁰ *Supra*, note 102. And see particularly the judgment of Sweet Co. Ct. J., in *Morehouse v. Income Investments Ltd.* (1965), 53 D.L.R. (2d) 106.

²⁰¹ The general capacity of the judiciary to develop meaningful guidelines in the area of unconscionability is discussed favourably by Waddams, *supra*, note 190 at 391-393. *Contra*, Leff, *supra*, note 197, 31 U. Pitt. L.R. at 354.

²⁰² *Infra*, sub-part 4.

²⁰³ B.C. Act, ss. 2(3)(5) and 32(n).

²⁰⁴ *Id.*, ss. 3(2)(f) and 32(o).

²⁰⁵ Ontario Act, ss. 2(c) and 16(c).

regulations "defining" any words or expressions not defined in the Act.²⁰⁶ This power to extend definitionally the scope of the "shopping list" may functionally serve the same purpose as the power to add by regulation.

There is one feature of this question of adding by regulation that deserves some discussion. Section 16(2) of the Ontario enactment uniquely provides that any regulation enacted by the Lieutenant Governor-in-Council whereby an addition is made to the deceptive practices listing "expires with the prorogation of the resumed session or of the next ensuing session as the case may be."²⁰⁷ The purpose of this provision is to enable the cabinet to enact regulations while the legislature is recessed. However, in the absence of subsequent positive legislative endorsement, these regulations would automatically expire upon the prorogation of the next ensuing session. While such automatic rescission protection would commend itself to those of us who find greater safeguards in legislative than in executive action, it could have a very negative effect. Uncertainty and inconsistency may be the only real consequence of Ontario's automatic rescission proviso. As the recent report to the federal Department of Consumer and Corporate Affairs suggested:

Section 16 [of the Ontario enactment] will result, in the event of Parliament's failure to formally validate existing rules, in certain forms of conduct being illegal one moment and legal the next. Moreover the invalidation of rules will, in cases of parliamentary inadvertence, bear no relation to the urgency of the need for which they were originally designed to cater. Where rules expire in this way, while the original need for them continues, they will have to be promulgated anew. In the interim, individuals will remain free to engage in conduct which may result in substantial injury to consumers.²⁰⁸

Automatic rescission of regulations which fail to gain subsequent legislative endorsement through inadvertence is a wholly inappropriate device in a consumer trade practices enactment. Section 16(2) should be reconsidered and repealed.

The same can be said about the "exemption by regulation" provisions. Each of the trade practices enactments permits the Lieutenant Governor-in-Council to exempt certain suppliers or types of consumer transactions from the operation and application of the legislation.²⁰⁹ The rationale for an exemption provision is related to the overall concern that a trade practices enactment be sufficiently responsive to unforeseen contingencies.²¹⁰ But what unforeseen eventualities could justify relieving a supplier from the obligation to adhere to the fair sales practice requirements of the legislation? Even if one could hypothesize a situation where the public interest could tolerate business conduct that is in violation of the trade practices enactment, why should exemption be available simply by executive action? The safer and

²⁰⁶ Saskatchewan Act, s. 28(e).

²⁰⁷ Ontario Act, s. 16(2).

²⁰⁸ *Trebilcock Study*, *supra*, note 7 at 160-161.

²⁰⁹ B.C. Act, s. 32(c); Ontario Act, s. 16(1)(d); Alberta Act, s. 21(c); Saskatchewan Act, s. 28(a).

²¹⁰ The need for "flexibility" was emphasized by the Hon. John Clement, Minister of Consumer and Commercial Relations, during debate of the Ontario Act. See *Ont. Leg. Deb.* (November 28, 1974) at 5866.

politically more accountable approach would place any exempting power with the full legislature; otherwise, an unnecessary temptation for "back door pressures" continues to persist. When the point was debated in Ontario, the Parliamentary Assistant to the Minister of Consumer and Commercial Relations reassured the legislature that "there would be no exemptions and no exclusions under the regulatory section. That's a matter of record; that's a commitment. . . ." ²¹¹ Unfortunately, the motion to amend this regulation-making provision by deleting the exemption power was dismissed as "facetious." ²¹²

3. *The Range of Private Remedies*

It is beyond dispute that a right provided by law can only be as strong as the remedy accorded for its enforcement and vindication. The difference between effective consumer protection legislation and legislation that is merely symbolic or "name-only" ²¹³ is often a difference in the range and adequacy of the remedies that are statutorily provided. The analysis of the remedies provided in each of the provincial trade practice enactments will materially influence one's evaluation of that enactment.

Ideally, a consumer trade practices enactment should provide the appropriate mix of civil, administrative, and criminal remedies that will ensure "the greatest deterrence to economic offenders, the maximum protection and benefits to victims and the best satisfaction of the public need to perceive that justice is being done." ²¹⁴ This mixture of private and public remedial strategies is a reflection of the realization that the most effective response to marketplace abuse is three-pronged: consumer-initiated civil actions, administrative enforcement by government and, as a last resort, the criminal sanction.

The private or consumer-initiated remedy will be considered first, not only because this approach lends itself to a more sensible discussion of the administrative remedies and the criminal sanction, but also because, in my view, a broader recognition of the desirability of private action by individual consumers is required. Statutory encouragement of private actions, either to recover actual losses or to obtain injunctive or declaratory relief, would provide both a convenient and psychologically satisfying vehicle of redress for the motivated consumer and a cost-saving opportunity for the invariably under-staffed and poorly funded governmental enforcing authority. ²¹⁵ The desirability of a broader emphasis in trade practices legislation upon private

²¹¹ Mr. Frank Drea M.P.P., *Ont. Leg. Deb.* (February 7, 1975) at 7410.

²¹² *Id.*

²¹³ *Supra*, note 10.

²¹⁴ Geis and Edelhertz, *supra*, note 2.

²¹⁵ See generally Note, *An Act to Prohibit Unfair and Deceptive Trade Practices*, *supra*, note 23 at 146-147.

action is in essence a reflection of the growing realization that "private attorneys general" may well be the best vindicators of the public interest.²¹⁶

To encourage the utilization of civil remedies in cases of consumer loss or injury, statutory reform of several barriers existing at common law is necessary. Overall, the common law "has the means and the flexibility, if applied intelligently and imaginatively, to afford redress to a consumer in most cases of deception or unconscionability."²¹⁷ However, two procedural obstacles should be removed. The first is the long-outmoded and increasingly ignored parol evidence rule which effectively precludes the admissibility of any oral evidence of representations or inducements which adds to, varies, or contradicts the terms of the written contract. The parol evidence rule, insofar as it relates to consumer transactions, has been resoundingly criticized in the literature.²¹⁸ The justification for extending the scope of the contract to include any representation made by the supplier and relied upon by the consumer inducing the latter to enter into the transaction, whether or not such representation was made orally, is surely too obvious to pursue. Indeed, it is fair to say that the illogicality of the parol evidence rule, as well as its consequent injustice, has prompted a sizeable erosion of the rule by the courts.²¹⁹ However, to ensure judicial uniformity,²²⁰ it is necessary to "formalize the massive erosion"²²¹ and abolish the parol evidence rule. Three of the provincial trade practices enactments have expressly abolished the rule,²²² while the fourth, Alberta, has done so by implication.²²³

The second procedural obstacle that requires statutory abolition is the privity doctrine. This matter has already been discussed in some detail.²²⁴ Suffice it to say that a modern consumer trade practices enactment ought to make it clear that the notion of contractual privity will not impede an other-

²¹⁶ See Lovett, *Private Actions for Deceptive Trade Practices* (1971), 23 Admin. L.R. 271 at 273 and 285; Note, *Private Remedies Under the Consumer Fraud Acts* (1972), 67 Nw. U.L.R. 413; Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, *supra*, note 28 at 506; Lovett, *supra*, note 23 at 743 and 749.

²¹⁷ *Trebilcock Study*, *supra*, note 7 at 275. Also at 280.

²¹⁸ See *Report on Consumer Warranties*, *supra*, note 81 at 29 *et seq.* and *Trebilcock Study*, *supra*, note 7 at 230: "[T]he rule has no place in the consumer marketplace where, commonly, reliance is placed not upon the terms of a printed form contract but upon the representations, oral or otherwise, which induce the making of the contract." The relevant critiques are collected at 288, n. 114.

²¹⁹ *Curtis v. Chemical Cleaning and Dyeing Co. Ltd.* (1951), 1 K.B. 805; *City and Westminster Properties Ltd. v. Mudd*, [1958] 2 All E.R. 733; *Mendelssohn v. Normand, Ltd.*, [1969] 3 All E.R. 1215. Generally discussed in *Trebilcock Study*, *supra*, note 7 at 228-229.

²²⁰ There has been the odd consumer case where the parol evidence rule has been applied with full vigour: see e.g., *Allen v. Danforth Motors Ltd.* (1958), 12 D.L.R. (2d) 572 (Ont. C.A.)

²²¹ *Trebilcock Study*, *supra*, note 7 at 230.

²²² B.C. Act, s. 27; Ontario Act, s. 4(7); Saskatchewan Act, s. 22.

²²³ Alberta Act, s. 4(1)(d).

²²⁴ *Supra*, notes 81 to 87 and accompanying text.

wise appropriate civil action. As noted earlier,²²⁵ three of the provincial statutes have expressly abolished the doctrine of privity;²²⁶ the Ontario enactment is deficient in this respect.²²⁷

Procedural difficulties aside, what is the range of private remedies provided by the trade practices legislation? In analyzing and evaluating this aspect of the problem, I propose to consider the following: (a) the availability of injunctive and declaratory relief, (b) rescission, damages and related remedies, and (c) incentives for private action.

(a) Injunctive and Declaratory Relief

Although the utility of a private injunctive or declaratory remedy has been questioned by at least two commentators,²²⁸ on the whole, the literature has wholeheartedly endorsed the private injunction or declaration as a beneficial counterpart to the preventive administrative remedies available to the governmental enforcing authority.²²⁹ Indeed, there is no cogent reason to deny the injunctive or declaratory remedy to the private consumer litigant. Any fears that such availability would prompt a flood of frivolous litigation have proved unfounded.²³⁰

Nonetheless, three of the provincial trade practice enactments have proceeded cautiously on this point. Alberta has provided for private injunctive and declaratory relief against unfair practices in two instances: where the consumer litigant can show that he had entered into a consumer transaction and had suffered damage or loss as a consequence of the unfair act or practice²³¹ or, where the consumer litigant is a "consumer organization" defined so as to require non-profit incorporation.²³² These prerequisites for actual agreement or for incorporation have already been critically analyzed.²³³ To Alberta's credit, there is provision for an interim injunction requiring the applicant to establish "a *prima facie* case of the existence of an unfair act or practice being committed by the defendant supplier" and relieving the applicant of any need to show irreparable harm.²³⁴ Here again the above-mentioned prerequisites and criticisms are relevant. The other cautious provinces are Saskatchewan, which allows declaratory relief but not injunctive,²³⁵ and Ontario which predictably, but unjustifiably, provides neither.²³⁶

²²⁵ *Id.*

²²⁶ B.C. Act, s. 1(1) "supplier"; Alberta Act, s. 1(h); Saskatchewan Act, s. 15(1).

²²⁷ *Supra*, notes 86 and 87 and accompanying text.

²²⁸ Travers and Landers, *The Consumer Class Action* (1970), 18 Kan. L.R. 811 at 814-15, cited in Rice, *supra*, note 33 at 384, n. 65.

²²⁹ See generally the articles cited, *supra*, note 216.

²³⁰ Zysblat, *supra*, note 160 at 104.

²³¹ Alberta Act, ss. 11(1) and 2(a)(e).

²³² Alberta Act, s. 14.

²³³ *Supra*, notes 124 to 129 and accompanying text.

²³⁴ Alberta Act, s. 15.

²³⁵ Saskatchewan Act, s. 15(1)(f).

²³⁶ *Cf. UCSPA*, s. 11(a) which permits consumer-initiated injunctive or declaratory relief whether or not the consumer has suffered any actual loss or damage.

The broadest and most commendable approach to the question of consumer-initiated applications for injunctions or declarations is in the B.C. Act. Section 16 provides that any person, whether or not that person has a special, or any interest, or is even affected by a consumer transaction, has standing to bring an action for either an interim or permanent injunction or a declaration with respect to any supplier's actual or attempted unfair act or practice.²³⁷ Where the litigant is successful, the court is empowered to order the supplier to advertise the particulars of any such judgment in the media.²³⁸ But have the courts responded adequately to these statutory innovations and onus shifts? This particular question masks a more general concern about the appropriateness of the curial body in the implementation of a comprehensive trade practices regulatory scheme and is discussed more fully in Part D of this article.²³⁹

(b) Rescission, Damages and Related Remedies

The most important aspect of the private remedy provisions in a consumer trade practices enactment will be the range of relief available to a consumer who has been induced by an unfair act or practice to enter into a consumer transaction, and, as a consequence, has suffered injury or loss. A comprehensive recovery of loss provision (found in at least thirty-eight American state trade practices statutes)²⁴⁰ should provide for rescissionary relief, full recovery of restitutionary reliance, and expectation losses, punitive or exemplary damages, and a flexibly worded direction empowering the court to make such other orders or judgments as may be necessary to achieve a just result.²⁴¹ This suggested range of remedies is provided in three of the provincial trade practices enactments. The B.C.,²⁴² Alberta,²⁴³ and Saskatchewan²⁴⁴ provisions are generally comparable in substance if not in form. The only significant point of contrast is the availability of punitive or exemplary damages.²⁴⁵ The B.C. and Alberta enactments²⁴⁶ permit the award of punitive

²³⁷ B.C. Act, s. 16. Section 17 provides that in any application under s. 16 for an interim injunction, the court "shall give greater weight, importance and the balance of convenience to the protection of consumers than to the carrying on of the business of the supplier." Furthermore, the application "need not establish that irreparable harm will be done . . . if the interim injunction is not granted."

²³⁸ B.C. Act, s. 16(1).

²³⁹ Part D, *infra*.

²⁴⁰ The thirty-eight American states having such provisions in their trade practices legislation are listed in the *Trebilcock Study*, *supra*, note 7 at 117.

²⁴¹ One model of flexibly worded direction to the courts to provide such relief "as the court deems necessary and proper" is s. 3-406 of the Model Act, *supra*, note 215 at 151.

²⁴² B.C. Act, s. 20(1).

²⁴³ Alberta Act, ss. 11(1)(2).

²⁴⁴ Saskatchewan Act, s. 15(2).

²⁴⁵ The appropriateness of the punitive or exemplary damages award is discussed generally in Rice, *Exemplary Damages in Private Consumer Actions* (1969), 55 Iowa L.R. 307. Also see Lovett, *supra*, note 216 at 286 and *supra*, note 23 at 745 and at 748.

²⁴⁶ B.C. Act, s. 20(1)(a); Alberta Act, s. 11(2)(c).

damages without restriction. A Saskatchewan court's punitive damages award, however, is limited to those cases where the supplier had committed a "willful and knowing" violation of the Act.²⁴⁷

Thus far, any discussion of the recovery of loss provision in the Ontario Act has been avoided, and for good reason. Unlike the clarity of language found in the other enactments, the Ontario Act's recovery of loss provision displays a numbing disregard for legislative lucidity. It is worthwhile to excerpt the critical provision in full:

4. (1) Subject to subsection 2, any agreement, whether written, oral or implied, entered into by a consumer, after a consumer representation that is an unfair practice and that induced the consumer to enter into the agreement,
 - (a) may be rescinded by the consumer and the consumer is entitled to any remedy therefor that is at law available, including damages; or
 - (b) where rescission is not possible because restitution is no longer possible, or because rescission would deprive a third party of a right in the subject-matter of the agreement that he has acquired in good faith and for value, the consumer is entitled to recover the amount by which the amount paid under the agreement exceeds the fair value of the goods or services received under the agreement or damages, or both.
- (2) Where the unfair practice referred to in subsection 1 comes within clause b of section 2, the court may award exemplary or punitive damages.²⁴⁸

It is difficult to discern whether the provision's lexical convolutions were the result of hurried inadvertence or of deliberative draftsmanship disclosing a legislative intention to provide a less than comprehensive civil remedy. The latter suggestion becomes increasingly plausible as one re-reads s. 4(1). There is no difficulty with the opening paragraph of s. 4(1): where a consumer has been induced by an unfair practice to enter into an agreement, he is given the right to rescind the agreement. This rescissionary remedy is self-executing, and, unlike the B.C., Alberta, or Saskatchewan provisions, does not require application to a court.²⁴⁹ There is also little difficulty with s. 4(1)(b): where the impossibility of *restitutio* or where third party rights would preclude rescission, the consumer is entitled to recover the difference between the amount he has already paid to the supplier and the "fair value" of the goods or services received under the agreement. This recovery would not include consequential losses. However, s. 4(1)(b) concludes with the phrase "or damages, or both." One would hope that this additional alternative would be judicially interpreted to permit the recovery of reasonably foreseeable consequential losses as well as the specified "fair value" difference. Otherwise, why would the draftsman have added these words?²⁵⁰

The more critical issue of statutory interpretation relates to the language of s. 4(1)(a). There are really two questions: (1) can the consumer claim damages without having to rescind the agreement? (2) whether or not rescis-

²⁴⁷ Saskatchewan Act, s. 15(2)(b).

²⁴⁸ Ontario Act, ss. 4(1) and (2).

²⁴⁹ *Id.*

²⁵⁰ The question of "measure of damages" and the failure of the Ontario Act to provide any direction on this matter is discussed, *infra*, notes 263 to 266 and accompanying text.

sion is a prerequisite under s. 4(1)(a), what is meant by "any remedy that is at law available, including damages"? The first question is of concern to the consumer who would prefer to retain the goods and merely sue to recover his losses. Is this permitted? One would think that if damages are allowable where third party rights or the impossibility of *restitutio in integrum* has precluded rescission,²⁵¹ then *a fortiori* they ought to be allowed where the innocent consumer voluntarily decides to forego his rescissionary right. Otherwise, consumers would be compelled to proceed under s. 4(1)(b) innovatively ensuring that restitution was no longer possible. The single question for a court, of course, will be whether to read "and" in s. 4(1)(a) disjunctively or conjunctively. It is submitted that the former interpretation is preferable.²⁵²

The second question relating to the interpretation of s. 4(1)(a) is more difficult. What did the legislature intend by providing that "the consumer is entitled to any remedy therefor, that is *at law* available, including damages."²⁵³ What are the implications of the "at law" restriction? Would the consumer, for example, be denied a remedy in damages with respect to losses arising out of an unfair act or practice that appears solely in the "unconscionability" shopping list?²⁵⁴ The court might well conclude that the traditional non-availability of the damages remedy in cases of mere unconscionability should be maintained, given the "at law" restriction of s. 4(1)(a), where the consumer's sole basis for complaint is a s. 2(b) violation. Indeed, a literal reading of the provision would compel this interpretation which, if correct, discloses a legislative denial of any suggestion that the Ontario enactment is in any way progressive.²⁵⁵

A further example of the undue caution permeating those few concessions to consumer protection granted by the Ontario Act is s. 4(2). The judicial award of punitive damages is limited to those cases where the unfair practice is an "unconscionable consumer representation."²⁵⁶ This restriction of punitive damages awards to cases of unconscionability and their non-

²⁵¹ Ontario Act, s. 4(1)(b).

²⁵² It would indeed be remarkable if a trade practices statute that was intended to provide a comprehensive protection to consumers suffering loss or injury as a consequence of unfair sales practices was interpreted as denying the consumer a simple damages remedy.

²⁵³ Ontario Act, s. 4(1)(a). (Emphasis added.)

²⁵⁴ Ontario Act, s. 2(b). See, *supra*, notes 177 to 187 and accompanying text.

²⁵⁵ This criticism is supported by the fact that the First Draft of s. 4(1) was reasonably straight-forward:

Any agreement . . . entered into by a consumer after a consumer representation that includes an unfair practice is voidable by the consumer and each supplier is liable and jointly and severally liable with each other supplier to the consumer for any moneys paid under the agreement *and for any damages* incurred by the consumer as a result of the unfair practice. (Emphasis added.)

See *Bill 55, An Act to Prohibit Unfair Practices in Sales to Consumers*, (4th Session, 29th Legislat., Ont. 23 Eliz. II, 1974). By First Reading this provision had been re-drafted into the present ss. 4(1)(a) and (b). In this writer's view, both the re-drafting and the particular language employed reflect a deliberate effort to provide a restricted private remedy.

²⁵⁶ Ontario Act, s. 4(2).

availability in cases where there has been a violation of the deceptive practices shopping list is difficult to understand, particularly since there is no compelling conceptual basis for differentiating the latter from the former.²⁵⁷ Indeed, in the Ontario enactment, at least one deceptive practice is expressly categorized under the list of unconscionable practices.²⁵⁸ Equally perplexing is the short limitation period imposed in the Ontario enactment. The remedies provided in s. 4(1) must be claimed "within six months after the agreement is entered into."²⁵⁹ This imposition of a six-month limitation period is unique in North America. Most trade practice enactments provide for a two-year²⁶⁰ or, in some cases, a three-year²⁶¹ limitation period. The absurdity of the six-month time limit was emphasized during the debate of this provision in the Ontario Legislature²⁶² but again without consequence.

One final point should be made in relation to the range of private remedies provided by the various provincial trade practice enactments. The only enactment containing a meaningful direction with respect to the method of calculating or measuring the damages recoverable is Saskatchewan's, which allows recovery of "any losses that were reasonably foreseeable as likely to result from the unfair or unconscionable act or practice."²⁶³ The other three enactments are silent as to the appropriate measure.²⁶⁴ Perhaps the response of an Ontario M.P.P. during the debate of this point is typical: "measures of damages should be determined by the courts — that's their job."²⁶⁵ Unfortunately this sanguine view of judicial responsiveness, when coupled with unnecessary statutory obscurity,²⁶⁶ often results in further legislative involvement to clarify confusion that ought not to have arisen.

²⁵⁷ *Supra*, note 146 and accompanying text.

²⁵⁸ The making of a misleading statement of opinion on which the consumer is likely to rely to his detriment: Ontario Act, s. 2(b)(vii).

²⁵⁹ Ontario Act, s. 4(5). The Act requires that any consumer intending to avail himself of a remedy provided in s. 4(1) must give notice of such in writing to the other party to the agreement. Section 4(6), however, may be unnecessarily restrictive in its requirement that the notice must be delivered personally or sent by registered mail. The First Draft of Bill 55, *supra*, note 255, s. 4(5) required that "notice" be given but did not prescribe mandatory procedures.

²⁶⁰ For example, *UCSPA*, *supra*, note 33, s. 11(h).

²⁶¹ The California *Consumers Legal Remedies Act*, *supra*, note 120, s. 1783.

²⁶² *Ont. Leg. Deb.* (Nov. 28, 1974) at 5830. The more controversial aspect of the six month limitation period is the fact that the time period begins as soon as the consumer has entered into the agreement. In many cases the nature and extent of the supplier's deceptive act or practice may not be discovered until seven or eight months or perhaps even a year has passed. It would be eminently more sensible to begin a limitation period *after* the consumer first became aware of the unfair practice. The First Draft of Bill 55, *supra*, note 255, s. 4(5) provided that in the case of a "deceptive" act or practice the consumer could seek a statutory remedy "within three months after the consumer became aware of the unfair practice"; and, in the case of an "unconscionable" act or practice, the consumer had to act "within six months after the agreement [was] entered into." Here again, re-drafting meant restriction.

²⁶³ Saskatchewan Act, s. 15(2)(a).

²⁶⁴ See B.C. Act, s. 20(1); Alberta Act, s. 11(2)(b); Ontario Act, s. 4(1).

²⁶⁵ Mr. Frank Drea M.P.P., *Ont. Leg. Deb.* (February 6, 1975) at 7361.

²⁶⁶ Especially evident in the Ontario Act, s. 4(1), discussed, *supra*.

(c) Incentives for Private Action

An individual consumer's recourse to private action may prove to be non-existent if the financial disincentives that presently exist are not eliminated. One cannot expect the individual consumer to initiate costly litigation to recover losses arising out of a deceptive or unconscionable trade practice in any case where the inconvenience and expense of such action loom as formidable barriers. Yet these financial disincentives will effectively preclude private action in the vast majority of cases involving unfair trade practices.²⁶⁷ In order to neutralize the disincentives that continue to discourage the use of private remedies, a modern trade practices enactment should specifically provide both financial and procedural incentives for consumer-initiated litigational efforts.

The financial incentive might be a minimum recovery provision. Several American enactments including the *Uniform Consumer Sales Practices Act*²⁶⁸ provide for minimal recoveries ranging from \$25 to \$200. To date, none of the provincial trade practices statutes have adopted this feature. A minimum recovery provision allowing, for example, "actual damages or one hundred dollars whichever is greater,"²⁶⁹ would be an important addition to the Canadian enactments and could provide a necessary incentive in a case where a private action for the recovery of losses arising out of an unconscionable or deceptive trade practice would not be financially worthwhile.²⁷⁰

A complementary procedural incentive that would minimize the financial barriers that continue to impede effective private consumer litigation is the class action. The class action device has become in recent years a highly controversial and much-discussed topic for both legal scholarship and law reform. Literally hundreds of articles on this issue have appeared in the law reviews.²⁷¹ The most recent and the most thorough Canadian analysis is Professor Neil J. Williams' excellent study that was first commissioned by the federal Department of Consumer and Corporate Affairs²⁷² and has now been published as a general study of consumer class actions in Canada.²⁷³ It is

²⁶⁷ "It is generally agreed that the greatest incidence and impact of deceptive and unconscionable practices are found in the low-income consumer market." Rice, *supra*, note 33 at 377. Also see Schrag, *Bleak House 1968: A Report on Consumer Tort Litigation* (1969), 44 N.Y.U.L.R. 115 and Lovett, *Private Actions for Deceptive Trade Practices*, *supra*, note 216 at 273.

²⁶⁸ *Supra*, note 33.

²⁶⁹ *UCSPA*, *supra*, note 33, s. 11(b).

²⁷⁰ *Trebilcock Study*, *supra*, note 7 at 218.

²⁷¹ The most recent American analysis is an excellent but lengthy note in the *Harvard Law Review*. See *Developments in the Law — Class Actions* (1976), 89 Harv. L.R. 1319. This 325-page Note makes reference to all of the important articles in the American literature.

²⁷² See Williams, *Damages Class Action Under the Combines Investigation Act in A Proposal for Class Actions Under Competition Policy Legislation* (Ottawa, Department of Consumer and Corporate Affairs, Bureau of Competition Policy, 1976).

²⁷³ Williams, *Consumer Class Actions in Canada — Some Proposals for Reform* (1975), 13 Osgoode Hall L.J. 1.

not my intention to provide yet another approbative exegesis of the appropriateness of the class action vehicle in consumer protection legislation. The advantages of the class action mechanism and its potential for maximizing cost-efficiency, facilitating full compensation, and achieving effective deterrence have been explored in the literature.²⁷⁴ The justification for a mass redress procedure that would permit consumers to aggregate their common grievances under a single collective suit is surely beyond dispute.

[In] many situations the class action is the only effective private remedy that exists for consumers who have been damaged by the same business practice, especially where individual losses are small. Without the class action, consumers will be denied compensation and perhaps equally as important the merchant responsible for their loss will be permitted to keep profits gained from activities which, at the very least, do not conform to accepted standards of business behaviour. There is a special justification for arming consumers with a weapon to establish and enforce business standards as every member of society is a consumer and all will stand to benefit from the exercise. A vital and potential class action procedure in the hands of the public would help influence the forces that control the marketplace to be more responsive to the need to act fairly and not exploit their position.²⁷⁵

Whether the consumer class action vehicle is enacted as part of an omnibus class action statute²⁷⁶ or simply as a revision to the Rules of Court,²⁷⁷ the necessary legislative approbation is inevitable.²⁷⁸ However, one can only speculate as to when the procedural dark ages will end. Until such time as omnibus class action legislation is enacted, it may be worthwhile to include a mass redress provision in consumer trade practices legislation. At least fifteen American states have authorized consumer class actions.²⁷⁹ The same

²⁷⁴ See, for example, Whybrow, *The Case For Class Actions in Canadian Competition Policy: An Economist's Viewpoint* in *A Proposal for Class Actions*, *supra*, note 272. Another helpful economic analysis is Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interests* (1975), 4 J. Leg. Stud. 47. Also see Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, *supra*, note 28 at 1103, and Starrs, *The Consumer Class Action — Part II: Considerations of Procedure* (1969), 49 B.U.L.R. 407 at 408-409.

²⁷⁵ Williams, *supra*, note 273 at 62-63.

²⁷⁶ See Williams' Model Consumer Class Actions Act, *supra*, note 273, at 65 *et seq.* Also see Hinds, *To Right Mass Wrongs: A Federal Consumer Class Action Act* (1976), 13 Harv. J. Legis. 776.

²⁷⁷ This was the suggestion in the *Report on Consumer Warranties*, *supra*, note 81 at 108.

²⁷⁸ At time of writing, the Ontario Law Reform Commission's study on Class Actions had begun soliciting the submission of briefs on all aspects of the class action and in particular on the following issues: the advantages and disadvantages of class actions; the protection of the various interests of the class representatives, the absentee class members, the opposing party and the public interest by means of procedural safeguards; the assessment and distribution of damages; the question of costs; negotiated settlements; the role of the class lawyer and professional responsibility; and alternatives to the class action. The deadline for written briefs was April 30, 1977.

²⁷⁹ The following listing appears in the *Trebilcock Study*, *supra*, note 7 at 117: Alaska, California, Connecticut, Indiana, Kansas, Massachusetts, Missouri, New Hampshire, New York, Ohio, Oregon, Rhode Island, Texas, Utah and Wyoming. Also see Sebert, *supra*, note 23 at 720 and Lovett, *supra*, note 23 at 746. The class action provisions of the *UDTPA*, *supra*, note 28, and the *UCSPA*, *supra*, note 33, are analyzed in Dole, *supra*, note 28, and in Rice, *supra*, note 33, respectively.

ought to be available in the provincial trade practices enactments under discussion.

Unfortunately, only the B.C. Act has expressly provided for class actions by consumers. Any person, regardless of "interest,"²⁸⁰ may bring an action for declaratory or injunctive relief and, in doing so, may sue on behalf of "consumers generally or on behalf of a designated class of consumers in the Province."²⁸¹ The B.C. Act appears to limit the class action vehicle to declarations and injunctions. However, s. 16(3) of the Act allows the court, in an action for a permanent injunction, to restore to any person who has an interest "any money or property . . . that may have been acquired by reason of a deceptive or unconscionable act or practice by the supplier."²⁸² When this provision is coupled with the general class action provision,²⁸³ there appears to be a statutory basis in the B.C. Act for class restitutionary recovery, if not for damages generally. The Ontario, Saskatchewan and Alberta enactments provide no mass redress procedures — not even for declaratory or injunctive relief.²⁸⁴ The deficiency is a serious one. Until this legislation is amended to permit a class action procedure it will continue to remain "the most retrograde in North America."²⁸⁵ The legislatures' response to this consumer need is more than mere procedural reform. In my view, the matter of class actions "touches upon the credibility of our judicial system."²⁸⁶

4. *The Administrative Remedies*

The importance of sound administrative or governmentally-initiated remedies cannot be overstated. While private action may be economically worthwhile and psychologically justifiable, comprehensive consumer trade practices regulation cannot rely solely upon consumer policing of the marketplace. If each consumer were left to assert his rights alone, if and when he felt sufficiently motivated, there would be at best a "random and fragmentary

²⁸⁰ B.C. Act, s. 16(1).

²⁸¹ *Id.*, s. 16(2). Several commentators have suggested that "the class action works best when injunctive relief, rather than damages, is sought." Eovaldi and Gestrin, *supra*, note 10 at 293. Also see Starrs, *supra*, note 274 at 419.

²⁸² B.C. Act, s. 16(3).

²⁸³ *Id.*, s. 16(2).

²⁸⁴ Under the Alberta Act a "consumer organization" is permitted to seek declaratory or injunctive relief [s. 14(1)]. See discussion, *supra*, notes 127 and 232 and accompanying text.

²⁸⁵ Mr. Patrick Lawlor M.P.P., *Ont. Leg. Deb.* (February 7, 1975) at 7402.

²⁸⁶ Weinstein, *Some Reflections on the "Abusiveness" of Class Actions* (1973), 58 Fed. Rules. D. 299 at 305. The full quote is as follows:

It seems to me that this matter touches upon the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens — including consumers — or we are not.

Quoted in Cochran, *Consumer Class Actions Under Wash. Rev. Code Ch. 19.86 — Still An Effective Remedy* (1975), 10 Gonzaga L.R. 633 at 649, n. 92.

enforcement," if there were any at all.²⁸⁷ The realization that deceptive or unconscionable trade practices are best regulated by combining private and public responses prompted American legislative draftsmen to provide a regulatory structure that would give pre-eminence to the governmental enforcing authority. The nature and extent of the administrative remedies accorded to the enforcing authority reflected the concern that governmental enforcement should be in the forefront in the battle against marketplace abuses.²⁸⁸ This structural preference favouring governmental enforcement is also evident in the Canadian trade practices legislation.

In each of the provincial enactments the designated governmental enforcing authority is the "director of trade practices."²⁸⁹ The Director's general duties and obligations are described more or less uniformly in three of the provincial enactments: enforcing the legislation, providing information for consumers, receiving and acting on consumer complaints, acting as a mediator, conducting relevant research, and maintaining a public record of any actions taken.²⁹⁰ The primary responsibility of the Director is to enforce the trade practices legislation. To facilitate this undertaking, a wide range of necessary investigative powers are provided in each of the enactments. The Director is empowered to commence an investigation whenever he has "reason to believe" that a person has engaged, is engaging, or is about to engage in a deceptive or unconscionable act or practice respecting a consumer transaction.²⁹¹ The investigation may be conducted by the Director or by a person appointed by him.²⁹² Where necessary, the Director may apply *ex parte* to a court for an order authorizing the entry and search of any premises and the seizure of any documents that may be relevant to the determination of whether or not the supplier under investigation has engaged or is engaging in an unfair act or practice.²⁹³ In cases where the Director has reason to believe that the supplier is about to abscond, or that certain monies or other assets are in danger of being dissipated in a manner that is prejudicial to interested consumers, he may in writing or by telegram, order the appropriate

²⁸⁷ Kalvin and Rosenfield, *The Contemporary Function of the Class Suit* (1941), 8 U. Chi. L.R. 684 at 686, quoted in Sewell, *Private and Public Remedies for Fraudulent Business Practices in California: The Importance of a Strong Public Role* (1973), 6 Loy. U.L.A.L. Rev. 312 at 318. Also see Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems* (1968), 48 B.U.L.R. 559 at 569.

²⁸⁸ See Lovett, *supra*, note 23 at 749.

²⁸⁹ B.C. Act, s. 1(1); Ontario Act, ss.1(d) and 5; Alberta Act, s. 3; Saskatchewan Act, s. 2. The comparable governmental authority in the various American jurisdictions is noted in the *Trebilcock Study, supra*, note 7 at 118-119.

²⁹⁰ B.C. Act, s. 4; Ontario Act, s. 5; Saskatchewan Act, s. 6(1). The Alberta Act does not list the Director's duties.

²⁹¹ B.C. Act, s. 8(1); Alberta Act, s. 5; Saskatchewan Act, s. 7(1). The Ontario Act, s. 11(1) requires that the Director's belief be based on "reasonable and probable grounds."

²⁹² B.C. Act, s. 9(1); Ontario Act, s. 11(1); Saskatchewan Act, s. 8(1). In the Alberta Act, the Director's power to delegate his investigatory duties is provided for by implication in s. 8.

²⁹³ B.C. Act, s. 9(4); Ontario Act, s. 11(4); Alberta Act, s. 7(1); Saskatchewan Act, s. 8(5).

party to refrain from dealing with these assets.²⁹⁴ This capacity to “freeze” the dispersion of trust funds or other assets is an essential component of most consumer protection legislation that has consumer compensation as one of its rationales.²⁹⁵ In addition to these investigatory related powers, three of the provincial enactments expressly empower the Director to apply to the court for the appointment of a receiver.²⁹⁶

In general, the range of investigatory powers provided to the Director by each of the provincial trade practices enactments is more or less uniform. Two points of contrast are, however, evident. The Alberta Act is unnecessarily weakened by its requirement that the Director first obtain the express authorization of the provincial Attorney-General before any application for a search warrant or any issuance of a “freeze order.”²⁹⁷ The B.C. Act, on the other hand, may have accorded too great an independence to the enforcing authority by providing a litigational immunity to the Director or his agents or employees with respect to any loss or damage caused by any good faith exercise of the powers given by the Act.²⁹⁸

Effective public enforcement of comprehensive consumer trade practices legislation requires that at least the following administrative remedies be available to the Director of Trade Practices: (a) the power to order the immediate cessation of any unfair trade practice; (b) the capacity to negotiate and enforce assurances of compliance voluntarily entered into by the supplier; and (c) the ability to institute proceedings or assume the conduct of proceedings on behalf of or in substitution for any consumer affected by a supplier’s unfair act or practice.

(a) The Cease and Desist Order

Prohibitory sanctions such as cease and desist orders or injunctions have traditionally been the most prevalent means of formal state action against unfair or deceptive business practices and they continue to be “the most important formal enforcement tool.”²⁹⁹ The public enforcing authority can utilize the injunction or cease and desist remedy as an immediate response to actual or anticipated violations of the trade practices statute. Whether the intervention is to prevent occurrence or repetition, the value of the prohibi-

²⁹⁴ B.C. Act, s. 13(1); Ontario Act, s. 12(1); Saskatchewan Act, s. 11(1). The Alberta Act, in s. 9(1), requires an application by the Director to the court, although this application may be *ex parte*.

²⁹⁵ Similar provisions are found in most of the provincial registration statutes. See, for example, *The Collection Agencies Act*, R.S.O. 1970, c. 71, s. 28; *Mortgage Brokers Act*, R.S.O. 1970, c. 278, s. 26; *Motor Vehicle Dealers Act*, R.S.O. 1970, c. 475, s. 27; *Real Estate and Business Brokers Act*, R.S.O. 1970, c. 401, s. 29; *Pyramidal Sales Act*, S.O. 1972, c. 57, s. 21; and *Travel Industry Act*, S.O. 1974, c. 115, as amended by S.O. 1976, c. 53, s. 21(a).

²⁹⁶ B.C. Act s. 13A; Alberta Act, s. 9(1)(d); Saskatchewan Act, s. 12(1).

²⁹⁷ Alberta Act, s. 19(1).

²⁹⁸ B.C. Act, s. 14(1). *Quaere* whether such grant of immunity is warranted and if so, whether the “good faith” prerequisite is an adequate protection against possible abuse of discretionary powers.

²⁹⁹ Seibert, *supra*, note 23 at 704.

tory sanction both as an effective vehicle for policing the consumer marketplace and as a necessary concomitant to the Director's investigatory powers is indisputable. It is not at all surprising, then, that any jurisdiction that has provided for public enforcement of its trade practices statute will have provided the enforcing authority with an injunctive or similar prohibitory remedy.³⁰⁰

The more interesting question that arises from an analysis of the provincial trade practices enactments is whether the prohibitory sanction should be at the disposal of the Director alone or only available upon application to a court of law. The B.C. and Alberta enactments require the latter,³⁰¹ while Ontario and Saskatchewan allow a Director-initiated cease and desist remedy.³⁰² Although the Director's application to the court for an interim injunction is facilitated in the B.C. and Alberta legislation by an express statutory alteration of the traditional burden of proof requirements,³⁰³ on balance it seems that the Director-initiated cease and desist order is a more appropriate mechanism in the context of consumer trade practices regulation. At least two inter-related reasons can be provided for this structural preference. First, even an *ex parte* application for an interim injunction cannot be as immediate and as convenient as the cease and desist order. Secondly, to require recourse to the courts for injunctive relief is to run the serious risk that judges will continue to exercise their discretion as they have done traditionally, that is, requiring proof of "irreparable harm" and consciously minimizing the force of any statutory direction to do otherwise.³⁰⁴ The Director-initiated cease and desist order is to be preferred.

Both Saskatchewan and Ontario provide the enjoined supplier with a right to a hearing either before an appropriate tribunal³⁰⁵ or before the Director himself.³⁰⁶ There is a possibility, however, of procedure thwarting substance. In both jurisdictions the operation of the Director's cease and

³⁰⁰ *Id.*, at 704, n. 74, for a listing of the relevant American jurisdictions.

³⁰¹ B.C. Act, s. 16; Alberta Act, s. 12.

³⁰² Ontario Act, s. 6(1); Saskatchewan Act, s. 14(1). This "cease and desist" feature is not unique to Canadian consumer protection legislation. It can be found in many of the provincial registration statutes. The particular registrar is empowered to order the immediate cessation of the use by the registrant of any advertisements, circulars or pamphlets which the registrar believes contains "false, misleading or deceptive statements." See, e.g., the *Motor Vehicle Dealers Act*, R.S.O. 1970, c. 475 (as amended by S.O. 1971, c. 50), s. 30. Similar provisions can be found in the registration statutes listed, *supra*, note 295. Also see Saskatchewan's *Department of Consumer Affairs Act*, S.S. 1972, c. 27, s. 8.

³⁰³ B.C. Act, s. 17, and, *supra*, note 237; Alberta Act, s. 15(2).

³⁰⁴ This problem is discussed, *infra*, in Part D: see note 403 and accompanying text.

³⁰⁵ Ontario Act, s. 6(3). The hearing board is the Commercial Registration Appeal Tribunal.

³⁰⁶ Saskatchewan Act, s. 14(2).

desist order can be suspended by a supplier's timely appeal procedures.³⁰⁷ The Ontario Act has attempted to redress the balance somewhat by allowing the Director to issue a cease and desist order which would take effect immediately if, in the opinion of the Director, immediate compliance is "necessary for the protection of the public."³⁰⁸ In this case, the cease and desist order would not expire until fifteen days after receipt of the supplier's request for a hearing. If the Commercial Registration Appeal Tribunal can schedule the supplier's hearing date within this time period, the cease and desist order may be extended until a judgment is rendered.³⁰⁹ The order for immediate compliance is not available to the Saskatchewan Director.

The only criticism that can be levelled against the otherwise sensible cease and desist remedy contained in the Ontario enactment is the absence of a mechanism that would permit a consumer complainant to monitor the Director's handling of the particular complaint. Where the Director has refused to proceed on a matter, the consumer should be permitted to appeal this inaction to the appropriate tribunal. This would ensure that a Director's refusal to issue a cease and desist order would be susceptible to review and evaluation, as is his decision to proceed.³¹⁰ If the supplier can appeal to protect his interests, why not allow a similar protection to the consumer? Unfortunately, the proposed amendment to the Ontario Act which would have given a right of appeal to consumers was defeated by the misguided belief that "the consumer has all kinds of remedies in court."³¹¹

(b) The Assurance of Voluntary Compliance

Voluntary compliance procedures, consent orders or, more simply, AVC's, play an indispensable role in any effective program of public enforcement of trade practices legislation.³¹² The assurance of voluntary compliance is most often a happy middle ground whereby a good faith supplier undertakes to discontinue the alleged unfair trade practice and to make appropriate

³⁰⁷ Ontario Act, s. 6(5) provides that where a supplier, within fifteen days after receiving the Director's notice, requires a hearing by the Tribunal, "the Tribunal may by order direct the Director to carry out his proposal or to refrain from carrying out his proposal. . .". Saskatchewan Act, s. 14(7) makes it clear that where a supplier has requested a hearing with the Director, the latter's cease and desist order does not take effect until there has been a hearing, reasons for the rescission have been given and the order has been served upon the supplier.

³⁰⁸ Ontario Act, s. 7(1).

³⁰⁹ Ontario Act, s. 7(4).

³¹⁰ This safeguard is particularly important to Ontario and Saskatchewan consumers since in neither case is the private injunctive remedy permitted. *Supra*, notes 235 and 236 and accompanying text.

³¹¹ Mr. Frank Drea M.P.P., *Ont. Leg. Deb.* (February 7, 1975) at 7401. The defeat of this proposed amendment prompted Mr. Renwick to remark that "the parliamentary assistant has refused to accept even those very reasonable amendments which have the support of all thinking people . . . as you go along, you keep chipping away at your bill, a bill which you say is for the protection of the consumer and yet you are consistently turning down reasonable amendments which would help the consumer." (at 7401).

³¹² Sebert, *supra*, note 23 at 708; Harrison, *supra*, note 23 at 434.

amends to any aggrieved consumers; thus, the Director's office is spared the costs of protracted injunction or cease and desist proceedings.³¹³ While the AVC is indeed a highly efficient enforcement measure which alone may account for its uniform inclusion in nearly all trade practices legislation,³¹⁴ its effectiveness depends to a large extent upon the Director's ability to give legal effect to the supplier's assurances. Consequently, there has to be a statutory acknowledgement that breach by the supplier of an AVC constitutes a violation under the trade practices enactment and renders the supplier liable to criminal prosecution.

Both the voluntary compliance procedure and the statutory recourse to the criminal sanction where an AVC has been breached can be found in three of the provincial trade practices enactments.³¹⁵ The Alberta Act is unique in this respect in that while provision is made for what is called a "supplier's undertaking,"³¹⁶ non-compliance by the supplier with his given undertaking will not attract the criminal sanction.³¹⁷ A second deficiency evident in the Alberta Act is the proviso that no AVC can be entered into without prior authorization by the provincial Attorney-General.³¹⁸ The only commendable aspect of the Alberta AVC provision is the specific statutory direction suggesting that a "supplier's undertaking" may contain certain specific reassurances relating to discontinuance of the unfair trade practice and redress of consumer losses.³¹⁹ Similar and, indeed, more detailed guidelines as to potential terms of the AVC are provided in both the B.C. and the Saskatchewan enactments.³²⁰ The Ontario Act is in this respect the most deficient, providing simply that an assurance of voluntary compliance may include "such undertakings as are acceptable to the Director."³²¹

(c) Substituted Actions

The commitment to effective public enforcement of a comprehensive consumer sales practices law is not limited to prohibition or voluntary compliance procedures. The Director of Trade Practices should assume the further responsibility to act in a representative capacity on behalf of any aggrieved

³¹³ The cost-saving features of the AVC are discussed more fully in Lovett, *supra*, note 23 at 741. The fact that the AVC becomes a matter of public record is an equally attractive feature: often a news release accompanies the entering into of an AVC thereby putting the public on notice that the particular supplier has formally reassured the Director that it will not engage in certain suspect activities. See Zimmering, *Louisiana's Consumer Protection Law — Three Years of Operation* (1976), 50 Tul. L.R. 375 at 383.

³¹⁴ At least thirty states now provide for AVC's in their trade practice legislation. Harrison, *supra*, note 23 at 434, n. 205.

³¹⁵ B.C. Act, ss. 15(1) and 25 (1)(d); Ontario Act, ss. 9(1) and 17(1)(c); Saskatchewan Act, ss. 13(1) and 18(1)(d).

³¹⁶ Alberta Act, s. 10(1).

³¹⁷ The Alberta Act lacks a general criminal sanction. See, *infra*, note 337 and accompanying text.

³¹⁸ Alberta Act, s. 19(1) and, *supra*, note 297 and accompanying text.

³¹⁹ Alberta Act, s. 10(1)(c)(d).

³²⁰ B.C. Act, ss. 15(1)(c) - (j); Saskatchewan Act, s. 13(2).

³²¹ Ontario Act, s. 9(3).

consumer litigant. This provision for a "substituted action," whereby the resources of the state are at the consumer's disposal, is the single most important administrative measure to ensure that worthwhile consumer-initiated litigational efforts are not abandoned. Vindication of the public interest requires a combination of private and public remedies and, where necessary, a substitution of the latter to ensure the viability of the former.³²²

The importance of the substituted action as a supplementary mechanism to facilitate the efficient redress of consumer losses, whether individual or class, has been recognized in at least forty American jurisdictions.³²³ Not surprisingly, the American endorsements have influenced the drafting of the Canadian provisions. The widest and indeed the most sensible approach to the substituted action is found in the B.C. Act.³²⁴ If the Director is satisfied that a consumer has sufficient grounds for litigation and that it is in the public interest, he may intervene to institute proceedings, assume the conduct of any proceedings brought against a supplier, or defend any proceedings brought against the consumer.³²⁵ Prior to the Director's involvement, both the consumer's and the Minister's written consent must be obtained.³²⁶ Once such consent is given by the consumer, the Director is empowered to conduct the proceedings in such a manner as he considers appropriate and proper.³²⁷ Any monies recovered by the Director are to be paid to the consumer³²⁸ but the costs, both for and against, remain with the Director.³²⁹

The Alberta and Saskatchewan substituted action provisions are largely similar.³³⁰ There is, however, one significant difference. The Alberta and Saskatchewan Director is not able to utilize the substituted action to defend the consumer in proceedings brought by a supplier. The B.C. Act, of course, envisages the representative suit as both a sword and a shield.³³¹ Curiously, but perhaps predictably, the Ontario Act does not provide for a substituted action. During the legislative debate on this matter, an amendment adding the substituted action provision was proposed. Again, and without any tenable explanation, this attempt to add some substance to an otherwise lifeless consumer protection law was defeated. The opposition member who saw this rejection of his motion as "another defeat for the consumer" and who

³²² The common impediments to effective utilization of private remedies and the attractiveness of the substituted action are discussed in Sewell, *supra*, note 287 at 315 *et seq.* Also see the *Trebilcock Study*, *supra*, note 7 at 331-332.

³²³ *Trebilcock Study*, *supra*, note 7 at 116. Also see Sebert, *supra*, note 23 at 722-273.

³²⁴ B.C. Act, s. 24. *Cf.* *UCSPA*, ss. 9(a)(3) and 9(b)(1).

³²⁵ B.C. Act, s. 24(1).

³²⁶ *Id.*, s. 24(2).

³²⁷ *Id.*, s. 24(3)(b).

³²⁸ *Id.*, s. 24(3)(c).

³²⁹ *Id.*

³³⁰ Alberta Act, s. 13(1); Saskatchewan Act, s. 16(1).

³³¹ *Supra*, note 325.

suggested that the Ontario Act was quickly becoming "rigid, close-minded and restricted" was, if anything, guilty of understatement.³³²

5. *The Criminal Sanction*

Both the appropriateness and the effectiveness of the criminal sanction in the enforcement of consumer trade practices legislation have been questioned.³³³ Nonetheless a consensus has emerged that while the criminal sanction ought not to be the primary enforcement tool, it has not outlived its usefulness as a remedy of last resort. Most commentators have argued in favour of retaining the criminal prosecution alternative to deal selectively with the more abusive cases of deceptive or unconscionable trade practices where effective deterrence is a desirable and attainable end.³³⁴ This writer shares the view that the criminal sanction is a "clumsy regulatory device"³³⁵ and should be relegated, in the context of consumer protection legislation, to a tertiary level. However, it should be retained and utilized whenever the supplier who has engaged in a deceptive or unconscionable trade practice can be shown to have done so knowingly, or without having taken all reasonable precautions to avoid the commission of the violation.

Three of the provincial trade practices enactments have included a general criminal offence provision.³³⁶ The fourth, the Alberta Act, has limited the availability of the criminal sanction to three specific circumstances: refusing to provide information required by the Director, providing false information, and contravening any cabinet regulation that has prescribed an information content for certain types of representations.³³⁷ The more general criminal offence provision can be found in the B.C., Ontario, and Saskatchewan legislation. The B.C. and Saskatchewan Acts make it clear that any person who contravenes the Act or its regulations, refuses or fails to furnish information as required under this Act, furnishes false information, or fails to comply with any order or written undertaking of voluntary compliance made pursuant to the Act, is guilty of an offence and is liable on summary conviction to a fine not exceeding \$5000 and/or to imprisonment for a term of not more than one year.³³⁸ In the case of a corporate defendant, a fine of up to \$100,000 can be imposed.³³⁹ A feature of the B.C. and Saskatchewan criminal offence provisions that deserves emphasis is the conscious statutory

³³² Mr. James Renwick M.P.P., *Ont. Leg. Deb.* (February 6, 1975) at 7373.

³³³ See generally Sebert, *supra*, note 23 at 745 and n. 230 for references to the literature.

³³⁴ See, for example, Rothschild and Throne, *Criminal Consumer Fraud: A Victim Oriented Analysis* (1976), 74 Mich. L.R. 661 at 690, 707; Geis and Edelhertz, *supra*, note 2 at 1005 and 1009; and Tracey, *Consumer Protection: An Expanded Role for the Local Prosecutor* (1975), 44 U. Cincinnati L.R. 81 at 88-89.

³³⁵ *Trebilcock Study*, *supra*, note 7 at 45.

³³⁶ B.C. Act, s. 25; Ontario Act, s. 17; Saskatchewan Act, s. 18.

³³⁷ Alberta Act, s. 17.

³³⁸ B.C. Act, s. 25(1); Saskatchewan Act, s. 18(1).

³³⁹ B.C. Act, s. 25(3); Saskatchewan Act, s. 18(3).

effort to avoid an indiscriminate imposition of strict liability. Both statutes permit a defence of "due diligence," i.e. that the commission of the offence was due to a mistake, or to reliance on information supplied to the accused, or to the act or default of another person, or to an accident or some other cause beyond his control *and* that the accused took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.³⁴⁰ In sum, this means that a supplier who has engaged in an unfair trade practice or has otherwise contravened the Act will be able to avoid criminal liability if he can show that his conduct was reasonable throughout. To impose strict criminal liability where all reasonable precautions have been taken is a meaningless and counter-productive utilization of the criminal sanction. An important study by the federal Law Reform Commission has concluded that the minimum standard for criminal liability in all regulatory legislation should be negligence and that an accused should not be convicted of a regulatory offence if he establishes that he acted with due diligence; that is, that he was not negligent.³⁴¹ This recommendation appears to be an eminently sensible one. The due diligence defence, combined with a reverse onus of proof, is the appropriate compromise which will allow the legislation "to meet the needs both of justice and of efficiency."³⁴² In this regard, the B.C. and Saskatchewan enactments can be commended.

The Ontario Act, unfortunately, has gone too far in the opposite direction. Although the scope of the criminal offence provision is as broad as that of the B.C. or Saskatchewan legislation, the Ontario Act requires a finding that the defendant "knowingly"³⁴³ contravened the legislation. This requirement for full *mens rea* unavoidably excludes the reckless or negligent supplier whose unfair trade practices could effectively be deterred by an imposition of criminal liability. The Ontario legislature should adopt the "due diligence" approach discussed above.³⁴⁴ Until such time as this amendment is made, the

³⁴⁰ B.C. Act, s. 25A; Saskatchewan Act, s. 20.

³⁴¹ *Strict Liability: Working Paper No. 2* (Law Reform Commission of Canada, 1974) at 35. Also see *Studies on Strict Liability* (Law Reform Commission of Canada, 1974). The arguments supporting the recommendations of the Law Reform Commission are basically the following: (1) The notion of strict liability and the resulting prosecution of the morally blameless defendant are not consistent with the traditional aims of the criminal law; punishment of the non-culpable defendant will not further the objectives of retribution, rehabilitation or deterrence. (2) A regime of strict liability wherein the morally blameless defendant is treated in the same way as the morally blameworthy defendant will detract from the traditional stigma associated with criminal conviction and generally reduce the efficacy of the criminal sanction. (3) Studies of misleading advertising prosecutions show that *in practice* the strict liability provisions are ignored and prosecutions are launched only where blameworthy conduct is evident. See Fitzgerald, *Misleading Advertising: Prevent or Punish?* (1970), 1 Dal. L.J. 246. Also see the excellent discussion of this issue in the *Trebilcock Study*, *supra*, note 7 at 45-55.

³⁴² *Strict Liability*, *supra*, note 341 at 37.

³⁴³ Ontario Act, s. 17(1). Section 17(2) has a similar requirement: "Every person who engages in an unfair practice . . . knowing it to be an unfair practice is guilty of an offence. . . ."

³⁴⁴ The "due diligence" defence is not uncommon to consumer protection legislation. See, for example, the U.K. *Trade Descriptions Act*, *supra*, note 137, s. 24 and the recently amended *Combines Investigation Act*, *supra*, note 3, s. 37.3(2).

full *mens rea* requirement in the Ontario Act will ensure that the Ontario criminal sanction remedy is only marginally more meaningful than that of Alberta.³⁴⁵

C. EVALUATION AND SOME PROPOSALS FOR REFORM

One is tempted at this point to state the obvious: of the four provincial enactments, the B.C. *Trade Practices Act* is indisputably the strongest consumer trade practices statute in Canada and the Ontario *Business Practices Act* the weakest. The latter has been touted by one Ontario legislator as "the finest piece of consumer legislation ever introduced in [the] province and indeed in the whole country."³⁴⁶ One could cynically accept the boast about provincial excellence as simply a reflection of the inferiority of Ontario consumer protection legislation generally. However, the suggestion that the Ontario Act can aspire to national excellence is without foundation. Given the many deficiencies and omissions already noted,³⁴⁷ the Ontario Act could easily be a contender for the weakest trade practices enactment in North America.³⁴⁸

A proper evaluation of comparable legislation is not concluded, however, by simply rating the various enactments. A more important and valuable exercise is the attempt to sift through the various approaches taken by the legislatures and develop a "model" trade practices enactment. Indubitably, each of the statutes analyzed in this article has both strengths and weaknesses. Even the Ontario enactment, which has been subjected to rigorous criticism on several points, contained at least one feature that could beneficially be considered by other provinces: the order for immediate compliance.³⁴⁹ The B.C. Act, which overall has been applauded, revealed several deficiencies which fortunately were not copied in the other enactments.³⁵⁰

It is submitted that a model trade practices statute can be developed by discriminately aggregating the strong points of each of the provincial enactments that have been discussed. Once the model is drafted, however, an equally serious effort must be made with respect to questions of publicity and enforcement. Otherwise, a model "name-only" bill may be the only consequence. Both of these concerns — the drafting of the legislation and its enforcement — have prompted this writer to suggest several proposals for reform in the hope that the proposed amendments and alterations will attract serious consideration.

³⁴⁵ Discussed *supra*, note 337 and accompanying text.

³⁴⁶ Mr. Frank Drea M.P.P., *Ont. Leg. Deb.* (February 7, 1975) at 7413.

³⁴⁷ *Supra*, Part B.

³⁴⁸ The specific criticisms relating to both the statutory design of the Act and to governmental enforcement efforts are reviewed in this Part of the article.

³⁴⁹ Ontario Act, s. 7(1), *supra*, note 308 and accompanying text.

³⁵⁰ E.g., several important omissions in the "shopping lists" of deceptive and unconscionable trade practices: see, *supra*, notes 186-187 and accompanying text; also recall our discussion of the court-oriented injunction procedure, *supra*, note 239 and accompanying text.

1. *Drafting the Legislation: Six Areas of Concern*

(a) Understandability

The drafting of statutes that are comprehensible to the non-lawyer is particularly crucial in the case of consumer protection legislation. Laws enacted to provide consumers with substantive or procedural rights can only be effective if they can be understood by the consumer. Regardless of the nature and extent of the legislative protection offered, the threshold obligation of the legislative draftsmen is to avoid arcane, obscure and unnecessarily legalistic phraseology where simpler wording would do. It is difficult to comprehend why provincial draftsmen persist in talking about "chattels personal,"³⁵¹ or what is gained by such obscurities as "the consumer is entitled to any remedy therefor that is at law available."³⁵² If a consumer fair practices statute is intended to "clarify the consumer's rights far more clearly than before,"³⁵³ surely clarity of expression is the minimal expectation.³⁵⁴

(b) Reasonable Coverage

The scope of the B.C. Act provides a satisfactorily wide range of coverage and can serve as a provincial model.³⁵⁵ Such issues as the nature of the conduct, the standard of deceptiveness, the types of goods and services included, the abolition of horizontal and vertical privity, and the importance of actual agreement have been explored in Part B; on each of these points the B.C. Act provides a strong and sensible lead. The restrictions apparent in the Ontario Act with respect to post-contractual abuses, lender-credit transactions, and the types of "services" scrutinized by the legislation should be avoided.³⁵⁶

³⁵¹ Ontario Act, s. 1(f); Alberta Act, s. 1(f); Saskatchewan Act, s. 2 "goods."

³⁵² Ontario Act, s. 4(1): discussed, *supra*, note 248 *et seq.* and accompanying text.

³⁵³ This objective is suggested in a publicity brochure distributed by the Ontario Ministry of Consumer and Commercial Relations. See *Balance in the Marketplace: The Ontario Businessman's Guide to the Business Practices Act* (Toronto: Ministry of Consumer and Commercial Relations, 1975) at 2.

³⁵⁴ A Report of the Joint Commons — Senate Regulations Committee (tabled in the House of Commons and Senate on January 31, 1977) has recommended that governmental rules and regulations "be as intelligible and as explicable as possible and stripped of their mystery." See *Basic Rights Trampled by Ottawa, Report Says* (Globe and Mail, February 4, 1977 at 1). A similar concern that legislation be understandable was voiced by Mr. James Renwick M.P.P. during the debate on the Ontario Act. His criticism of the unnecessary legalistic obscurities was unrestrained:

I don't think there is a single consumer, when he sees this bill and tries to understand it, who will possibly understand whether or not he's got a legal remedy involved in it, without going to see a lawyer. I don't think he will have any sensation that he is being presented with an inexpensive, efficient method of deciding a consumer complaint. I think we're involved in a kind of marshmallow world of traditional legal conceptions that aren't going to help the consumer at all.

Ont. Leg. Deb. (November 28, 1974) at 5849.

³⁵⁵ Discussed, *supra*, Part B, note 50 *et seq.* and accompanying text.

³⁵⁶ Discussed, *supra*, Part B.

(c) A Full Range of Civil Remedies

It has already been noted that the modern consumer trade practices statute is intended to provide an integrated framework of civil, administrative, and criminal remedies with recourse to the latter as a last resort. It has been argued in this article that the civil or consumer-initiated remedies should be emphasized and encouraged.³⁵⁷ The B.C., Alberta, and Saskatchewan statutes provide a uniformly acceptable range of private remedies. The court is properly directed to respond with whatever remedy or combination of remedies is deemed appropriate.³⁵⁸ It is evident that legislative direction and judicial flexibility are the important guidelines in drafting a workable private remedies provision. Both of these features are absent in the Ontario provision. Indeed, except for the consumer-initiated rescissionary right, the Ontario Act's civil remedies provision is a good example of what not to do.³⁵⁹ Unnecessarily restrictive, unduly obscure, and unfortunately non-progressive, s. 4 of the Ontario Act requires a complete re-drafting.³⁶⁰ In the course of such re-drafting, Ontario would do well to include some direction respecting both measure and types of damages recoverable. On this point the Saskatchewan provision is helpful.³⁶¹ Finally, to overcome the problem of financial disincentives, a model statute would include a minimum recovery provision and would provide for a mass redress or class action procedure.³⁶²

(d) Effective Administrative Measures

The concern here is not with the Director's general investigatory and related powers which are uniformly satisfactory in all of the provincial enactments,³⁶³ but with the provision of substantive administrative remedies. The first such remedy should be a Director-initiated cease and desist procedure. Ontario's "order for immediate compliance" is particularly noteworthy and, in the context of trade practice regulation, may prove to be more effective than the court-oriented injunctive remedy found in the B.C. and Alberta enactments.³⁶⁴ A voluntary compliance procedure is the next requisite. Provincial draftsmen should pay special attention to the specific AVC guidelines found in the B.C. and Saskatchewan provisions.³⁶⁵ The final and indispensable administrative remedy is the substituted action. Of all the deficiencies in

³⁵⁷ *Supra*, note 214 *et seq.* and accompanying text.

³⁵⁸ B.C. Act, s. 20(1)(c); Alberta Act, s. 11(2)(f); Saskatchewan Act, s. 15(2)(g); and, *supra*, note 241 and accompanying text.

³⁵⁹ Discussed, *supra*, note 24 *et seq.* and accompanying text.

³⁶⁰ *Id.*

³⁶¹ Saskatchewan Act, s. 15(2)(a); *supra*, note 263 and accompanying text.

³⁶² Discussed, *supra*, note 267 *et seq.* and accompanying text.

³⁶³ Discussed, *supra*, note 290 *et seq.* and accompanying text.

³⁶⁴ Ontario Act, ss. 6 and 7. *Supra*, note 302 and accompanying text. The Commercial Registration Appeal Tribunal is empowered by s. 6(6) to "attach such terms and conditions to its order as it considers proper to give effect to the purposes of [the] Act." *Quaere* whether this open-ended direction would permit the CRAT to order the violator to make restitution to affected consumers. The constitutionality of the wider power to award damages is discussed, *infra*, Part D.

³⁶⁵ *Supra*, note 320.

the Ontario Act, the omission of a substituted action procedure is perhaps the most serious.³⁶⁶ A model act could easily adopt the provisions found in the B.C. Act³⁶⁷ which, in permitting the Director's intervention both offensively and defensively, are superior to the more restricted substituted action made available in the Alberta and Saskatchewan enactments.³⁶⁸ One final point: the availability of these administrative remedies should not be made conditional upon the Director first obtaining authorization from the Attorney-General. This Alberta requirement³⁶⁹ detracts from a potentially effective and efficient program of enforcement by leaving it unnecessarily vulnerable to political pressure and interest group lobbying.

(e) A Sensible Criminal Sanction.

The point has already been made that the most sensible criminal offence provision in any regulatory statute, and particularly in a consumer trade practices statute, is one that bases liability upon a negligence standard and permits a "due diligence" defence.³⁷⁰ Model provisions can be found in the B.C. and Saskatchewan enactments.³⁷¹ Alberta's failure to provide a general criminal sanction and Ontario's insistence on full *mens rea* are deficiencies that must be avoided.³⁷² It has been suggested that while recourse to the criminal sanction is appropriate for deceptive or misleading trade practices, it should not be imposed where the violation is one that involves an "unconscionable" act or practice.³⁷³ Because the nature of an unconscionable practice is ill-defined, by terms such as "excessively," "grossly," and "undue,"³⁷⁴ it may be more appropriate to require, as a minimum, proof of full *mens rea* in this area. The issue is not easily resolvable. On balance, the non-differentiating approach of the B.C. and Saskatchewan provisions is preferable. The "due diligence" defence would provide a satisfactory protection to those suppliers whose conduct was found to be in violation of the unconscionability categories. The concern for more precise definition is better served by a process of administrative rule-making than by a further relegation of the criminal sanction.

(f) Rule-Making Powers

In a consumer trade practices enactment, it is particularly desirable to provide a procedure for the issuance of trade regulation rules which will define with greater specificity the kinds of conduct that will be deemed a violation of the "shopping list" categories. The complaint that the provincial deceptive and unconscionable "shopping list" enumerations are unduly imprecise

³⁶⁶ Discussed, *supra*, note 332 and accompanying text.

³⁶⁷ *Supra*, note 324.

³⁶⁸ *Supra*, note 330.

³⁶⁹ Alberta Act, s. 19(1) and, *supra*, note 318 and accompanying text.

³⁷⁰ *Supra*, note 342 and accompanying text.

³⁷¹ *Supra*, notes 338-339.

³⁷² *Supra*, notes 337, 343 and accompanying text.

³⁷³ Ziegel, *Enforcing a Consumer Bill*, *Globe and Mail*, May 23, 1974 at 7.

³⁷⁴ E.g., Ontario Act, ss. 2(b)(ii)(v) and (viii).

and, thus, unhelpful to the business community is a valid one. A comprehensive rule-making procedure would provide an efficient mechanism for the particularization of unfair trade practices.³⁷⁵ Although two of the provincial trade practices enactments do provide a regulation-making power which enables the Lieutenant Governor-in-Council to add new categories to the "shopping lists,"³⁷⁶ this should not be confused with the power to issue binding interpretive trade rules which would give content to the existing and, some say, sufficiently wide categories.

Rule-making powers have been provided in the consumer trade practices legislation of at least twenty-eight American jurisdictions.³⁷⁷ The actual rule-making authority is generally vested in the Attorney-General or some other appropriate ministerial department.³⁷⁸ Should Canadian jurisdictions provide similar power, the rule-making authority could well be the Minister responsible for consumer affairs and for the enforcement of the trade practices legislation. One model for provincial enactments is the United Kingdom's *Fair Trading Act*,³⁷⁹ which contains a comprehensive rule-making procedure involving a three-stage screening process: the Director submits his proposals for desirable trade regulation rules to a Consumer Protection Advisory Committee consisting of representatives from industry, consumer groups, and government; the Advisory Committee studies the requests and determines which are sufficiently justifiable for recommendation to the Secretary of State; the Secretary of State receives the Committee's report and has the sole authority to promulgate rules through orders made by statutory instrument reviewable by Parliament.³⁸⁰ Whether the provincial trade practices legislation should provide the necessary procedural fairness by adopting the U.K. triple-screening procedures or by developing a more formalized public hearing machinery is a question of secondary import. What is of primary concern is that some rule-making powers be available to the appropriate Minister or enforcing authority.³⁸¹ The advantages of an even-handed and definitionally valuable rule-making power have been thoroughly reviewed in

³⁷⁵ Sebert, *supra*, note 23 at 710 and 718. Also see the excellent discussion of rule-making powers and their potential in trade practices regulation in the *Trebilcock Study*, *supra*, note 7 at 148-164.

³⁷⁶ B.C. Act, s. 32(n)(o); Ontario Act, s. 16(1)(c). *Supra*, notes 203-205 and accompanying text.

³⁷⁷ *Trebilcock Study*, *supra*, note 7 at 117: Alaska, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Utah, Vermont, West Virginia and Wisconsin.

³⁷⁸ *Id.* at 118. In Delaware, Georgia, Hawaii and Louisiana, for example, the rule-making authority is vested in the Director of Consumer Protection with the concurrence of the Attorney-General and an appointed Consumer Advisory Board.

³⁷⁹ 1973, c. 41. (U.K.).

³⁸⁰ See *Trebilcock Study*, *supra*, note 7 at 157-159.

³⁸¹ The suggestion that a rule-making power be given to an appropriate provincial agency or tribunal is considered, *infra*, Part D.

the literature.³⁸² It is hoped that provincial draftsmen will regard the rule-making power as one of the drafting priorities suggested herein.

2. *Enforcing the Legislation: Lessons from B.C. and Ontario*

Absent an effective program of enforcement, a model consumer trade practices statute would quickly deteriorate into yet another example of legislative pollution.³⁸³ The line dividing legislative symbolism and legislative substance is often nothing more than a governmental commitment to publicize and enforce the legislation. To date, three provinces have enacted and are enforcing a consumer trade practices statute.³⁸⁴ Because Alberta's entry into this field of regulation is too recent to provide any empirical basis for comment,³⁸⁵ the discussion herein will be limited to the problems encountered by the B.C. and Ontario enforcing authorities. In my view there are important lessons to be learned from the efforts and experiences of both provinces in the implementation of their respective trade practices enactments.

The first lesson relates to the question of enforcement. Consumer protection in the public sector has been aptly described as "woefully understaffed and underfinanced, morassed in a sea of red tape and unbearably slow acting."³⁸⁶ Although this description is considered typical of most consumer law enforcement programs,³⁸⁷ the B.C. experience has provided a unique and refreshing exception. Its enforcement record reflects a properly staffed, hard-working trade practices division supported by a clear governmental commitment to make its trade practices legislation meaningful to British Columbia consumers.³⁸⁸ By contrast, the Ontario enforcement program is depressingly familiar and falls easily within the above-mentioned description being both woefully understaffed and unbearably slow acting. One need only compare the data arising out of the first year of enforcement in both B.C. and Ontario.

³⁸² *Supra*, note 375.

³⁸³ The tendency of federal and provincial governments to enact legislation that is often unnecessary thus straining the courts and generally polluting the legislative landscape, has attracted the attention of leading Canadian jurists. When sworn in as Chief Justice of the Ontario Supreme Court, Estey C.J.O. suggested that Canadian legislatures "have been hyperactive . . . cranking out any and all kinds of legislation, whether it is needed or not." See *Courts Strained by Unnecessary Legislation*, *Estey Says*, *Globe and Mail*, February 8, 1977 at 1. For a general exploration of this theme see Wallis, *An Overgoverned Society* (New York: The Free Press, 1976).

³⁸⁴ *Supra*, note 4.

³⁸⁵ The Alberta Act was proclaimed in force January 1, 1976. The B.C. Act was proclaimed in force July 5, 1974, and the Ontario Act on May 1, 1975.

³⁸⁶ Travers and Landers, *supra*, note 228 at 812, quoted in Shea, *Toward Effective Consumer Law Enforcement: The Capacity to Deceive Test Applied to Private Actions* (1975), 10 *Gonzaga L.R.* 457 at 458.

³⁸⁷ Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience* (1975), 54 *Ore. L.R.* 117 at 160; Sebert, *supra*, note 23 at 759; Shea, *supra*, note 386 at 458, n. 6.

³⁸⁸ See the *Department of Consumer Services Annual Report 1975* (Province of British Columbia, 1975). During 1975, the B.C. Department of Consumer Services handled 8,027 consumer complaints and was able to obtain some \$375,000 in rebates and refunds for consumers. Also see, *infra*, notes 389-397.

Although Ontario's population is nearly three and one-half times greater than B.C.'s,³⁸⁹ its enforcing authority has a staff that is effectively less than one-third the size of that in B.C.³⁹⁰ and the enforcement data for a comparable time period reflects the unfortunate consequences for Ontario consumers of this glaring disparity.³⁹¹

A similar disparity is evident in the commitment of the B.C. and Ontario governments to the question of publicity and consumer education. Indeed, one explanation for the inaction and ineffectiveness of the Ontario trade practices authority may well be the fact that the vast majority of Ontario consumers are totally unaware of the *Business Practices Act*. Publicity of the Ontario Act consisted of a limited distribution of a four-page pamphlet.³⁹² No attempt whatsoever has been made to publicize the existence of the legislation in any meaningful manner. By contrast the B.C. publicity efforts "have been nothing short of frenzied."³⁹³ A major consumer education programme was launched to publicize the existence and implications of the B.C. trade practices statute. In addition to an extensive media advertising campaign, a twenty-page brochure describing the Act was sent to every household in the province.³⁹⁴ Requests for various publications resulted in the mailing of over 137,500 pieces of literature including education kits, brochures, and fact sheets to B.C. consumers. As well, the first full year of operation saw the trade practices staff undertake 450 speaking engagements at various public meetings.³⁹⁵ This

³⁸⁹ Population figures at April 1976 were as follows: Ontario - 8,315,000 and British Columbia - 2,486,000. See (1976), 51 Can. Stat. Rev. at 24.

³⁹⁰ The Ontario Business Practices Division of the Consumer Protection Bureau currently has four full-time staff lawyers. Their responsibilities are not limited to the enforcement of the Ontario Act but extend to twelve different consumer protection and registration statutes. See, for example, the legislation, *supra*, note 295. The British Columbia counterpart employs four lawyers on a full-time basis and several others on specific retainer. Law students working part-time and during the summer months provide further support. See Annual Report, *supra*, note 388 at 23.

³⁹¹ Compare the performance of B.C. and Ontario under their respective trade practices legislation:

	<u>B.C.</u>	<u>Ontario</u>
AVC's	22	4
Injunctions	4	10 (cease and desist orders)
Substituted Actions	6	0
Prosecutions	1	3

The disparity is accentuated by the fact that the B.C. figures are for a twelve month period ending December, 1975, while the Ontario figures are for an eighteen month period ending February, 1977. B.C. data: see the Annual Report, *supra*, note 388 at 51. Ontario data: conversation with Mr. David I. Radford of the Business Practices Division.

³⁹² *Supra*, note 353. A companion pamphlet was entitled *Balance in the Marketplace: The Consumer's Guide to the Ontario Business Practices Act* (Toronto: Ministry of Consumer and Commercial Relations, 1975). There was a limited distribution to selected public libraries.

³⁹³ Zysblat, *supra*, note 160 at 100.

³⁹⁴ *Id.*

³⁹⁵ Annual Report, *supra*, note 388 at 30 and 49.

commitment to consumer education as both an informative and a preventive device is, of course, shared by most progressive consumer protection bureaux³⁹⁶ and reflects the growing realization that consumer education should not be an ancillary but a primary function of the consumer protection authority.³⁹⁷

Why is this commitment lacking in Ontario? What is the explanation for the profound divergence between B.C. and Ontario with respect to both enforcement and publicity? One Ontario legislator, a member of the Opposition, suggested that "when the consumers of this province complain in the future about the lack of action in certain areas, we will direct them to read the debates . . ." ³⁹⁸ This reference to the repeated refusal of the Minister to permit reasonable amendments to the Ontario Act³⁹⁹ is only a partial explanation of Ontario's current level of general inaction. The more important reason for the under-enforcement and lack of publicity is funding. The Ontario government has simply not provided an adequate budget for an effective trade practices regulation programme.⁴⁰⁰ To a large extent, this is consistent with its non-progressive attitude in the drafting and the debate of the Ontario Act, and will continue to ensure that at least one provincial trade practices enactment will remain a name-only legislative gesture.

D. RETHINKING TRADE PRACTICES REGULATION: AN ALTERNATIVE

Thus far, the analysis and evaluation of provincial trade practices legislation has proceeded upon the assumption that the primary "quality control agency"⁴⁰¹ in the battle against deceptive and unconscionable trade practices should be the court. Indeed, most of the commentators that have hitherto

³⁹⁶ Kazanjian, *supra*, note 23 at 422. The State of Washington's consumer education effort deserves special emphasis:

In the State of Washington, a full-time "Consumer Education" staff has been added to the Attorney-General's Consumer Protection Division . . . this office prepares a weekly column for a number of state newspapers; participates in a bi-weekly half-hour television program, "Law in Action"; contributes to local news telecasts on a regular basis; and assists local police departments in establishing procedures for dealing with low-income consumer problems . . . the utilization of the media by the Washington Attorney-General has involved no cost to the taxpayers of that State. Thousands of dollars of free broadcasting time have been obtained as a result of the sophisticated rapport created with the commercial radio and television stations by the Consumer Protection Division. (at 422).

³⁹⁷ *Id.* I share Professor Ziegel's caution, *supra*, note 1 at 204, that consumer education "is no universal solvent, no magic wand that effaces the harsh realities." But it is one of the weapons that can be deployed in the battle against marketplace abuses.

³⁹⁸ Mr. Albert Roy M.P.P., *Ont. Leg. Deb.* (February 7, 1975) at 7413.

³⁹⁹ Discussed, *supra*, Part B.

⁴⁰⁰ Mr. R. Simpson, Executive Director of the Business Practices Division, estimated the operating budget for all features of the Ontario Act to be approximately \$300,000. (Conversation: March 14, 1977.) The British Columbia legislature allocated nearly \$587,000 for implementation and enforcement of the B.C. Act. (Correspondence with the Director of Trade Practices, July 9, 1976).

⁴⁰¹ This phrase appears in Leff, *supra*, note 197 at 354.

participated in the study of trade practices regulation in Canada have unhesitatingly endorsed what could be described as a litigational model, with the court occupying the predominant position in the regulatory structure.⁴⁰²

Increasingly, however, and especially in the area of trade practices regulation, the argument is being made that a curial body may be wholly inappropriate in a regulatory framework whose object is the effective and efficient regulation of marketplace trade practices. This suggestion that the reliance being placed upon the courts be re-evaluated and that the advantages of the specialized administrative body be reconsidered seems to reflect at least four concerns. The first is simply a realization that a judiciary long-steeped in the traditional presumptions of the common law may be unduly reluctant to interpret and apply innovative consumer protection legislation with the vigour it deserves. The fear that a court insensitive to legislative spirit may thwart legitimate enforcement efforts may be justified given several recent decisions in British Columbia wherein one can detect some judicial unresponsiveness to the legislative guidelines in the trade practices enactment.⁴⁰³ The second concern about the litigational model is also related to questions of effectiveness. An argument has been made that judicial "case-by-case sniping"⁴⁰⁴ is both an expensive and frustrating mechanism for the regulation of marketplace abuses and that a specialized administrative agency would be better able to cope with the open-textured quality of the "shopping list" enumerations by utilizing a rule-making power to provide some specificity.⁴⁰⁵ Related to this concern about the effectiveness of litigation is the more general question of access to justice. One commentator has suggested that "if the consumer is given rights and remedies that must be asserted in a court . . . we may just

⁴⁰² See, for example, Waddams, *supra*, note 190 at 391 and at 393, n. 62. A similar endorsement of the curial model is suggested in the *Trebilcock Study*, *supra*, note 7 at 172.

⁴⁰³ In *Hanson, Director of Trade Practices v. John's Tax Services* (B.C.S.C., March 5, 1975, not yet reported) the Director sought to enjoin the defendant's "income tax refund discounting" practice on the ground that the transactions entered into with unsuspecting consumers were so harsh and adverse to the consumer as to be inequitable and thus unconscionable (s. 3(2)(e) of the B.C. Act). McKay J., however, dismissed the application stating that more information about the type of individual who utilized the defendant's service was necessary for a finding of unconscionability, and he did so notwithstanding the fact that the provincial cabinet had passed a regulation pursuant to s. 32(o) of the B.C. Act directed specifically at tax refund discounting. See B.C. Reg. 134/75 (Order-in-Council 562, Feb. 6, 1975).

In *Director of Trade Practices v. Household Finance Corp. of Canada*, [1976] 3 W.W.R. 731, the Director sought both declaratory and injunctive remedies against the defendant on the ground that the finance company's studious efforts to hide from the consumer the fact that his conditional sales contract had been assigned to the finance company was a deceptive act or practice. The trial judge dismissed the applications holding that a practice of non-disclosure which did not lead the consumer into an error of judgment is not a deceptive practice (at 736-737). The judgment was affirmed on appeal (B.C.C.A., March 16, 1977, not yet reported). The Court of Appeal agreed that the B.C. Act did not require disclosure of the financing arrangements made between merchants and finance companies.

⁴⁰⁴ Leff, *supra*, note 197 at 358.

⁴⁰⁵ *Infra*, notes 411-413 and accompanying text.

as well do nothing."⁴⁰⁶ The final concern, expressed by Professor Leff, is one that questions the very nature of the consumer bargaining process and the ubiquitous adhesion contract. He has suggested that most consumer contracts should be thought of as "products" just as the products sold pursuant to them;⁴⁰⁷ this view of the "contract as thing"⁴⁰⁸ would emphasize governmental regulation as simply "quality control" not requiring judicial involvement.

The arguments favouring regulation by a specialized administrative agency have been voiced by Kenneth Culp Davis:

A court is passive. It has no obligations to search for evidence which parties fail to present. A regulatory agency has an affirmative duty to carry out a program, to protect a public interest which frequently is otherwise unrepresented. When parties fail to produce needed facts, the regulatory agency typically must take the initiative in aggressively making its own factual investigation. Unlike a court, a regulatory agency employs staffs of specialists, wields independent powers of investigation, and accumulates vast storehouses of information about its specialized field.⁴⁰⁹

Other commentators have also emphasized the advantages of expertise, efficiency, and effectiveness, particularly with respect to trade practices regulation.⁴¹⁰ The rule-making powers that were considered earlier⁴¹¹ could, in the context of an administrative tribunal, take on even greater significance. The trade practices agency could assume rule-making procedures similar to those of the Federal Trade Commission,⁴¹² issuing advisory opinions, policy statements, and industry guides, as well as binding trade regulation rules.⁴¹³ These directives would provide a helpful particularization of the shopping-list categories and would assist in the development of a coherent and consistent policy regarding questions of trade practices regulation.

Should the provinces adopt the specialized agency model for the regulation of consumer trade practices? First of all, one should appreciate how the administrative agency model would fit within the context of the existing trade practices legislation. The Ontario framework provides an easy illustration.

⁴⁰⁶ Shuchman, *Profile on Default: An Archival Study of Automobile Repossession and Resale* (1969), 22 Stan. L.R. 20 at 53, cited in Leff, *supra*, note 197 at 355, n. 30.

⁴⁰⁷ *Supra*, note 197 at 352, n. 18.

⁴⁰⁸ Leff, *Contract as Thing* (1970), 19 Am. U.L.R. 131.

⁴⁰⁹ Davis, *Official Notice* (1949), 62 Harv. L. Rev. 537 at 537-538, quoted in Connelly, *Exclusive Dealing and Tied Selling Under the Amended Combines Investigation Act* (1976), 14 Osgoode Hall L.J. 521 at 563.

⁴¹⁰ See, for example, Sebert, *supra*, note 23 at 748 and Harrison, *supra*, note 23 at 431.

⁴¹¹ *Supra*, note 377 *et seq.* and accompanying text.

⁴¹² For an overview of the FTC rule-making procedures see Kintner and Smith.

The existing Commercial Registration Appeal Tribunal,⁴¹⁴ which in the context of the *Business Practices Act* reviews the issuance of cease and desist orders,⁴¹⁵ could be re-structured to assume an even greater jurisdiction with respect to the provision of civil and administrative remedies. The Tribunal is already empowered to attach "such terms and conditions" to its review of the Director's cease and desist order "as it considers proper, to give effect to the purposes of [the] Act."⁴¹⁶ Presumably this would permit the provision of restitutionary relief.⁴¹⁷ To expand this jurisdiction to allow a completely flexible remedial capacity, including the awarding of damages, would not require a substantial re-structuring. The addition of a rule-making procedure similar to that used by the FTC would also be feasible. The only theoretical or structural difficulty that might impede the provincial draftsman is a constitutional one.

The administrative agency's capacity to award damages may be challenged as being in violation of s. 96 of the *British North America Act*⁴¹⁸ which has been judicially interpreted as prohibiting a provincial legislature from "investing a tribunal with jurisdiction of a kind which ought properly to be exercised by a superior, district or county court."⁴¹⁹ Although recent decisions have prompted one constitutional scholar to suggest that "there is no reason to suppose that section 96 difficulties have frustrated the development of administrative tribunals in the provinces,"⁴²⁰ the question of damage awards may provoke a less sympathetic constitutional interpretation.⁴²¹

⁴¹⁴ Established by s. 7 of *The Department of Financial and Commercial Affairs Act*, R.S.O. 1970, c. 113, renamed by S.O. 1972, c. 1, s. 23(1) as *The Ministry of Consumer and Commercial Relations Act*.

⁴¹⁵ Ontario Act, ss. 6-7.

⁴¹⁶ *Id.*, s. 6(6).

⁴¹⁷ *Supra*, note 364. Also see Ziegler, *supra*, note 373 at 7.

⁴¹⁸ 1867, 30 & 31 Vict., c. 3 (U.K.); R.S.C. 1970, App. II, No. 5. Section 96 provides as follows: "The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

⁴¹⁹ Hogg, *Is Judicial Review of Administrative Action Guaranteed by the British North America Act?* (1976), 54 Can. B. Rev. 716 at 717. The literature on the extent and implications of the judicial interpretation of s. 96 is collected at 717, n. 4.

⁴²⁰ *Id.*, at 718. Professor Hogg refers to the decisions of the Supreme Court of Canada in *Tremblay v. Commissions des Relations de Travail du Quebec*, [1967] S.C.R. 697 and *Tomko v. Labour Relations Board (N.S.)* (1975), 69 D.L.R. (3d) 250. Both are unequivocal illustrations of a more lenient, perhaps pragmatic, approach to questions involving provincial board powers and the limitations imposed by s. 96. For a recent example see *Jones v. Board of Trustees of Edmonton Catholic School District School District No. 7 et al.* (1976), 70 D.L.R. (3d) 1 (S.C.C.).

⁴²¹ The constitutionality of a provincial enactment investing a provincial tribunal with the power to award damages has not been tested. Unlike the labour injunction or the trade practice cease and desist order, the damages remedy might be characterized as a traditional judicial function more appropriately exercised by judges appointed pursuant to s. 96. This constitutional uncertainty may have been the reason behind the recommendation of the Ontario Law Reform Commission's *Report on Consumer Warranties* that the provincial tribunal "should have the power to make an order for restitution but not for general damages." *Supra*, note 81 at 120.

The original question, however, was whether the specialized administrative agency model was attractive in principle. Of the forty-eight American states that have enacted trade practices legislation,⁴²² eight have chosen to place enforcement powers in an independent agency.⁴²³ My own hesitation in this matter is a hesitation which stems from a general reluctance to rely too heavily on bureaucratic regulation largely because most regulatory bodies have a "marked life cycle."

In youth they are vigorous, aggressive, evangelistic and even intolerant. Later they mellow, and in old age—after some ten or fifteen years—they become, with some exceptions, either an arm of the industry they are regulating or senile.⁴²⁴

In my view, the most appropriate and indeed the most effective regulatory framework with respect to consumer trade practices might well be a combination of the litigational *and* administrative agency models. The complementary inter-weaving of court and agency would provide a double-barrelled and highly flexible regulatory technique.

An agency invested with rulemaking authority could concentrate on elaborating illegal practices in specific trades under the deceptive practices law and could apply these rules to individual cases through assurances of discontinuance or cease-and-desist orders where these means were sufficient. In more extreme cases, the attorney general could seek more stringent sanctions in the courts, such as injunctions, receivership, or dissolution. Both the agency and the courts could be authorized to order restitution to known victims of the deceptive practice, thus encouraging the submission of complaints from the public. Jurisdictional conflicts between the agency and the attorney general would not be unlikely. But assuming that a reasonably tolerable working relationship developed, a spirit of competition between these two authorities might well stimulate more creative approaches to commercial regulation.⁴²⁵

Whether or not provincial trade practices legislation adopts this combination of "quality control agencies" or chooses one to the exclusion of the other, is a question that is secondary to the overall obligation to re-think the contemporary approaches to trade practices regulation. One cannot continue to presume the superiority of the litigational or court-oriented model. A rigorous intellectual analysis of the appropriateness or inappropriateness of the suggested alternatives must be undertaken. This search for alternatives should be characterized by a realization that judicial processes cannot alone rectify pervasive consumer injustices.⁴²⁶

⁴²² *Supra*, note 23.

⁴²³ California (Director of Consumer Affairs); Louisiana (Division of Consumer Protection); Maryland (Division of Consumer Affairs); Montana (Department of Business Regulation); Nevada (Commissioner of Consumer Affairs); Ohio (Director of Commerce); Utah (Trade Commission); Wisconsin (Commissioner of Banking). See Harrison, *supra*, note 23 at 430, n. 187.

⁴²⁴ Galbraith, *The Great Crash* (Boston: Houghton Mifflin, 1961) at 171. The "capture theory" of regulatory agencies has attracted a large literature. An interesting Canadian perspective is presented in Trebilcock, *Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?* (1975), 13 Osgoode Hall L.J. 619.

⁴²⁵ Comment, *Developments in the Law — Deceptive Advertising*, (1967), 80 Harv. L.R. 1005 at 1134.

⁴²⁶ Note, *Non-Traditional Remedies for the Settlement of Consumer Disputes*, *supra*, note 23 at 395.

The ultimate objective of most consumer advocates is to create a set of institutions which enable the consumer to be sovereign in the marketplace. No goal so far-reaching is attained by enactments of a single rule of law, the grant of a single remedy or the creation of a single procedural mechanism.⁴²⁷

The recent abundance of legal commentary calling for the creation of new non-curial mechanisms for the resolution of consumer disputes⁴²⁸ reflects a healthy commitment to the oft-forgotten notion that "law is not solely or even centrally an affair for courts."⁴²⁹ A similar commitment to a re-thinking of the public enforcement structure of trade practices legislation would be equally refreshing and rewarding.

E. CONCLUSION

The recent provincial venture into the area of comprehensive consumer trade practices regulation is to be welcomed. The social, psychological, and economic harms that are a consequence of unfair and deceptive business practices have been documented in the literature.⁴³⁰ No society should tolerate marketplace abuses, particularly where the most vulnerable victim is often the low-income consumer whose experience with the unscrupulous businessman reinforces his increasing sense of helplessness, frustration, and outrage.⁴³¹ Unquestionably, society has a duty to deliver "a civilized brand of civil justice."⁴³² In many respects the provincial trade practices legislation is a commendable step in this direction. The real question, however, is whether this legislative effort will be matched by a requisite governmental commitment to implementation and enforcement.

⁴²⁷ Travers and Landers, *supra*, note 228 at 834.

⁴²⁸ *Supra*, note 426. Also see Eovaldi and Gestrin, *supra*, note 10, and Jones and Boyer, *Improving the Quality in the Marketplace: The Need for Better Consumer Remedies* (1971-72), 40 *Geo. Wash. L.R.* 357.

⁴²⁹ Cahn and Cahn, *Power to the People or the Profession? — The Public Interest in Public Interest Law* (1970), 79 *Yale L.J.* 1005 at 1017.

⁴³⁰ See, *supra*, note 426 at 385, n.5 for the most recent itemization of the relevant studies and articles.

⁴³¹ "A baffling frustration in achieving simple consumer justice still constitutes one of the most demoralizing features of low income life in America . . ." Lovett, *supra*, note 216 at 274. In 1967 the U.S. National Advisory Commission on Civil Disorders concluded that "consumer grievances—real or imagined—were one of twelve major grievances that contributed to the sense of alienation, tension and frustration that made rioting and civil unrest a stark reality in our cities." *Supra*, note 426 at 385, n.5. Also see Rothschild and Throne, *supra*, note 334 at 675: "Given the day-to-day frustrations and indignities of ghetto life, the victim of criminal consumer fraud in the inner city may come to perceive street crime as his only means of economic survival, emotional survival, emotional escape or moral retribution."

⁴³² Rosenberg, *Devising Procedures That Are Civil to Promote Justice That is Civilized* (1971), 69 *Mich. L.R.* 797 at 808.

Drafting a sensibly progressive trade practices statute is, of course, the threshold prerequisite. Various combinations of rights and remedies may be attempted. Indeed, a major part of this article has been devoted to such a statutory analysis and several proposals for reform have been suggested.⁴³³ Throughout this analytical exegesis, however, the importance of an effective enforcement programme has never been in doubt. Without a properly funded and adequately staffed public enforcement authority, even our "model" act will gradually but inevitably sink to "name-only" status. By the same token, the badly drafted Ontario Act "could, *if effectively employed*, become one of the most promising bulwarks against the manipulation of consumers by dishonest and unscrupulous businessmen."⁴³⁴

The difference between substance and symbolism in trade practices regulation is most often attributable to such factors as budget and publicity. The two are obviously inter-related. An effective publicity campaign to inform consumers of new rights and remedies will require a generous budgetary allocation. The resulting awareness on the part of consumers may impose increasing administrative and enforcement costs upon the governmental authority, requiring even more funding. This inter-relationship will not go unnoticed by a non-progressive provincial government that sees consumer education as an unnecessary luxury that could precipitate a deluge of consumer complaints. The irony is that an effective publicity campaign to educate consumers with respect to new rights and remedies under the trade practices legislation would encourage greater recourse to privately initiated redress procedures and, thus, provide a regulatory complement to public enforcement efforts.⁴³⁵

The effort to inform or educate the consumer with respect to a recently enacted trade practices statute is nothing less than a reflection of the provincial government's commitment to a meaningful program of consumer protection.⁴³⁶ Equally revealing is the effort to re-evaluate and, where necessary, reform the structural deficiencies in the legislative framework.⁴³⁷ Without this combined perspective of effective enforcement and legislative review, the paramountcy of symbolism over substance becomes inevitable. Should this materialize, consumerism will confront one of its greatest challenges to date:

⁴³³ *Supra*, Parts B and C.

⁴³⁴ Ziegel, *supra*, note 373. (Emphasis added.)

⁴³⁵ *Supra*, notes 215-216 and accompanying text.

⁴³⁶ This is not to say, however, that the effort to inform and educate should be used as a rationalization for inaction in other consumer protection efforts. Consumer education is but one of the tools available to the enforcing authority: it is not a "universal solvent." *Supra*, note 397 and accompanying text.

⁴³⁷ I share Professor Aaron Director's perspective that "every extension of state activity should be examined under a presumption of error." Director, *The Parity of the Economic Marketplace* (1964), 7 J. Law & Econ. 1 at 2, quoted in Epstein, *supra*, note 196 at 294, n. 3.

the realization that "government . . . has been the biggest consumer fraud around."⁴³⁸

This article has attempted to provide some direction for those provincial governments that are determined to avoid this criticism.⁴³⁹ One would hope that no government would seriously run the risk of attracting allegations that its trade practices statute is itself an unfair and deceptive act or practice.

⁴³⁸ Mr. Herbert Denenberg, Commissioner of Insurance for the Commonwealth of Pennsylvania, in a speech to the 1973 Conference of the New York Consumer Assembly: Government has more power than it can use. It merely lacks the will and guts to use it. Our experience indicates that government, as it conventionally operates, has been the biggest consumer fraud around. Quoted, *infra*, note 439 at 75.

⁴³⁹ A consumer research group has already completed an extensive investigation of one government's consumer protection efforts with results that tend to confirm the suggestion, *supra*, in note 438. See Schulman and Geesman, *Deceptive Packaging; A Close Look at the California State Department of Consumer Affairs*, (San Francisco: San Francisco Consumer Action, 1974).